

RECEIPT NUMBER

524626

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

ORIGINAL

SCHOOL DISTRICT OF THE CITY OF PONTIAC)
 47200 Woodward Avenue)
 Pontiac, Michigan 48342,)
 LAREDO INDEPENDENT SCHOOL DISTRICT)
 1620 Houston Street)
 Laredo, Texas 78040,)
 LEICESTER TOWN SCHOOL DISTRICT)
 Leicester Central School)
 68 Schoolhouse Road)
 Leicester, Vermont 05733,)
 NESHOBIE ELEMENTARY SCHOOL DISTRICT)
 17 Neshobe Circle)
 Brandon, Vermont 05773,)
 OTTER VALLEY UNION HIGH SCHOOL DISTRICT)
 2997 Franklin Street)
 Brandon, Vermont 05733,)
 RUTLAND NORTHEAST SUPERVISORY UNION)
 49 Court Drive)
 Brandon, Vermont 05733,)
 PITTSFORD TOWN SCHOOL DISTRICT)
 3447 U.S. Route 7)
 Pittsford, Vermont 05763,)

JUDGE : Friedman, Bernard A. ✓
 DECK : S. Division Civil Deck
 DATE : 04/20/2005 @ 11:10:46
 CASE NUMBER : 2:05CV71535
 CMP PONTIAC SCHOOLS V US DEPT OF EDUCATION (JLC)

MAGISTRATE JUDGE CAPEL, ✓

COMPLAINT FOR
DECLARATORY and
INJUNCTIVE RELIEF

CASE NO. _____

U.S. DIST. COURT CLERK
EAST DIST. MICH.
DETROIT-PSSG

05 APR 20 AM 1:15

FILED

SUDBURY TOWN SCHOOL DISTRICT)
31 Schoolhouse Road)
Sudbury, Vermont 05733,)
)
WHITING TOWN SCHOOL DISTRICT)
87 South Main Street)
Whiting, Vermont 05778,)
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NATIONAL EDUCATION ASSOCIATION,)
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READING EDUCATION ASSOCIATION)
147 North 5th Street)
Reading, Pennsylvania 19601,)

TEXAS STATE TEACHERS ASSOCIATION)
316 West 12th Street)
Austin, Texas 78701)

UTAH EDUCATION ASSOCIATION)
875 E 5180 S)
Murray, Utah 84107-5299,)

VERMONT-NEA)
10 Wheelock Street)
Montpelier, Vermont 05602-3737,)

Plaintiffs,)

v.)

MARGARET SPELLINGS, in her official)
capacity as Secretary of the United States)
Department of Education)
United States Department of Education)
400 Maryland Avenue, S.W.)
Washington, DC 20202,)

Defendant.)

COMPLAINT FOR DECLARATORY & INJUNCTIVE RELIEF

INTRODUCTION

1. This is a lawsuit for declaratory and injunctive relief based upon Section 9527(a) of the No Child Left Behind Act ("NCLB"), which provides in full as follows:

(a) **GENERAL PROHIBITION.** Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local education agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act. [20 U.S.C. § 7907(a). (Emphasis added)]

Plaintiffs contend that the Secretary of Education is violating this “Unfunded Mandates Provision” by requiring states and school districts to comply fully with all of the NCLB mandates even though states and school districts have not been provided with sufficient federal funds to pay for such compliance. Plaintiffs further contend that by failing to honor the commitment made by the Unfunded Mandates Provision – namely, that the federal government would fund the mandates or not require compliance with them – the Secretary of Education is violating the Spending Clause of the United States Constitution.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1331.
3. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e)(1) because the defendant resides in this district and pursuant to 28 U.S.C. § 1391(e)(3) because one of the plaintiffs resides in this district and the action involves no real property.

PARTIES

4. Plaintiff School District of the City of Pontiac provides K-12 public education to approximately 10,858 students in 21 public schools in Pontiac, Michigan,

and is responsible for implementing the NCLB in those schools. Because the NCLB is underfunded, the Pontiac School District has had and will have to spend non-NCLB funds to comply with the NCLB mandates, diverting those funds from other educational programs and priorities to the detriment of the Pontiac School District and the students in its charge. Moreover, because the NCLB is underfunded, the Pontiac School District has been unable to comply fully with the NCLB mandates and it and its students have been harmed by its inability to do so, in that some of its schools have failed to make adequate yearly progress (“AYP”) under the NCLB as a result of that underfunding, thereby harming the Pontiac School District’s reputation and its legal status.

5. Plaintiff Laredo Independent School District provides K-12 public education to approximately 23,421 students in 30 public schools in Laredo, Texas, and is responsible for implementing the NCLB in those schools. Because the NCLB is underfunded, the Laredo Independent School District has had and will have to spend non-NCLB funds to comply with the NCLB mandates, diverting those funds from other educational programs and priorities to the detriment of the Laredo Independent School District and the students in its charge. Moreover, because the NCLB is underfunded, the Laredo Independent School District has been unable to comply fully with the NCLB mandates and it and its students have been harmed by its inability to do so, in that some

of its schools have failed to make AYP as a result of that underfunding, thereby harming the Laredo Independent School District's reputation and its legal status.

6. Plaintiff Rutland Northeast Supervisory Union ("Rutland Northeast") supervises the provision of K-12 public education to approximately 2,000 students in 11 different school districts in the south central section of Vermont, and is responsible for implementing the NCLB in those school districts. Because the NCLB is underfunded, Rutland Northeast has had and will have to spend non-NCLB funds to comply with the NCLB mandates, diverting those funds from other educational programs and priorities to the detriment of Rutland Northeast and the students in its charge. Moreover, because the NCLB is underfunded, Rutland Northeast has been unable to comply fully with the NCLB mandates and it and its students have been harmed by its inability to do so, in that some of its schools have failed to make AYP as a result of that underfunding, thereby harming Rutland Northeast's reputation and its legal status.

7. Plaintiffs Leicester Town School District, Neshobe Elementary School District, Otter Valley Union High School District, Pittsford Town School District, Sudbury Town School District and Whiting Town School District ("Vermont School Districts") are 6 of the 11 school districts that comprise Rutland Northeast. The Vermont School Districts provide K-12 public education to approximately 1,529 students in 6 schools, and are responsible for implementing the NCLB in the schools within their

respective jurisdictions. Because the NCLB is underfunded, the Vermont School Districts have had and will have to spend non-NCLB funds to comply with the NCLB mandates, diverting those funds from other educational programs and priorities to the detriment of the Vermont School Districts and the students in their charge. Moreover, because the NCLB is underfunded, some of the Vermont School Districts (Leicester, Brandon and Otter Valley) have been unable to comply fully with the NCLB mandates and they and their students have been harmed by their inability to do so, in that their schools failed to make AYP as a result of that underfunding, thereby harming the school districts' reputations and their legal status.

8. NEA is a nationwide employee organization with more than 2.7 million members, the vast majority of whom are employed by public school districts ("school districts") throughout the United States. The primary mission of NEA is to promote quality public education by, inter alia, reducing class size, supporting innovative educational programs, and ensuring that teachers and other education employees have the resources that are necessary for them to perform their jobs effectively. Because the NCLB is underfunded, states and school districts have had to use non-NCLB funds to comply with the NCLB mandates, diverting those funds from other educational programs and priorities. NEA, its members, and the students they serve, have been harmed by the diversion of funds from educational programs and priorities they support and by the fact

that the diversion has made obtaining and maintaining funding for non-NCLB programs and priorities (through collective bargaining and otherwise) more difficult. In addition, NEA and its members have been harmed by the stigma that has resulted from schools and school districts in which NEA members work improperly being labeled as failing because they have not been provided with the necessary funds to make AYP.

9. Plaintiffs Connecticut Education Association ("CEA"), Illinois Education Association ("IEA"), Indiana State Teachers Association ("ISTA"), Michigan Education Association ("MEA"), NEA-New Hampshire ("NEA-NH"), Ohio Education Association ("OEA"), Texas State Teachers Association ("TSTA"), Utah Education Association ("UEA"), and Vermont-NEA ("V-NEA") are NEA state affiliates with a collective membership of approximately 425,500 members, the vast majority of whom are employed by public school districts in their respective states. The primary mission of these NEA state affiliates is to promote quality public education in their respective states by, inter alia, reducing class size, supporting innovative educational programs, and ensuring that teachers and other education employees have the resources that are necessary for them to perform their jobs effectively. Because the NCLB is underfunded, Connecticut, Illinois, Indiana, Michigan, New Hampshire, Ohio, Texas, Utah and Vermont, and school districts in those states, have had to use non-NCLB funds to comply with the statute, diverting those funds from other educational programs and priorities.

CEA, IEA, ISTA, MEA, NEA-NH, OEA, UEA, TSTA and V-NEA, their members, and the students they serve, have been harmed by the diversion of funds from educational programs and priorities that those associations support and by the fact that the diversion has made obtaining and maintaining funding for such programs and priorities (through collective bargaining and otherwise) more difficult. In addition, those associations and their members have been harmed by the stigma that has resulted from schools and school districts in which those associations' members work improperly being labeled as failing schools and school districts because they have not been provided with the necessary funds to make AYP.

10. Plaintiff Reading Education Association ("REA") is a local affiliate of NEA, which represents for the purpose of collective bargaining approximately 1,100 teachers who are employed in the Reading, Pennsylvania, School District. Because the NCLB is underfunded, the Reading School District has had to use non-NCLB funds to comply with the NCLB mandates, diverting those funds from other educational programs and priorities. REA, its members, and the students they serve, have been harmed by the diversion of funds from educational programs and priorities they support and by the fact that obtaining and maintaining funding for non-NCLB programs and priorities (through collective bargaining and otherwise) has become more difficult. In addition, REA and its members have been harmed by the stigma that has resulted from schools in the Reading

School District improperly being labeled as failing because they have not been provided with the necessary funds to make AYP.

11. Margaret Spellings is the Secretary of the United States Department of Education ("ED"). As such, Spellings serves as the chief administrative officer of ED, and is responsible for overseeing implementation and enforcement of the NCLB, including, inter alia, approving or disapproving state plans submitted under the NCLB, see 20 U.S.C. § 6311(e), providing NCLB funds to or withholding NCLB funds from states, see 20 U.S.C. § 6311(g), and otherwise taking action to obtain compliance with the NCLB mandates, see, e.g., 20 U.S.C. §§ 6571, 6578. Spellings is sued in her official capacity.

FACTS

12. On January 8, 2002, President George W. Bush signed into law the 2001 reauthorization of the Elementary and Secondary Education Act of 1965 ("ESEA"), the principal federal statute relating to primary and secondary education at the state and local levels. The 2001 reauthorization of the ESEA is titled the "No Child Left Behind Act" ("NCLB").

13. The NCLB, like the original ESEA and all of its subsequent reauthorizations, was enacted by Congress pursuant to its power under Article I, Section 8, of the United States Constitution – i.e., the Spending Clause – which permits Congress

to condition the receipt of federal funds on the recipients' compliance with certain obligations, provided that the conditions under which the federal funds will be made available are unambiguously set forth in the statute.

I. THE NCLB PROHIBITION AGAINST UNFUNDED MANDATES

14. Among the unambiguous provisions in the NCLB is the Unfunded Mandates Provision (Section 9527(a)), which appears in the Uniform Provisions section of the statute under the title "Prohibitions on Federal Government and Use of Federal Funds." Section 9527(a) provides in full as follows:

(a) GENERAL PROHIBITION. Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local education agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act. [20 U.S.C. § 7907(a) (emphasis added)].

15. The language in the Unfunded Mandates Provision was carried over verbatim from the 1994 reauthorization of the ESEA, in which it was included for the express purpose of prohibiting the ESEA from imposing "unfunded mandates" on states and school districts. The former Secretary of Education acknowledged that this is the purpose of the Unfunded Mandates Provision, stating:

[T]here are requirements in this law for funding by the law. The law contains language that says things that are not funded are not required.

Roll Call, at p. 6 (September 4, 2003) (quoting former Secretary of Education Rod Paige). The former Secretary of Education reiterated that acknowledgment in a speech delivered on December 2, 2003, when he stated that "if it is not funded, it's not required. There is language in the bill that prohibits requiring anything that is not paid for." Paige Speech at the Sumner School (Dec. 2, 2003).

16. Notwithstanding the foregoing acknowledgement of the purpose of the Unfunded Mandates provision, the former Secretary of Education repeatedly has stated that "[i]f a state decides to accept the federal funds [offered under the NCLB], then it's required to implement the law in its entirety." Paige Speech to National Urban League (March 25, 2004). See also Paige Remarks to the Council of Chief State School Officers (March 23, 2004); Paige Testimony before House Education Appropriations Committee (March 24, 2004). These statements by the former Secretary of Education (with the exception of Paige's congressional testimony) are posted on ED's website and represent the official position of ED on this point — viz., that states and school districts must comply fully with all of the NCLB mandates, that lack of federal funds is not an excuse for failing to comply, and that a state's and/or school district's noncompliance with these mandates due to lack of funds will result in the withholding of the federal funds to which they otherwise are entitled under the NCLB.

17. The position set forth in Paragraph 16 above is reflected in ED's uniform rejection of requests for waivers from the NCLB mandates based upon a lack of federal funding. Thus, for example, when the Maine Legislature passed a joint resolution in May 2003 calling on ED to waive the NCLB mandates for Maine due to the lack of federal funding, Acting Deputy Secretary of Education Eugene Hickok informed the Maine Department of Education that waivers will not be granted on that ground.

18. Consistent with the response given to the Maine Legislature, the former Secretary of Education stated ED's position regarding requests for waivers due to the lack of federal funding as follows:

If anyone comes to me to appeal for a waiver from the federal requirements, I hope to be very pleasant as I firmly say, not in this century. Not in this country.

Paige Remarks to Meeting of Chief State School Officers (Jan. 9, 2002) (available at www.ed.gov/news/speeches/2002/01/20020109.html).

19. The current Secretary of Education has reaffirmed that position by her recent rejection of Connecticut's request for a waiver from certain NCLB mandates for which ED has provided the state with millions of dollars less than it will cost the state to comply with the mandates. Spellings' denial of the Connecticut waiver makes clear that ED will not grant waivers from the NCLB mandates based on lack of NCLB funding.

20. Given ED's position on this point, it would be futile for the plaintiff school districts to ask ED to waive the NCLB mandates that have not been fully funded.

II. SHORTFALLS IN FEDERAL FUNDING OF THE NCLB

21. Since its enactment, the NCLB has been funded at billions of dollars less than necessary for states and school districts to comply with its mandates. As the National Conference of State Legislatures has correctly observed, these mandates, which are detailed infra at ¶¶ 32-86, are both "more specific and far-reaching" than those imposed on states and school districts by any other past or present federal education law. Memorandum of the National Conference of State Legislatures on Legal Questions Regarding the NCLB at 3 (July 7, 2003). The breadth of the NCLB mandates is perhaps best illustrated by the fact that prior to its enactment federal funding under the ESEA was linked, and limited, to providing supplemental educational services to students whose family's income fell below a certain level (referred to as "Title I eligible students"), who comprise approximately 35% of the public school population. But the NCLB requires states and school districts to implement systemwide testing and accountability changes in their educational systems and ensure that all students – Title I eligible or not – meet federally mandated proficiency standards. See National Conference of State Legislatures, Task Force on No Child Left Behind – Final Report at 5, 40 (Feb. 2005) ("NCSL 2005").

22. Congress understood when it enacted the NCLB that states and school districts would need substantial additional federal funding to comply with those sweeping new mandates. In fact, the provision of substantial additional federal funding to states and school districts was part of the basic political agreement that led to the NCLB's enactment – Congress agreed to impose unprecedented mandates on states and school districts in exchange for substantial additional federal funding. Thus, Congress established funding authorization levels for most of the NCLB programs, including all of the NCLB Title I programs – which comprise the bulk of the costly NCLB mandates. The funding authorization levels Congress set were \$13.5 billion for Title I programs and \$12.9 billion for other NCLB programs for the first year of the program (federal fiscal year (“FY”) 2002); \$16 billion for Title I programs and \$13.2 billion for other NCLB programs for FY 2003; \$18.5 billion for Title I programs and \$13.5 billion for other NCLB programs for FY 2004; \$20.5 billion for Title I programs and \$13.8 billion for other NCLB programs for FY 2005; and \$22.75 billion for Title I programs and \$14.1 billion for other NCLB programs for FY 2006.

23. The Conference Report leading to enactment of the NCLB explained the reason for establishing these funding authorization levels as follows:

The Conferees further recognize that to implement fully the reforms incorporated in the conference agreement, the local educational agencies [school districts] will require increased Title I resources, for which reason the Conferees have agreed

to significant and annual increases in Title I authorizations.
[H.R. Conf. Rep. No. 107-334, at 693 (2001)].

The Conferees went on to stress that in future years Congress should increase funding above these authorization levels to ensure full funding of the unprecedented NCLB mandates:

The Conferees wish to emphasize that the conference agreement provides for significantly increased funding for Title I, Part A, and strongly encourage Congress to continue to significantly increase funding for Title I, Part A. Such funding, in conjunction with the significant reforms in the conference agreement, is critical to helping schools close the achievement gap and low-income students achieve and succeed academically. [Id.]

24. Even if the NCLB had been funded at the funding authorization levels set forth in ¶ 22 above, that would not have been sufficient to fully fund the NCLB in accordance with the various statutory formulae. In order to comply, for example, with the statutory formula for computing the major component of Title I funding – the school district grants – the NCLB would have to be funded in an amount sufficient to provide every school district in the country with a supplement for every Title I eligible pupil (see supra ¶ 21) amounting to 40% of the average per pupil expenditure in the state (within a range that raises that average in the lowest-spending states and lowers it in the highest-spending states). See 20 U.S.C. § 6333(a)(1). For FY 2002, that amount – referred to

herein as the "Title I statutory amount" – would have been \$27.22 billion. For FY 2003, the Title I statutory amount would have been \$25.68 billion; for FY 2004, it would have been \$24.72 billion; for FY 2005, it would have been \$26.93 billion; and for FY 06, it would have been \$28.16 billion.

25. But Congress never has come close to appropriating even the funding authorization levels established for the NCLB, much less the amounts required to fully fund the NCLB in accordance with the various statutory formulae. In FY 2002, Title I was funded at \$10.35 billion, just 18% more than the level at which Title I was funded before the NCLB mandates took effect. That \$10.35 billion was \$3.15 billion less than the funding authorization level and \$16.87 billion less than the Title I statutory amount. As detailed in the following chart, the shortfalls between the funding authorization levels and the amounts actually appropriated have grown more substantial with every passing year. Currently – in FY 2005 – Title I is funded at \$7.76 billion less than the funding authorization level and \$14.19 billion less than the Title I statutory amount. Next year, the shortfall will likely be even greater: under President Bush's proposed budget for FY 2006, the Title I school district grants will be funded at a level that is \$14.82 billion less than the Title I statutory amount, and \$9.42 billion less than the funding authorization level.

SHORTFALLS IN TITLE I FUNDING
(In Billions of Dollars)

Federal Fiscal Year	Title I Statutory Amount	Title I Funding Authorization Level	Title I Actual Appropriation	Gap Between Title I Statutory Amount and Actual Appropriation	Gap Between Actual Appropriation and Funding Authorization Level
2002	\$ 27.22	\$ 13.5	\$ 10.35	- \$ 16.87	- \$ 3.15
2003	\$ 25.68	\$ 16.0	\$ 11.69	- \$ 13.99	- \$ 4.31
2004	\$ 24.72	\$ 18.5	\$ 12.34	- \$ 12.38	- \$ 6.16
2005	\$ 26.93	\$ 20.5	\$ 12.74	- \$ 14.19	- \$ 7.76
2006	\$ 28.16	\$ 22.75	\$ 13.34 (President's Budget Proposal]	- \$ 14.82	- \$ 9.42

26. Nor are the funding shortfalls limited to Title I programs; they exist with regard to other NCLB programs as well. In FY 2002, overall funding for NCLB programs (including funding for Title I and all other NCLB programs) fell \$4.22 billion short of the funding authorization levels. In FY 2003, overall funding fell \$5.38 billion short of the funding authorization levels; in FY 2004, it was \$7.55 billion short of the funding authorization levels; and in the current year (FY 2005), it is \$9.8 billion less than the funding authorization levels. Next year, if President Bush's proposed budget is adopted, the overall gap between appropriations and funding authorization levels will

grow to \$12.03 billion. As the NCSL has correctly observed, the sum of the matter is this: whereas “the NCLB has greatly expanded the target of federal education policy . . . [imposing] testing and accountability requirements [that] affect all public schools and students,” not just the 35% of public school students that are Title I eligible, the “federal government has provided only marginal financial increases to meet its mandates,” leaving the federal share of overall education spending since the enactment of the NCLB essentially unchanged at approximately 8% of the total revenue spent on K-12 education. NCSL 2005 at 40.

27. The multi-billion dollar shortfalls in NCLB funding at the federal level translate directly into specific funding shortfalls not only at the state level, but at the school district and school levels as well. That is so because almost all Title I funds are passed through states to school districts according to a statutory formula that is driven by the number of Title I eligible students in each school district. See 20 U.S.C. §§ 6333-6335; 34 C.F.R. § 200.70. School districts, in turn, must distribute the vast majority of the Title I funds that they receive to individual schools “in rank order on the basis of the total number of children from low-income families” (or Title I eligible students) that are in each school. 34 C.F.R. § 200.78. School districts are not permitted to give any Title I funds to schools that have no Title I eligible students despite the fact that those schools must comply with certain of the NCLB Title I mandates. Moreover, because school

districts must provide certain schools with higher concentrations of Title I eligible students with Title I grants that amount to 125% of the per pupil allocation that the school district receives from ED, other schools that serve lesser numbers of Title I eligible students receive no Title I funds at all even though they are subject to the full panoply of NCLB mandates. For example, although plaintiff Otter Valley High School District in Vermont is required to comply with the NCLB Title I mandates, it receives no Title I funds at all, and hence must spend state and local money in order to comply with those mandates.

28. The multi-billion dollar national funding shortfalls this fiscal year (FY 2005) will result in Michigan receiving approximately \$453.8 million less than it would have received if the NCLB were funded at the Title I statutory amount, and approximately \$235.5 million less than it would have received if the NCLB were funded at the funding authorization levels. As a consequence, plaintiff Pontiac School District will receive approximately \$7.4 million less in NCLB Title I funding than it would have received had the Title I statutory amount been appropriated, and approximately \$3.8 million less than the funding authorization level. Under President Bush's proposed budget for FY 2006, Michigan is slated to receive approximately \$500.5 million less than it would receive had the Title I statutory amount been appropriated, and approximately

\$318.2 million less than the funding authorization level, which will result in even greater shortfalls for Michigan school districts, including the Pontiac School District.

29. The multi-billion dollar national funding shortfalls this year (FY 2005) will result in Vermont receiving approximately \$38.2 million less in NCLB Title I funds than the Title I statutory amount, and approximately \$20.3 million less than the funding authorization level. As a consequence, plaintiff Rutland Northeast will receive approximately \$671,000 less in NCLB Title I funds than it would have received had the Title I statutory amount been appropriated, and approximately \$356,000 less than the funding authorization level. These shortfalls mean that the school districts under Rutland Northeast's supervision, including all of the plaintiff Vermont School Districts, will receive far less in NCLB Title I funding than they would have if the NCLB were funded at the Title I statutory amount, or even at the funding authorization level.

30. The multi-billion dollar national funding shortfalls this year (FY 2005) will result in Texas receiving approximately \$1.29 billion less than the Title I statutory amount, and approximately \$678 million less than the funding authorization level. As a consequence, plaintiff Laredo Independent School District will receive approximately \$15.6 million less in NCLB Title I funds than it would have received had the Title I statutory amount been appropriated, and approximately \$8.2 million less than the funding authorization level.

31. Similar funding shortfalls have been suffered by states and school districts throughout the country. In fact, in FY 04, 10 states and some 7,000 school districts received less in NCLB Title I funding than they did the previous year, and for FY 05 9 states and two-thirds of all school districts (including plaintiffs Pontiac, Laredo, and Rutland Northeast School Districts) are receiving less in NCLB Title I funding than they received last year. Moreover, under President Bush's proposed budget for FY 2006, states and school districts are slated to receive only a negligible increase of 1.3% in NCLB funding, despite the fact that they will be required to comply with significantly greater and more costly NCLB mandates (see infra ¶¶ 32-86).

III. THE NCLB MANDATES AND THE COSTS OF COMPLYING WITH THOSE MANDATES

32. The NCLB dictates that any state that accepts Title I funding must (a) revise the state's curriculum standards in core academic areas, (b) develop standardized tests aligned with the curriculum standards to measure the progress of public school students in meeting those standards, (c) require school districts to administer those tests to all but a very small group of students, (d) based on the performance of students on those tests, both overall and within specified subgroups (viz., major racial and ethnic groups, low income students, limited English proficiency students and disabled students), require school districts to determine whether schools, and whether the school districts themselves, are making AYP in improving student performance on those tests, (e) if

schools and school districts are not making AYP, take certain specified actions against those schools and school districts, and, finally, (f) ensure that school staff (teachers and paraprofessionals) meet prescribed qualification requirements. As detailed below, the costs of complying with these NCLB mandates are enormous, and far exceed the limited increase in Title I federal funding that followed enactment of the NCLB.

A. The Curriculum and Testing Mandates

33. To the extent they have not already done so, states must, in consultation with a broad array of interested parties, develop and adopt "challenging academic content standards" specifying the content of instruction in mathematics, language arts (*i.e.*, reading and writing), and science, detailing what knowledge and skills all students are expected to master in each of those areas. 20 U.S.C. § 6311(b)(1)(D). See also ED, Standards and Assessments Peer Review Guidance: Information and Examples for Meeting Requirements of the NCLB at 8-13 (April 28, 2004) ("Standards Guidance"). The math and language arts standards were to be in place upon enactment of the NCLB in 2002; the science standard must be in place by the beginning of the 2005-06 school year.

34. States also must develop and adopt, again in consultation with a broad array of interested parties, "challenging student academic achievement standards" for all students that are aligned with the state's academic content standards, and that describe three levels of achievement on the state academic standards ranging from basic (lowest),

to proficient (passing), to advanced (above average) on the state academic content standards. 20 U.S.C. § 6311(b)(1)(D). See also Standards Guidance at 14-22. The state's definition of "proficient" must reflect a high level of student achievement, not just minimum competency. Standards Guidance at 14.

35. States must develop, and states and school districts must administer, "a single statewide system of high quality assessments" for "all public school students . . . including those with disabilities and those not yet proficient in English." Standards Guidance at 23. That system of assessments must include no less than 17 different standardized tests that are aligned with the state academic content standards, and that validly and reliably indicate the extent to which students have mastered those standards.

36. The implementation of these testing mandates is phased-in. Currently (the 2004-05 school year), states and school districts must administer 6 of the required tests, testing students in math and language arts at least once while they are in grade ranges 3-5, 6-9 and 10-12. Next year (the 2005-06 school year), states and school districts must administer 14 of the required tests, testing students in math and language arts in each grade from 3 thru 8 and, once more, while they are in grade range 10-12. And, by the 2007-08 school year, states and school districts must administer all 17 of the required tests, adding science tests for students in grade ranges 3-5, 6-9 and 10-12. 20 U.S.C. § 6311(b)(3)(C).

37. To enable students with disabilities to take the NCLB-required tests, states and school districts "must make their assessment system fully accessible to all students" by offering disabled students individualized testing accommodations consistent with each student's individualized education plan. Standards Guidance at 23, 40. "[F]or those students who are unable to participate meaningfully in the regular assessment, even with accommodations," states must develop alternative assessments. Standards Guidance at 23.

38. States must also develop, and states and school districts must administer, tests of the English skills of all limited English proficient students. 20 U.S.C. § 6311(b)(7). In addition, states must provide the NCLB-required tests in a student's native language if necessary to secure valid and reliable test results. 20 U.S.C. § 6311(b)(3)(C)(ix).

39. States have an ongoing obligation to update and evaluate their assessment system by developing and implementing a quality control system to ensure that the NCLB-required tests remain fully aligned with state academic content standards. Standards Guidance at 43.

40. The costs of complying with these basic curriculum and testing mandates have proved to be considerable, and reasonably can be expected to increase exponentially next year when the required number of tests jumps from 6 to 14, more than doubling the

number of students to whom school districts must administer NCLB-required tests, as well as the number of tests each state must develop, administer, and continually review. For example, a recent study for the State of Connecticut accurately reports that the costs – at the state level alone – of developing and administering the required NCLB assessments increased 44% between FY 2004 and the current fiscal year (FY 2005) due to, inter alia, the number of new NCLB assessments the state now must develop to comply with the NCLB. Connecticut State Department of Education, Cost of Implementing the Federal No Child Left Behind Act in Connecticut, State Level Costs at 9 (March 2, 2005) (“Connecticut Study”). That study correctly concludes that over \$1.39 million of those costs for the current fiscal year (FY 2005) are ones the state itself must bear due to the shortfalls in available federal funding. Id. at 25.

41. The development and administration of the tests mandated by the NCLB will cost states billions of dollars. As the General Accounting Office has estimated, from FY 2002 through FY 2008, states will spend approximately \$3.9 billion on developing and administering these tests – assuming states continue to use the same mix of question types that they are currently using to assess students. GAO 03-389, Title I Characteristics of Tests Will Influence Expenses; Information Sharing May Help States Realize Efficiencies at 3-4 (May 2003). If states expand the mix of question types that they use (as many educational experts contend is necessary if the tests are to provide a valid and

reliable indication of student achievement), the cost to states will likely expand to \$5.3 billion between 2002 and 2008. Id. These state test development and administration costs already exceed NCLB funds in a significant number of states. Center on Education Policy, From the Capital to the Classroom: Year 2 of the No Child Left Behind Act at 66 (Jan. 2004) ("CEP Report Year 2").

42. The costs of complying with the NCLB assessment mandates rise further once the annual cost of test administration for school districts is factored in. For example, as was determined by a study of NCLB costs completed for the Ohio Department of Education, it will cost Ohio approximately \$9.1 million to develop just 8 of the NCLB-required tests, and an additional \$25.59 million (\$20.29 million at the state level and another \$5.3 million at the school district level) to administer the tests. See W. Driscoll & H. Fleeter, Projected Costs of Implementing The Federal "No Child Left Behind Act" in Ohio, at 12-15 (Dec. 12, 2003) ("Ohio Study"). On top of that \$34.69 million, the NCLB testing mandates impose a significant additional cost by forcing school districts to devote school days to test preparation and administration that were formerly devoted to instruction. Id. at 15-16. If Ohio school districts devote just 2 days a year to those tasks, the cost of doing so is \$46 million. Id. The total cost to Ohio and its school districts of complying with the NCLB testing mandates could therefore exceed

\$80 million a year, dwarfing by orders of magnitude the \$11.7 million that the federal government is now providing Ohio to comply with the testing mandates. Id. at 14.

43. Other states and school districts face similar shortfalls in funding to comply with the NCLB testing mandates. For example, officials with the Illinois State Board of Education have reported that Illinois plans, at a minimum, to spend \$77 million over the next five years— or \$15.4 million per year – on the development and administration (at the state level alone) of 6 new NCLB-required tests. Yet Illinois receives, on average, just \$13 million a year to comply with the NCLB testing mandates – \$2.4 million less than it needs to comply with those mandates. And, Illinois’ estimate omits the additional cost to school districts of providing the required testing accommodations to special education and disabled students, and of devoting instructional time to test preparation and administration.

44. In many states, the funding shortfalls have resulted in assessment systems that are fatally flawed, yielding incoherent, inaccurate measures of student achievement. In Pennsylvania, for example, lack of funding is one of the reasons the Pennsylvania Department of Education has offered for its failure to date to provide school districts with Spanish language versions of the NCLB-required tests. As a consequence, several schools in the Reading, Pennsylvania, School District, in which a significant percentage of the students are native Spanish speakers with limited English proficiency, have been

subjected to NCLB sanctions for failing to make AYP simply because the NCLB tests administered to those students in English have not enabled them to demonstrate what they actually know.

45. For other school districts, such as plaintiff Otter Valley Union High School District in Vermont, the funding shortfall is even more stark. Although Otter Valley receives no NCLB Title I funds, it still must comply with the NCLB testing mandates, which Otter Valley can do only by devoting a considerable amount of its own funds to administering the NCLB-required tests.

B. The Annual Data Collection, Grading and Reporting Mandates

46. Based primarily on students' performance on the NCLB-required tests, states and school districts annually must grade and publicly report upon the performance of all schools in the state (regardless of whether the schools themselves receive Title I funding), designating them as making or failing to make AYP. 20 U.S.C. § 6311(h)(1-2); 20 U.S.C. § 6316(a)(1)(A-B). Schools that receive NCLB Title I funds ("Title I schools") must be further designated as (a) "schools in need of improvement" if they fail to make AYP in improving student performance on the NCLB-required tests for two consecutive years, (b) "schools in need of corrective action" if they fail to make AYP in improving student performance on the NCLB-required tests for four consecutive years, and (c) "schools in need of restructuring" if, after one full year of corrective action, they

continue to fail to make AYP in improving student performance on the NCLB-required tests. 20 U.S.C. §§ 6316(b)(1)(A), (b)(7)(C), (b)(8)(A).

47. This annual evaluation of all schools must be based on both the aggregate performance of all the students in each school and the performance of each NCLB student subgroup in each school (viz., the major racial and ethnic groups, students with disabilities, students with limited English proficiency, and economically disadvantaged students). As a consequence, states and school districts have had to develop detailed data management systems that track test performance down to the student level, and match that data with other information about each student (e.g., his or her race, Title I eligibility, English language skills, etc.). The cost of developing such data management systems has proven to be considerable for states and school districts. See Center for Educational Policy, From the Capitol to the Classroom - Year 3 of the NCLB at 100 (March 2005) (“CEP Report Year 3”) (accurately reporting that states have had to devote significant resources – both money and time – to establish the extensive data management systems required by the NCLB).

48. Based on the data described in ¶ 47, both states and school districts must issue annual report cards regarding their education systems. In the case of states, the report card must detail (a) the overall performance of students on the NCLB-required tests and the performance of each NCLB student subgroup on those tests, (b) the

percentage of students not tested overall as well as in each NCLB subgroup, (c) the most recent two-year trend in student performance on the math and language arts tests for each grade level, (d) high school graduation rates, (e) the performance of school districts in making AYP, including the names of all schools in each school district designated as in need of improvement, corrective action, or restructuring, and (f) the professional qualifications of teachers, including the percentage who are teaching with emergency or provisional credentials, as well as the percentage of classes instructed by teachers who are not “highly qualified” (as defined by the NCLB, see ¶ 81 below) in both the state as a whole and in those schools in the top and bottom quartile of the state in terms of the students’ family income level. 20 U.S.C. § 6311(h)(1)(C).

49. In the case of school districts, the report card must specify (a) the number and percentage of schools in the school district designated as in need of improvement, (b) the length of time each such school has been so designated, and (c) the performance of school district students on the NCLB–required tests as compared to the performance of students statewide, on both a school district and individual school basis. 20 U.S.C. § 6311(h)(2)(B).

50. In addition, school districts must inform parents whose children are in schools and/or school districts that have been designated as in need of improvement, corrective action, or restructuring of the reasons for that designation, and the actions that

will be taken at the school and/or school district level to address the issues that caused that designation. 20 U.S.C. § 6316(b)(6).

51. School districts must also provide timely notice to parents of Title I students if their child has been assigned to or taught for more than four weeks by a teacher who does not meet the NCLB definition of highly qualified. 20 U.S.C. § 6311(h)(6)(B). School districts also must inform parents of Title I students that they may request information regarding the professional qualifications of their child's teachers, including whether the teachers meet state qualifications and licensing criteria or are teaching under emergency or provisional licenses; the teachers' majors, and any graduate certifications or degrees that they hold and in what field(s); and whether their child is provided services by paraprofessionals, and, if so, the qualifications of those individuals. 20 U.S.C. § 6311(h)(6)(A). To comply with these mandates, school districts must develop data management systems that they did not previously have, in order to be able to track on an ongoing basis throughout the school year the qualifications of teachers and paraprofessionals who are teaching Title I students.

52. These data collection, analysis, and reporting mandates impose significant administrative costs on states and school districts that the federal government has not funded. For example, last school year, it cost the Anchorage, Alaska, School District \$634,000 more than it received in NCLB funds to comply with these mandates.

Similarly, the Jordan, Utah, School District, estimates it will spend \$2 million (almost half the total amount of NCLB funding the school district receives, see infra ¶ 63) just on gathering the necessary data to comply with the NCLB.

53. These specific estimates are confirmed by more generalized reports from school administrators. For example, in a recent survey of school superintendents in Connecticut, 91% “reported that NCLB’s recordkeeping requirements are creating extra costs for their districts,” and a majority (58%) reported that those costs were “substantial.” Jerome N. Frank, Early Changes, Enduring Challenges: Educators Speak Out About the Impact of the NCLB at 33 (Oct. 2004). Similarly, a recent review of seven different state studies of the administrative costs of complying with the NCLB (largely consisting of the costs imposed by the new recordkeeping and reporting requirements) correctly reported “consistent finding(s) that increases in federal appropriations do not cover the increased administrative costs.” William J. Mathis, The Cost of Leaving No Child Behind? or The Cost of Implementing the Federal NCLB Act? at 18 (Aug. 2004). In Vermont alone, administrative costs of compliance “are virtually equivalent to the entire [NCLB Title I] appropriation” to the state, leaving no NCLB funds to actually pay for educational services. Id.

54. Moreover, these data collection, analysis, and reporting costs are in addition to the extensive administrative costs states and school districts incur in

complying with all of the paperwork requirements imposed by the NCLB, which, inter alia, require states and school districts to develop extensive plans documenting how they have complied with the multitude of mandates imposed by the NCLB. See 20 U.S.C. § 6312 (school district plan mandates); 20 U.S.C. § 6311 (state plan mandates). In addition, states must submit annual reports to ED describing (a) the state's progress in developing and implementing the NCLB-required tests; (b) student performance on those tests, both in the aggregate and disaggregated into the NCLB student subgroups; (c) the number and names of each school designated as in need of improvement, corrective action, or restructuring, the reasons for each such designation, and the measures that will be taken at each school to improve student performance; (d) the number of students and schools participating in the NCLB-required public school choice and supplemental educational services programs; and (e) information on teacher qualifications, including the percentage of students being taught by highly qualified teachers as that term is defined in the NCLB in the state as a whole, as well as in each school district and in each school. 20 U.S.C. § 6311(h)(4).

C. The AYP Mandates

55. To avoid designating schools as “in need of improvement,” “corrective action,” or “restructuring,” school districts must ensure that all students in each school,

and all students in each NCLB student subgroup in each school, see supra ¶ 47, perform at the required level of proficiency on the NCLB-required tests.

56. The NCLB mandates that by the end of the 2013-14 school year virtually all public school students must perform at or above the level of proficiency – i.e., the high level of achievement set by each state and approved by ED, see supra ¶ 34 – on the NCLB-required tests. 20 U.S.C. § 6311(b)(2)(F). For states and school districts to meet that mandate they must raise student test performance at unprecedented rates – accomplishing in ten years time what would take states and school districts many decades if student test performance were to continue to improve at the rates posted on the most recent National Assessment of Educational Progress (“NAEP”) tests. See, e.g., Robert L. Linn, Accountability: Responsibility and Reasonable Expectations, Educational Researcher 32, No. 7 at 5-7 (Oct. 2003) (reporting that at current rates of progress on the NAEP it would take 57 years for all fourth graders to reach proficiency in math, 61 years for all eighth graders to reach proficiency in math, 166 years for all twelfth graders to reach proficiency in math, and even longer for students in those grades to reach proficiency on the reading/language arts assessments).

57. Moreover, the NCLB mandates that school districts begin raising student test performance now in order to avoid being designated as a failing school district or a school district with failing schools, and being subjected to the sanctions that are triggered

by such designations. To that end, states must develop, subject to review and approval by ED, a timetable for moving student test performance to the 100% proficiency level that must be reached by the end of the 2013-14 school year. The timetable must apply to all schools in the state, and must move students from their current test performance levels to the 100% proficiency level in regular increments over the next nine years. 20 U.S.C. § 6311(b)(2)(E-H).

58. Already, just two years into the AYP school grading scheme, fully one fourth of the schools in the United States (some 21,350 schools), as well as some 1,675 school districts, have failed to meet these NCLB mandates, and therefore have been designated as schools or school districts failing to make AYP. Moreover, of those 21,350 schools, some 10,992 – more than 12% of all public schools nationwide – have failed to make AYP for two or more years, subjecting them to sanctions under the NCLB school improvement provisions.

59. The percentage of schools failing to make AYP in large school districts (most of which are urban school districts) is even higher, due in part to the fact that it is more difficult for schools with diverse student populations to make AYP (as a consequence of the requirement that schools be graded not just on the performance of all students in the aggregate, but also on the basis of the performance of students in each NCLB student subgroup). Last year, for example, over 80% of large school districts had

schools that failed to make AYP. CEP Report Year 2 at vi. See also Harvard Civil Rights Project, Large Mandates and Limited Resources: State Response to the No Child Left Behind Act and Implications for Accountability at 7 (Feb. 2004) (reporting that in each of six states studied, schools identified as needing improvement “enrolled a disproportionately large number of minority and low-income students, and students with limited English proficiency,” and that this disparity was particularly evident in New York and Illinois where such schools “enrolled over twice as many minority and low income students, on average” as other schools).

60. The large numbers of schools and school districts already failing to make AYP is significant, because over the course of the next decade the standards for measuring whether a school and/or school district has made AYP will rise significantly both in terms of the number of students who must be tested and in terms of the levels of student test performance that must be achieved. As previously noted, states and school districts currently must administer 6 NCLB-required tests to three different groups of students (math and language arts tests to students in each of three different grade ranges), but next year they must administer 14 NCLB-required tests to seven different groups of students (math and language arts tests to students in each grade from 3-8 and, once again, to students while they are in grade range 9-12). Moreover, whereas most school districts currently have to meet the same proficiency requirements that they met last year in order

to make AYP, next year they will have to meet significantly higher proficiency requirements in order to make AYP and, over the next several years, the proficiency requirements will steadily increase, culminating in the 100% proficiency mandate by the end of the 2013-14 school year.

61. For example, under the Michigan plan approved by ED, Michigan school districts (including plaintiff Pontiac School District) must ensure this school year that at least 38% of their elementary school students, 31% of their middle school students, and 42% of their high school students score at or above proficiency on the NCLB-required tests for their schools to make AYP (the same proficiency levels they have been required to meet for the last two years). Next school year, however, the requirements will rise: Michigan school districts will be required to ensure that 49% of their elementary school students, 43% of their middle school students, and 52% of their high school students score at or above proficiency for their schools to make AYP. And, during each of the last five years of the NCLB (i.e., the 2009-10 through 2013-14 school years), Michigan school districts must post annual increases of 10% in the number of students scoring at or above proficiency for their schools to make AYP.

62. To improve student test performance to the levels required by the NCLB next year, plaintiff Pontiac School District will need to significantly improve student test performance on the NCLB-required high school tests. On the 2003-04 high school

language arts test, 41% of all high school students in the School District performed at proficiency levels, and performance among students in the NCLB student subgroups ranged from a low of 31% (for students with disabilities) to a high of 45% (for Hispanic students). Yet to make AYP next year, the School District must ensure that at least 52% of its high school students as a group and in each NCLB student subgroup perform at proficiency levels. On the NCLB math test, even greater improvement is necessary. Last year, only 16% of the high school students performed at proficiency levels on that test, and students in the NCLB subgroups performed at levels ranging from a low of 6% (for students with disabilities) to a high of 20% (for Hispanic students). Yet to make AYP next year, the School District must ensure that at least 44% of its high school students as a group and in each NCLB student subgroup perform at proficiency levels. The Pontiac School District has determined that it will require the expenditure of funds far in excess of the amount of Title I funds the School District is now receiving in order to realize the types of gains in student test performance that are necessary.

63. Other school districts anticipate similar NCLB funding shortfalls. The Jordan, Utah, School District, for example, has determined that it is likely to cost more than \$182 million over the next ten years to fully comply with the NCLB's AYP mandates. A substantial portion of those costs (i.e., \$59 million) are costs that the School District must incur now in order to pay for the mentoring, additional instruction, and

remediation work that needs to be done to ensure that all 78 of its schools make AYP by the end of the 2013-14 school year. In contrast to the \$59 million now needed, the Jordan School District receives – in total – just under \$5 million per year in federal NCLB funding.

64. The Reading, Pennsylvania, School District has determined that to raise student test performance to the required proficiency levels in the five schools that have failed to make AYP, it will be necessary to extend the school day and year at those schools. This expansion will cost at least \$26 million per year, which is \$18 million more than the Reading School District currently receives in NCLB Title I funding.

65. Plaintiff Brandon Town School District (which oversees one elementary school of 395 students) estimates that for the current school year it needed to spend \$390,000 more than it received in NCLB Title I funding to ensure that the school makes AYP. The other plaintiff Vermont School Districts have experienced similar shortfalls in NCLB funding.

66. By every reasonable estimate, as proficiency requirements increase dramatically over the next several years and more students are subject to the NCLB testing requirements in more subjects, the funding shortfalls with which school districts are now struggling will grow far worse. For example, as the Ohio Study demonstrates, the marginal annual cost of moving the lowest student performers in Ohio schools from

75% proficiency (the level mandated by state law) to 100% proficiency (the level mandated by the NCLB as of the 2013-14 school year) will be \$1.4 billion, and the current annual cost to the state and its school districts of complying with the current NCLB proficiency mandates is \$450 million. Ohio Study at 33-34, 39-51. Yet Ohio currently receives \$412 million in NCLB Title I funding, \$38 million less than is now needed to meet the proficiency requirements.

67. As determined by another study, to raise student performance in all NCLB student subgroups in Illinois to the current proficiency levels would cost an additional \$1.8 billion a year, over three times the total amount of NCLB Title I funds now being provided. The analysis concludes that to reach the 2013-14 school year 100% proficiency mandate would cost \$2.7 billion a year over current spending levels.

68. As determined by a study in Texas, the additional cost of moving Texas students from their current levels of test performance to the 55% proficiency level (just over the 52% proficiency level in language arts that schools must reach next year to make AYP) will be \$1.7 billion – \$1.2 billion more than the amount Texas receives in increased Title I funding due to the NCLB. Jennifer Imazeki & Andrew Reshovsky, Does No Child Left Behind Place a Fiscal Burden on States? Evidence from Texas at 19-20 (Feb. 2005). In schools in which students are now performing at less than the 55% proficiency level, the NCLB funds provided are sufficient to cover barely a third of the

costs of raising those schools up to the 55% proficiency level. *Id.* at 22-23. The Texas study further demonstrates that it will cost over \$10 billion to move Texas students from their current levels of test performance to the mandated 100% proficiency level by the end of the 2013-14 school year – ten times the amount of NCLB Title I funding the state is now receiving. *Id.* at 20.

69. A study in Vermont similarly determined that the cost of raising student proficiency to NCLB-mandated levels would be \$149.5 million annually – \$120.35 million more than the total amount of NCLB Title I funding Vermont now receives. William J. Mathis, No Child Left Behind: Costs and Benefits, Phi Delta Kappan V. 84, No. 9 at 682 (May 2003).

70. These estimates as to how much it will cost Ohio, Illinois, Texas and Vermont to raise student performance to proficiency levels on the NCLB-required tests are in line with the estimates of other states. Indeed, every state that has made such an estimate has correctly concluded that it will cost far more than the federal government is now providing states to comply with the NCLB's AYP mandates. The recent report by the bipartisan National Conference of State Legislatures confirmed these conclusions, finding that the federal government has provided "minimal or nonexistent new federal resources to allow schools to offer the remediation services and enhanced learning

opportunities necessary to meet the ambitious proficiency goals of the NCLB.” NCSL 2005 at 48.

D. The School and School District Improvement Mandates

71. In addition to requiring states and school districts to ensure that students perform at ever-increasing proficiency levels, the NCLB mandates that school districts and schools take very specific, and potentially costly actions, if they fail to make AYP.

72. Title I schools that fail to make AYP for two years in a row, designated by the NCLB as schools “in need of improvement,” must develop two-year plans to raise student performance on the NCLB-required tests, and must do so in consultation with experts, parents, school staff, and the school district. 20 U.S.C. § 6316(b)(3). The plan must, inter alia, address the specific academic issues that caused the school to be designated as in need of improvement, adopt scientifically based strategies for resolving those issues, “adopt policies and practices concerning the school's core academic subjects that have the greatest likelihood of ensuring that all groups of students” meet the NCLB proficiency standards, and commit the school to spend not less than 10% of its NCLB Title I funds on professional development programs for school staff. Id. Such plans must be reviewed and approved by each school district through a peer review process, and must be implemented by schools with technical assistance from their school district. 20 U.S.C. §§ 6316(b)(3)(E), (b)(4).

73. The costs of implementing school improvement plans that will "have the greatest likelihood of ensuring that all groups of students" meet the NCLB proficiency standards – which is what the NCLB requires – will be significant, and will far outstrip available NCLB funding, as is demonstrated, inter alia, by the studies referenced in ¶¶ 61-70 above. Although states are charged with providing technical assistance to schools identified as needing improvement, the NCLB funds available for such efforts are far from sufficient. According to the CEP's latest report, "only 11 states felt NCLB allocations were adequate for them to provide technical assistance to all schools identified for improvement." CEP Report Year 3 at vii. The 2005 Connecticut Study provides a concrete illustration of that reality. For FY 2005, the state received approximately \$ 218,000 to provide technical assistance to the 93 schools in the state that have been identified as needing improvement, or roughly \$ 2,344 per school for such assistance. Connecticut Study at iv. Because that funding is manifestly inadequate, Connecticut estimates that by FY 2008 it will have expended \$18.2 million of its own funds to provide schools identified as needing improvement with the NCLB required technical assistance. Id.

74. In addition, school districts also must offer all students in schools designated as in need of improvement the choice of remaining where they are or transferring to one of at least two other public schools in the school district that are

making AYP. Under regulations issued by ED, this “public school choice” must be offered regardless of the capacity of the receiving schools. Because the NCLB contains no funding for increasing school capacity by building or purchasing new classroom space, the NCLB public school choice requirements as enforced by ED are unfunded mandates in those school districts where school capacity must be increased to comply with those requirements. Moreover, ED’s position on this point means that even if the only school in a school district that is making AYP is over-capacity, the school district still must allow students from all of the schools in need of improvement to transfer to that school, either drastically overcrowding that school or requiring the expenditure of state and/or local funds to increase the capacity of that school – e.g., by building additional classroom space and/or hiring additional teachers.

75. If a Title I school fails to make AYP in improving student performance on the NCLB-required tests for three consecutive years, school districts must offer supplemental educational services to Title I eligible students in those schools, and must provide parents with timely notice of the availability of those services. 20 U.S.C. § 6316(e). School districts, whether they provide supplemental services directly or through a third party vendor, have substantial administrative and oversight responsibilities regarding the delivery of supplemental services and, as a consequence, incur significant costs in implementing the supplemental services mandate. The NCLB does not provide

school districts with any funds for administering the supplemental services mandate, imposing yet another significant unfunded mandate on school districts. CEP Report 2 at 113. Nor do states – which may expend, in total, only 1% of the NCLB funds they receive on NCLB administration – have sufficient federal funds to monitor the quality and effectiveness of supplemental service providers (the majority of which are for profit enterprises). See CEP Report 3 at 139 (reporting that only 13 of the 49 states that replied to its survey thought “there was sufficient funding to implement a system to monitor the quality and effectiveness of supplemental service providers,” and that 17 of those 49 states did not even have a system in place for monitoring those providers).

76. If a Title I school fails to make AYP for four years in a row, the school district must take “corrective action” against the school that “substantially and directly responds to . . . the consistent academic failure of [the] school,” as well as to “any underlying staffing, curriculum, or other problems in the school” and be “designed to increase substantially the likelihood that each group of students [in the NCLB student subgroups] will meet or exceed the” NCLB required proficiency levels. 20 U.S.C. § 6316(b)(7). Such action must include doing at least one of the following: (a) replacing the school staff relevant to the failure; (b) instituting and fully implementing a new curriculum in the school; (c) significantly decreasing management authority at the school; (d) appointing an outside expert to assist the school in making AYP; (e) extending the

school day or year; and/or (f) restructuring the school. 20 U.S.C. § 6316(b)(7)(C)(iv). School districts also must promptly report to parents the status of the school and the corrective action(s) that will be taken against the school. 20 U.S.C. § 6313(b)(6).

77. To date, most school districts that have schools that have failed to make AYP have determined that to improve a school's AYP status requires one or both of two actions – implementing a new curriculum and/or extending the school day and/or year. See CEP Report Year 2 at 75-76 (reporting based on survey of 274 representative school districts that more than half of the school districts implemented a new curriculum and more than one-third extended the school day and/or year). Either action is an expensive undertaking for any state or school district, which will – in itself – far outstrip available NCLB Title I funding. For example, implementing a new curriculum in a school requires both the development (or purchase) of the new curriculum and the training of staff to use that curriculum. Some sense of the cost involved is provided by plaintiff Brandon Town School District, which has determined that the cost to implement a new reading program in a single K-6 elementary school for 368 students is in the range of \$100,000 (\$75,000 for support materials and texts and \$25,000 for professional development). Similarly, the cost of extending the school day one hour for all schools in Ohio is \$2.1 billion per year, \$1.7 billion more than that state now receives in total to comply with NCLB Title I. Ohio Study at 57. The cost of extending the school day one hour in the Cleveland School

District is \$108 million, \$60 million more than the Cleveland School District currently receives – in total – to comply with NCLB Title I. Id.

78. If a Title I school fails to make AYP after one full year of corrective action, the school district must restructure the school by taking at least one of the following actions: (a) reopening the school as a public charter school; (b) replacing all or most of the school staff relevant to the failure; (c) contracting with an entity with a demonstrated record of effectiveness to operate the school; (d) turning the operation of the school over to the state; or (e) implementing some other major restructuring of the school's governance. 20 U.S.C. § 6316(b)(8)(B).

79. The NCLB Title I funding that has been provided to schools that have reached the NCLB restructuring phase is patently inadequate to fund any meaningful improvement, much less a wholesale restructuring. In Michigan, for example, 101 schools are now subject to the NCLB restructuring provisions. For that purpose, school districts have been provided with a flat \$ 45,000 in NCLB funds per school, regardless of the nature of the problems confronting each particular school or the number of students in the school. Center on Education Policy, Makeovers, Facelifts or Reconstructive Surgery: An Early Look at NCLB School Restructuring in Michigan at 3 (Nov. 2004). As a consequence, Michigan school districts have had to use their own funds to comply with the NCLB-mandated restructuring or, if they are unable to do so, forego needed reforms.

Id. at 2, 9, 13 (reporting that the Willow Run School District used its own funds to provide the staff time necessary to rewrite the curriculum in a school and to rebuild the school to support small learning communities, and that the Brownell Elementary School in the Flint School District was unable to reduce class size as needed due to the lack of funding).

80. If a school district that receives Title I funds fails to make AYP for four consecutive years, the state must take at least one of the following actions: (a) defer programmatic or reduce administrative funding to the school district; (b) institute and fully implement a new curriculum in the school district; (c) replace the school district personnel relevant to the failure; (d) remove particular schools from the school district's jurisdiction, and establish alternative arrangements for the governance and supervision of those schools; (e) appoint a receiver or trustee to administer the affairs of the school district; (f) abolish or restructure the school district; or (g) authorize students to transfer to higher performing schools in other school districts. 20 U.S.C. § 6316(c)(10)(C). These required actions will also be costly to implement in any meaningful manner.

E. The Teacher and Paraprofessional Qualification Mandates

81. The NCLB requires states to ensure that all public school teachers that teach English, reading, language arts, mathematics, science, foreign languages, civics and government, economics, arts, history or geography meet specified qualification

requirements by no later than the end of the 2005-06 school year, regardless of whether they are employed in a school that receives any NCLB funds. For middle school or high school teachers, the required NCLB qualifications are (a) passing a "rigorous State academic subject test in each of the academic subjects that the teacher teaches," (b) meeting a state's "high objective uniform state standard of evaluation," or (c) successfully completing, in each of the academic subjects that the teacher teaches, an undergraduate major, a graduate degree, "coursework equivalent to an undergraduate academic major or advanced certification or credentialing." 20 U.S.C. § 7801(23)(A), (B)(ii). School districts were required to comply with these qualification requirements for new hires in Title I schools as of the beginning of the 2002-03 school year.

82. School districts also must ensure that low-income and minority students are not disproportionately taught by teachers who fail to meet the required NCLB qualifications, are teaching out-of-field, and/or are inexperienced. 20 U.S.C. § 6312(c)(1)(L).

83. In addition, by no later than January 8, 2006, school districts must ensure that all paraprofessionals working in programs supported, even in part, by Title I funds have a high school degree, as well as one of the following additional credentials: (a) an associate's degree, (b) two years of post-secondary study, or (c) have passed a rigorous assessment of their knowledge of reading, writing, and math. 20 U.S.C. § 6319(d).

School districts also must limit the work assigned to such paraprofessionals, restricting them, for example, to one-on-one tutoring and prohibiting them from providing instructional services to students other than under the direct supervision of a teacher. 20 U.S.C. § 6319(g).

84. The costs of complying with the NCLB employee qualification requirements will be considerable. Many states and school districts have had to create costly data collection systems simply to determine whether or not their employees meet the qualification requirements. CEP Report Year 2 at 132-33. And, once those data collection systems are in place, school districts have to notify employees of the qualification requirements and take appropriate action to deal with employees who do not meet them.

85. Moreover, because of market forces resulting from the widespread teacher shortage that exists in many parts of the country, school districts are likely to bear the cost of complying with the NCLB teacher qualification requirements. For example, the New Hampshire School Administrators Association has estimated that it will cost school districts \$11 million to comply with the teacher qualification requirements, on the theory that those requirements will result, on average, in a 2% increase in teacher salaries. A similar analysis performed for Illinois estimates the cost to school districts at \$15 million, based on an average increase of approximately \$500 per teacher. The Ohio Study places

this number even higher, estimating that it would cost Ohio \$25.3 million to comply with the NCLB teacher qualification mandate. Ohio Study at 21-22.

86. School districts will have to bear similar costs to comply with the NCLB paraprofessional qualification mandates. As of 2003, 18 of 51 states were unable to report on the status of their efforts to comply with the paraprofessional qualification mandate because their school districts had no system in place to determine if their paraprofessionals met the NCLB qualification requirements. CEP Report Year 2 at 150. Of those states that did report such information, a majority reported that less than half of their paraprofessionals met the NCLB qualification requirements. *Id.* Moreover, because paraprofessional salaries in many states are extremely low, it is likely that complying with the paraprofessional qualification mandate will require school districts to increase paraprofessional salaries, adding further to their NCLB compliance costs.

IV. THE NEGATIVE EDUCATIONAL CONSEQUENCES OF SHORTFALLS IN FEDERAL FUNDING OF THE NCLB

87. Because of the multi-billion dollar national funding shortfalls of NCLB, and the insistence by ED that states and school districts comply fully with all of the NCLB mandates imposed upon them even if NCLB funds that they receive are insufficient to pay for such compliance, states and school districts have had and will have to spend a substantial amount of non-NCLB funds to comply with those mandates, diverting those funds from other important educational programs and priorities, such as

programs for gifted and talented students, courses in foreign languages, art, music, computers, and other non-NCLB subjects, class size reduction efforts, and extracurricular activities.

88. For example, to comply with the NCLB's unfunded mandates:

- a) Illinois had to cut its \$19 million dollar gifted student program and eliminate its social studies and writing tests;
- b) Missouri has made state tests in science and social studies voluntary, meaning that school districts can continue to offer those tests only if the school districts pay for them;
- c) Connecticut had to shelve plans to improve its current tests in grades 4, 6 and 8 so that it can develop the new NCLB tests required for grades 3, 5 and 7. Moreover, the Commissioner of Education has stated that the \$41.6 million of its own funds that the state will have to expend to comply with the unfunded NCLB mandates through FY 08 both could, and should, have been spent on the state's own educational priorities, including developing rigorous and challenging curriculums, ensuring teacher quality, reducing class size and extending the school day and year. Connecticut Study at 29.

- d) At the school district level, the NCLB unfunded mandates have caused cutbacks in instructional time and teachers who instruct students in subjects not targeted by the NCLB tests. For example, the University Park Elementary School in Prince George's County, Maryland, reportedly suspended all special classes and activities for third through sixth graders for six weeks in order to devote intensive preparation time to the NCLB required standardized tests. The classes and activities suspended during that time period included music, art and computer classes, as well as field trips. So too the Wind Point Elementary School in Racine, Wisconsin, was reported to have cut back art specialists and physical education teachers to half-week jobs.

The foregoing are not isolated examples, but rather illustrations of a broad pattern of cutbacks in programs and priorities designed to promote quality education that have resulted from efforts by states and school districts to comply with the unfunded mandates imposed on them by the NCLB.

89. The negative educational consequences resulting from the multi-billion dollar national funding shortfalls of the NCLB have been particularly severe for school districts, such as plaintiffs Pontiac and Laredo Independent School Districts, that serve

the nation's most disadvantaged students. As one analysis has concluded, the result of the imposition of the NCLB's unfunded mandates on school districts already struggling to educate disadvantaged students has been to "impose[] a separate and unequal education, reduced to test preparation, for the nation's most vulnerable children." Fairtest at 75 (May 2004).

90. The negative educational consequences of the multi-billion dollar national funding shortfalls of the NCLB have prompted numerous state legislatures to pass resolutions and take other actions objecting to the NCLB's unfunded mandates and/or requesting exemptions from those mandates. The nation's educational leaders also recognize these negative educational consequences. According to a national survey of 1,900 school administrators, 89% of school superintendents and 88% of school principals share the "major concern" that the NCLB is an "unfunded mandate" requiring school districts and schools to cut back on other educational programs and priorities in order to pay for the actions that are called for by the NCLB. Public Agenda, Rolling Up Their Sleeves: Superintendents and Principals Talk About What's Needed to Fix Public Schools, at 13, 26 (November 2003).

* * *

91. The position taken by ED – i.e., that states and school districts must comply fully with all of the mandates imposed upon them by the NCLB even if the NCLB funds

that they receive are insufficient to pay for such compliance, or face the withholding of federal funds to which they otherwise are entitled under the NCLB – has caused and will cause harm to states and school districts, including the plaintiff school districts and the states and school districts in which members of the plaintiff associations are employed. These states and school districts have been and will be required to spend substantial amounts of non-NCLB funds in order to comply with the NCLB’s unfunded mandates, diverting those funds from other important educational programs and priorities, and/or they have been and will be unable to comply fully with the NCLB’s unfunded mandates, as a result of which they will fail to make AYP and be designated as failing schools and school districts. Plaintiffs seek to remedy this harm by obtaining declaratory and injunctive relief from this Court enforcing Section 9527(a) of the NCLB, and thereby establishing that states and school districts, including the plaintiff school districts and the states and school districts in which members of the plaintiff associations are employed, must comply with the NCLB mandates only to the extent that they are provided with sufficient NCLB funds to pay for such compliance.

FIRST CAUSE OF ACTION
[Under the Spending Clause of the
United States Constitution, Article I, Section 8]

92. The allegations in Paragraphs 1-91 are realleged and incorporated herein by reference.

93. In enacting the NCLB pursuant to the Spending Clause of the United States Constitution, Congress set forth the conditions under which states and school districts – including the plaintiff school districts – would be eligible to receive federal funds. One of those conditions, set forth in Section 9527(a) of the NCLB, is that states and school districts are not required to “spend any funds or incur any costs not paid for under this Act.” 20 U.S.C. § 7907(a).

94. By requiring states and school districts – including plaintiff school districts – to comply fully with all of the NCLB mandates even if the federal funds that they receive are insufficient to pay for such compliance, defendant Spellings is violating the Spending Clause by changing one of the conditions pursuant to which states and school districts accepted federal funds under the NCLB – viz., that states and school districts would not be required to “spend any funds or incur any costs not paid for under this Act.” 20 U.S.C. § 7907(a).

SECOND CAUSE OF ACTION

[Under Section 9527(a) of the NCLB, 20 U.S.C. § 7907(a),
and the Declaratory Judgment Act, 28 U.S.C. § 2201]

95. The allegations in Paragraphs 1-94 are realleged and incorporated herein by reference.

96. Section 9527(a) of the NCLB provides that, in attempting to comply with the NCLB mandates, states and school districts cannot be required to “spend any funds or incur any costs not paid for under this Act.” 20 U.S.C. § 7907(a).

97. By requiring states and school districts – including plaintiff school districts – to comply fully with all of the NCLB mandates even if the federal funds that they receive are insufficient to pay for such compliance, defendant Spellings is violating Section 9527(a) of the NCLB.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court:

(1) Issue an order declaring that states and school districts are not required to spend non-NCLB funds to comply with the NCLB mandates, and that a failure to comply with the NCLB mandates for this reason does not provide a basis for withholding any federal funds to which they otherwise are entitled under the NCLB;

(2) Enjoin defendant and any other officer or employee of ED from withholding from states and school districts any federal funds to which they are entitled under the NCLB because of a failure to comply with the mandates of the NCLB that is attributable to a refusal to spend non-NCLB funds to achieve such compliance;

(3) Award to plaintiffs, pursuant to 28 U.S.C. § 2412 and any other applicable statute, the costs, fees, and other expenses incurred in prosecuting this lawsuit; and

- (4) Order such other and further relief as this Court may deem appropriate.

Respectfully submitted,



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