**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION**

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

**NOTICE OF FILING**

TO: ATTACHED SERVICE LIST

**PLEASE TAKE NOTICE** that on April 26, 2005, the undersigned filed with the Clerk of the United States District Court, Northern District of Illinois, located at 219 S. Dearborn Street, Chicago, Illinois 60604, Plaintiffs' Memorandum of Law in Opposition to Illinois State Board of Education's and Dr. Randy Dunn's 12(b)(1) Motion to Dismiss, copies of which are served upon you herewith.

Dated this 26th day of April, 2005.

Respectfully Submitted,

SCARIANO, HIMES AND PETRARCA, CHTD.

By: _____
One of the Attorneys for Plaintiffs

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**CERTIFICATE OF SERVICE**

I, Darcee C. Young, an attorney, certify that on April 26, 2005, I have caused to be served Plaintiffs' (1) Notice of Filing; and (2) Memorandum of Law in Opposition to Illinois State Board of Education's and Dr. Randy Dunn's 12(b)(1) Motion to Dismiss to the individuals on the attached service list by placing the above-identified documents in the U.S. Mailbox located at 180 N. Stetson, Chicago, Illinois, before 5:00 p.m., with proper postage prepaid, on April 26, 2005.

Dated this 26th day of April, 2005.

DARCEE C. YOUNG
One of Plaintiff's Attorneys

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**Board of Education of Ottawa Township High School District 140, LaSalle County, Illinois, et al.**
**v.**
**The U.S. Department of Education, et al.**

**Case No. 05 C 0655**

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**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION**

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| BOARD OF EDUCATION 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; 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., BY HER MOTHER AND FATHER AND NEXT FRIEND J.H., AND A.H.; AND J.H. AND A.H. INDIVIDUALLY,<br><br>Plaintiffs,<br><br>v.<br><br>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,<br><br>Defendants. | **Case No. 05 C 0655**<br><br>**Judge: David H. Coar**<br><br>**Magistrate: Morton Denlow** |

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

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.; AND 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 Illinois State Board of Education's and Dr. Randy Dunn's 12(b)(1) 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 "Plaintiff Special Education Students"), and their parents, Plaintiffs S.H., C.H., D.C., L.G., J.H., and A.H, filed a complaint against the U.S. Department of Education ("DOE"), Margaret Spellings, the Illinois State Board of Education ("ISBE") and Dr. Randy J. Dunn ("Dr. Dunn") seeking a declaratory judgment that §§ 6311 and 6326 of the No Child Left Behind Act of 2001 ("NCLBA") are invalid. Compl. ¶¶ 1-17.[1]

The NCLBA, enacted January 8, 2002, amended the Elementary and Secondary Education Act, 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. 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 to determine whether the school is making adequate yearly progress. 20 U.S.C. § 6316(a)(1)(A).

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

Adequate yearly progress ("AYP") 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); 20 U.S.C. § 6311(b)(2)(F). Compl. ¶ 31. 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.

The assessments of all students and students in subgroups of 40 or more are calculated for purposes of determining AYP. 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. 105 ILCS 5/2-3.25(b); Compl. ¶ 32. If a school receiving Title I funds fails to make AYP for two consecutive years the school must begin taking various remedial actions including but not limited to offering school choice and supplemental education services, until AYP is attained. 20 U.S.C. § 6316(b)(1)(A); Compl. ¶ 58.

The Individuals With Disabilities Education Act ("IDEA") 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 initiate remediation activities. Compl. ¶¶ 41, 53. Further, the IEPs of each Plaintiff School Districts' special education students including Plaintiff Special Education Students must be modified in order to employ systemic remediation activities without regard to those student's unique needs. Compl. ¶ 54.

In addition to naming the DOE and Margaret Spellings as Defendants, the Plaintiffs named the ISBE and its Interim Superintendent of Education, Dr. Randy J. Dunn, in his official capacity (collectively referred to as "State Defendants"). The State Defendants moved to dismiss the 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. MTD at 3. For purposes of a 12(b)(1) motion to dismiss, all well pleaded facts are taken as true, all reasonable inferences are drawn in favor of the plaintiff, and all ambiguities are resolved in favor of the plaintiff. American Society of Consultant Pharmacists v. Patla, 138 F.Supp.2d 1062, 1066 (N.D. Ill. 2001). "Dismissal should be denied whenever it appears that a basis for federal jurisdiction exists or may exist and can be stated by the plaintiff." Alicea-Hernandez v. Archdiocese of Chicago, No. 01 C 8374, 2002 WL 598517, * 1 (N.D. Ill., April 18, 2002).

**II. The 11th Amendment Does Not Bar This Suit in Federal Court**

The Eleventh Amendment prohibits federal courts from exercising jurisdiction over suits brought by a citizen against a state, its departments and agencies, except for cases where: (1) the plaintiff "seek[s] prospective equitable relief for ongoing violations of federal law...under the Ex

Parte Young doctrine, Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441 (1908); (2) Congress has abrogated the state's immunity from suit through an unequivocal expression of its intent to do so through a valid exercise of its power, Marie O. v. Edgar, 131 F.3d 610, 615 (7th Cir. 1997); or (3) a state has properly waived its immunity and consented to suit in federal court. Id., (citations omitted).

**A. Congress Abrogated The State's Immunity From Suit In Federal Court**

The Eleventh Amendment generally prohibits the naming of a state or one of its agencies or departments as a defendant in a suit. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100, 104 S.Ct. 900, 907 (1984). Through passage of § 1403(a) of IDEA, Congress made its intention to abrogate Illinois' immunity from suit in federal court for violations of IDEA unmistakably clear.

Section 1403(a) of IDEA provides that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter." 20 U.S.C. § 1403(a). Until 1990, states were immune from suit under IDEA because its statutory language did not evince an unmistakably clear intention to abrogate the state's constitutionally secured immunity from suit. Straube v. Florida Union Free School District, 778 F.Supp 774, 778 (S.D. N.Y. 1991)(citations omitted). To correct the resulting inequity of mandating State compliance with IDEA's provisions while at the same time denying litigants the right to enforce their rights, Congress enacted 20 U.S.C. § 1403. Straube v. Florida Union Free School District, 778 F.Supp 774, 778 (S.D. N.Y. 1991).

In the Seventh Circuit case of Board of Education of Oak Park and River Forest High School District No. 200 v. Kelly E., 207 F.3d 931, 935 (7th Cir. 1999), in holding that IDEA validly abrogated the States' Eleventh Amendment immunity, the court stated that, "States that accept

federal money, as Illinois has done, must respect the terms and conditions of the grant. One string attached to money under the IDEA is submitting to suit in federal court." See also, South Dakota v. Dole, 483 U.S. 203, 206, 107 S.Ct. 2793, 2795-96 (1987). The Seventh Circuit has upheld federal grants conditioned upon state waiver of immunity to suits involving the funded programs. Judge Easterbrook of the Seventh Circuit wrote in Kelly E., "...we hold that states must take the bitter with the sweet; having accepted the money, they must litigate in federal court." 207 F.3d at 935.

This case arises under IDEA. In the Complaint, Plaintiffs allege that the provisions of the NCLBA and IDEA are in direct conflict in that NCLBA requirements dictate a violation of the rights afforded to disabled students as provided by IDEA. Compl. ¶ 24-25. Further, jurisdiction over the subject matter of the Complaint, pursuant to 28 U.S.C. § 1331 (Compl. ¶ 18), is premised on the federal statutes at issue in the Complaint, the NCLBA (Compl. ¶¶ 27-43) and IDEA (Compl. ¶¶ 44-55). Therefore, because Illinois accepts federal money pursuant to IDEA, which conditions acceptance of those funds upon waiver of immunity to suits involving IDEA, Illinois is not entitled to immunity from suit in this Court. Accordingly, given Congress' actions to abrogate the State's sovereign immunity in cases arising under IDEA, the State is subject to the jurisdiction of this Court over Plaintiffs' Complaint.

**B. Official Capacity Suits Against State Officials Are Not Barred By The Eleventh Amendment**

In this case, Dr. Dunn is sued in his official capacity. Since Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441 (1908), it has been settled that the Eleventh Amendment provides no shield for state officials sued in their official capacity for prospective relief. Papasan v. Allain, 478 U.S. 265, 278, 106 S.Ct. 2932, 2940-41 (1986); Trepanier v. Ryan, No. 00 C 2393, 2003 WL 21209832, * 3 (N.D.

Ill., May 21, 2003)(denying Defendants' motion to dismiss claims against certain state officials sued in their official capacity); Marie O. v. Edgar, 131 F.3d 610, 615 (7th Cir. 1997); Catlett v. Peters, 32 F.Supp.2d 1010, 1012 (N.D. Ill. 1998)(actions for injunctive relief against state officials in their official capacities were not barred by Eleventh Amendment); Bruggeman v. Blagojevich, 324 F.3d 906, 912-13 (7th Cir. 2003). The case of Ex Parte Young involved a suit against state officials to enjoin enforcement of a railroad commission's order requiring a reduction in rates. 209 U.S. at 129, 28 S.Ct. 441. In finding that the Eleventh Amendment did not bar the plaintiffs' suit, the Supreme Court held that when a state official violates the Constitution or federal law, he acts outside the scope of his authority and is no longer entitled to the State's immunity from suit. Id. Notwithstanding the Eleventh Amendment, Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441 (1908), authorizes suits for prospective injunctive relief against state officials who, as in this case, are sued in their official capacity. Dean Foods Co., v. Brancel, 187 F.3d 609, 613 (7th Cir. 1999)(holding that "a private party can sue a state officer in his or her official capacity to enjoin prospective action that would violate federal law").

In the U.S. Supreme Court case of Verizon Maryland, Inc., v. Public Service Commission of Maryland, the Court stated that "[i]n determining whether the doctrine of Ex Parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." 535 U.S. 635, 645, 122 S.Ct. 1753, 1760 (2002) (holding that the doctrine of Ex Parte Young permitted the plaintiffs' suit against state officials sued in their official capacities).

The Plaintiffs' Complaint in this case indisputably alleges an ongoing violation of federal law, the NCLBA and IDEA, in that Plaintiffs seek only a declaration of rights that will force the

Defendants to conform their future conduct to federal law. See Ameritech Corp. v. McCann, 297 F.3d 582, 585-588 (7th Cir. 2002)(holding that action sought only prospective relief against state official sued in his official capacity, and thus was not barred by the Eleventh Amendment).

Further, Ex Parte Young requires that an officer of the state sued in his or her official capacity "must have some connection with the enforcement of the act, or it is merely making him a party as a representative of the state..." 209 U.S. at 157, 28 S.Ct. at 453. The State Defendants erroneously assert that Dr. Dunn is not responsible for enforcement of the NCLBA. MTD at 6. However, one of the pillars of the NCLBA is to give states unprecedented flexibility in how they design and implement NCLBA provisions. Dr. Dunn is indisputably responsible for enforcing the NCLBA in Illinois. Compl. ¶ 17. As discussed in the Complaint, the NCLBA gives states the authority and responsibility to establish numerous criteria including but not limited to determining the following: standards and assessments used to provide the substance for AYP definitions, 20 U.S.C. § 6311(b)(2)(C), Compl. ¶ 31; minimum group size for students with disabilities, Compl. ¶ 34; the time line for reaching 100 percent proficiency by 2013-2014, 20 U.S.C. § 6311(b)(2)(C), Compl. ¶ 31; processes and timing for releasing AYP decisions to schools and the public, Compl. ¶ 37; and a system of rewards, sanctions and instructional interventions, Compl. ¶ 37.

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), see also, Odgon v. Hoyt, No. 04 C 2412, 2005 WL 66039, *3 (N.D. Ill., Jan. 11, 2005). Not only have Plaintiffs identified Dr. Dunn as the individual responsible for "supervising public schools in Illinois and administering and implementing the NCLBA," (Compl. ¶ 3), the Complaint alleges that the ISBE caused the injury to Plaintiffs by notifying them of their status and directing them as to what

remedial activities are required as a result of the Plaintiff School Districts' failure to make AYP. Compl. ¶ 7. Dr. Dunn is the chief administrative officer of the ISBE. 105 ILCS 5/2-2 et seq. As such, he 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. 105 ILCS 5/2-2 et seq. The allegations contained in the Complaint make it clear that Dr. Dunn is responsible for enforcing the NCLBA in Illinois. Therefore, the State Defendants' Motion to Dismiss should be denied.

Even assuming *arguendo* that Dr. Dunn has only a general duty to enforce the NCLBA, the court in Ex Parte Young rejected the notion that a general duty is always insufficient to meet the connection prerequisite. "It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced...The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists." 209 U.S. at 157, 28 S.Ct. at 453. Accordingly, Dr. Dunn meets the connection prerequisite in that the Complaint alleges that he is responsible for enforcing the NCLBA in Illinois. Accordingly, the State Defendants' Motion to Dismiss should be denied.

**IV. Plaintiffs Have Standing To Challenge the NCLBA**

The State Defendants assert that Plaintiffs' Complaint fails to fulfill the "case or controversy" requirement of Article III. MTD at 7. 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 had 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).

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct are sufficient to overcome a motion to dismiss, for on a motion to dismiss the court presumes that 'general allegations embrace those specific facts that are necessary to support the claim.'" Doe v. County of Montgomery, Illinois, 41 F.3d 1156, 1159 (7th Cir. 1994), citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37 (1992).

In this case, Plaintiffs suffered an "injury in fact." The Defendants are the cause of the injury and the injury is likely and not speculative. As an initial matter, Plaintiffs have alleged an "injury in fact." The Complaint alleges that "if the special education student population achievement scores were excluded from the Plaintiff School Districts' calculations for purposes of making AYP, Plaintiff School District would have achieved AYP." Compl. ¶ 42. If not for the State Defendants actions in including the special education student populations achievement scores in the overall calculations for determining AYP, the Plaintiff School Districts would have made AYP and would not be required to take costly remedial actions. Further, with regard to injury of the Plaintiff Special Education Students, the Complaint alleges that, "Significant harm to individual students within the

special education subgroup will result if their IEPs are altered and amended for the sole purpose of meeting NCLBA requirements..." Compl. ¶ 26. As a result of the Plaintiff School Districts' failure to make AYP, IEP teams must reconvene to change the IEPs of the Plaintiff Special Education Students absent consideration for each student's unique disability. Compl. ¶¶ 53, 54, 60, 63. Moreover, all Plaintiffs' injuries are ongoing in that the State Defendants continue to require Plaintiff School Districts to implement remedial measures as a result of failing to make AYP and the IEPs of Plaintiff Special Education Students will be modified without regard to their individual disabilities. Therefore, the Complaint adequately alleges that the School District Plaintiffs and Plaintiff Special Education Students suffered a concrete ongoing injury caused by the State Defendants.

It is clear on the face of the Complaint that the State Defendants are a cause of Plaintiffs' injuries. "Under the NCLBA, each State establishes a definition of adequate yearly progress ...to determine the achievement and progress of students within various subgroups of each school district and school..." Compl. ¶ 31. "On an annual basis, the ISBE notifies districts and schools of their status regarding AYP as well as remedial activities that are required." Compl. ¶ 37. Each of the Plaintiff School Districts failed to make AYP. Compl. ¶¶ 38, 39, 41. Therefore, Plaintiffs' allegations establish that their injury is traceable to the actions of the State Defendants.

Lastly, it is likely that a favorable decision by this Court would redress Plaintiffs' injuries in that Plaintiffs seek a declaration that the provisions of the NCLBA regarding state plans and assessments conflict with IDEA. Declaratory relief would prevent future violations of IDEA. Accordingly, Plaintiffs have alleged an actual case or controversy for purposes of withstanding the State Defendants' Motion to Dismiss.

## IV. Conclusion

The Eleventh Amendment does not bar this action against the Defendant ISBE because IDEA is unmistakably clear in its language abrogating Illinois' immunity from suit in federal court. Defendant Dr. Dunn is similarly not entitled to immunity from suit in federal court because actions for injunctive relief against state officials in their official capacities are not barred by the Eleventh Amendment. Further, dismissal of the Complaint should be denied because the Complaint alleges an actual case or controversy and sets forth a proper basis for this Court to exercise jurisdiction over Plaintiffs' claims. Accordingly, this Court should deny the Illinois State Board of Education's and Dr. Randy Dunn's 12(b)(1) Motion to Dismiss in its entirety.

Respectfully Submitted,

SCARIANO, HIMES AND PETRARCA, CHTD.

Dated: 4/26/05 By: _____

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