UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT and the GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT *Plaintiffs,* v. MARGARET SPELLINGS, in her official capacity as SECRETARY OF EDUCATION, *Defendant.*	:	CIVIL ACTION NO. 3:05CV1390 MRK AUGUST 22, 2005

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. For over twenty years, the plaintiff State of Connecticut has implemented effective assessment and accountability measures for its school districts. Through its "state-wide mastery examination" or Connecticut Mastery Test (CMT) statutory scheme, Connecticut has led the country in the comprehensive nature and high-quality of its assessments of all of its students, and in its efforts in focusing attention and resources on low performing school districts.

2. Connecticut's CMT statutory scheme has been successful, for Connecticut's students are ranked as among the highest achieving in the nation.

3. Approximately three years ago, the federal government adopted Public Law 107-111, the No Child Left Behind ("NCLB") Act, codified at 20 U.S.C. §6301 *et seq*. The NCLB Act imposes a comprehensive educational assessment and accountability regime upon the States. The NCLB Act adopts many of the principles and some of the elements of Connecticut's CMT statutory scheme.

4. With respect to requiring state or local funding to meet its statutory requirements, the NCLB Act provides as follows:

> (a) GENERAL PROHIBITION. **Nothing in this chapter shall be construed to** authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational 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 <u>any</u> funds or incur <u>any</u> costs not paid for under this chapter.**

Section 9527(a) as codified at 20 U.S.C. §7907(a) (emphasis added) (the "Unfunded Mandates Provision"). The Unfunded Mandates Provision prohibits the federal government from directing or controlling the States' programs or curricula and requires full federal government funding for the provisions of the NCLB Act.

5. Federal funding to Connecticut for NCLB mandates is substantially less than the costs attributable to the federal requirements of the NCLB Act.

6. The plaintiff State of Connecticut, by and through its Commissioner of Education, has requested waivers from certain NCLB mandates from the United States Secretary of Education for the U.S. Department of Education, Margaret Spellings ("Secretary Spellings" or the "Secretary"). Connecticut has requested waivers to continue elements of its successful twenty-year history of assessments, including permitting annual alternate-grade testing; a three-year phase-in for English language learner ("ELL") students; and to allow special education students to be afforded the option of being tested at instructional level rather than at grade level.

7. The NCLB Act expressly grants the Secretary of Education the authority to grant waivers from the NCLB Act's statutory requirement and regulatory interpretations. NCLB § 9401, codified at 20 U.S.C. § 7861.

8. Secretary Spellings has denied most of Connecticut's waiver requests and has adhered to a rigid, arbitrary and capricious interpretation of the NCLB mandates. By denying Connecticut's waiver requests, the Secretary is requiring Connecticut to expend substantial sums in excess of federal funding to comply with the NCLB mandates as interpreted by the United States Department of Education ("USDOE").

9. Effective July 1, 2003, the plaintiff Connecticut General Assembly amended Connecticut's mastery testing statutes to conform to the testing requirements of the NCLB Act. Public Act no. 03-168, codified at Conn. Gen. Stat. § 10-14n. Consistent with the Unfunded Mandates Provision of the NCLB Act, the Connecticut General Assembly expressly required that the costs attributable to the additional federal requirements of the NCLB Act shall "be paid exclusively from federal funds." Conn. Gen. Stat. § 10-14n(g).

10. Connecticut cannot comply with both its state statute and the federal Department of Education's rigid, arbitrary and capricious interpretation of the NCLB mandates unless the mandates of the NCLB Act are either fully funded or the mandates are waived.

11. The Secretary is violating the Unfunded Mandates Provision of the NCLB Act by requiring the State of Connecticut and its school districts to comply with USDOE's rigid, arbitrary and capricious interpretation of the NCLB mandates even

though she has the authority to waive these mandates and the State of Connecticut and its school districts have not been provided with sufficient federal funds to pay for such compliance.

12. The Secretary is violating the Spending Clause (Article I, Section 8) of the United States Constitution by requiring the State of Connecticut and its school districts to comply with USDOE's rigid, arbitrary and capricious interpretation of the NCLB mandates even though she has the authority to waive these mandates and the State of Connecticut and its school districts have not been provided with sufficient federal funds to pay for such compliance.

JURISDICTION AND VENUE

13. Pursuant to 28 U.S.C. §§ 1331, 1346, 2201, and 2202, 5 U.S.C. § 704 and 20 U.S.C. § 1066d(3), this Court has jurisdiction over the parties and claims in this lawsuit.

14. Venue lies in this Court pursuant to 28 U.S.C. § 1391.

PARTIES

15. The Plaintiff State of Connecticut has a fundamental, long-standing and well-established concern regarding the education of its citizens. As enshrined in its State Constitution since 1818, every child in Connecticut is entitled to a free public elementary and secondary education. Connecticut Constitution, Article Eighth. The educational interests of the State include, but are not limited to, the concern that each child have equal opportunity to receive a suitable program of educational experiences; that each school district finance an educational program designed to achieve this end;

and that in order to reduce racial, ethnic and economic isolation, each school district shall provide educational opportunities for its students to interact with students and teachers from other racial, ethnic, and economic backgrounds.

16. The Plaintiff General Assembly of the State of Connecticut is vested with the legislative power of the State, and determines the expenditure of State funds. The Plaintiff General Assembly enacted Connecticut's state-wide mastery examination statutory scheme. *See* Conn. Gen. Stat. §10-14n. By passage of Public Act no. 03-168, codified at Conn. Gen. Stat. § 10-14n(g), the Plaintiff General Assembly has modified Connecticut's state-wide mastery examination statutory scheme to coordinate with NCLB Act, but only to the extent that state funds are not used for the NCLB Mandates.

17. Defendant Secretary of Education Margaret Spellings is the Secretary of the United States Department of Education. Secretary Spellings serves as the chief administrative officer of USDOE, and is responsible for overseeing implementation and enforcement of the NCLB Act, including, inter alia, approving or disapproving State plans submitted under the NCLB Act, see 20 U.S.C. § 6311(e), providing NCLB funds to, or withholding NCLB funds from, States, see 20 U.S.C. §§ 1234d, 6311(g), and otherwise taking action to obtain compliance with the NCLB mandates, see 20 U.S.C. § 1234d. Secretary Spellings is sued in her official capacity for her own actions or omissions or those of individuals working under her control or supervision.

THE NO CHILD LEFT BEHIND ACT (NCLB)

18. 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. Since 1965, the ESEA has provided "Title I" funds to the States. Title I funds historically have been targeted for direct instruction of the nation's neediest children and the State of Connecticut typically directs Title I funds to its poorest elementary schools. The 2001 reauthorization of the ESEA is titled the "No Child Left Behind Act" (NCLB).

19. The NCLB Act, like the original ESEA and all of its subsequent reauthorizations, was enacted by Congress pursuant to its power under Article I, Section 8, cl. 1 of the United States Constitution – i.e., the Spending Clause. The Spending Clause 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.

20. Unlike past versions of ESEA, however, the NCLB Act affects all students in the nation's public schools, not only those in public schools that qualify for and receive Title I funding.

21. The NCLB Act imposes significant mandates on the States and their school districts.

22. Among other provisions, the NCLB Act requires that States and school districts, as a condition for receipt of federal educational funds:

a) develop academic assessments that must be administered to 95% of public school students in the State to determine whether students in each grade and in each subgroup are making Adequate Yearly Progress ("AYP"), as defined in 20 U.S.C. § 6311(b)(2)(C) in math, reading or language arts, and science (20 U.S.C. § 6311(b)(3)(A)) compared to the students in the same grade and same subgroup the previous year;

b) beginning in the 2005-2006 school year, administer math and reading or language arts assessments every year to students in each grade from 3-8, and at least once to students in grades 10-12 (20 U.S.C. § 6311(b)(3)(C)(v) and (vii));

c) beginning not later than the 2007-2008 school year, measure the proficiency of students in science by administering assessments not less than one time in grades 3-5, 6-9 and 10-12 (20 U.S.C. § 6311(b)(3)(C)(v));

d) annually review the education performance of the State, school districts and schools, based primarily on students' performance on the State academic assessments, to determine whether Adequate Yearly Progress (AYP) is being made, and publicize the results of the annual review (20 U.S.C. §§ 6311(h)(1-2), 6316(a)(1)(A-B), 6316(c)); and

e) ensure that virtually all public school students meet or exceed the State's required levels of proficiency in math, reading or language arts and science by the end of the 2013-2014 school year (20 U.S.C. § 6311(b)(2)(F)).

23. In developing their assessments, the NCLB Act requires the States to develop assessments that are "consistent with relevant, nationally recognized professional and technical standards." NCLB § 1111 (b)(3)(C)(iii), codified at 20 U.S.C. § 6311(b)(3)(C)(iii). The States' choices in implementing the NCLB mandates must be grounded in scientifically based research. *See, e.g.*, 20 U.S.C. § 6314(b)(1)(B)(2).

24. When developing their assessments, the NCLB Act requires the States to make "reasonable adaptations and accommodations for students with disabilities (as defined under section 602(3) of the Individuals with Disabilities Education Act)

necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards." NCLB § 1111 (b)(3)(C)(ix)(II), codified at 20 U.S.C. § 6311(b)(3)(C)(ix)(II).

25. When developing their assessments, the NCLB Act requires the States to assess English language learner ("ELL") students in a "valid and reliable manner" and provide "reasonable accommodations on assessments." NCLB § 1111 (b)(3)(C)(ix)(III), codified at 20 U.S.C. § 6311(b)(3)(C)(ix)(III). The NCLB Act requires that ELL students be tested, in either English or their native language, after one year in a United States school. Moreover, the States must test such students in English for reading or language arts once the student has attended school in the United States for three or more consecutive school years. NCLB § 1111 (b)(3)(C)(x), codified at 20 U.S.C. § 6311(b)(3)(C)(x).

26. When passing the NCLB, Congress emphasized that it was not creating a "lowest-common denominator" system, but rather, was attempting to ensure that all children had the opportunity to obtain a high-quality education and reach proficiency as measured by challenging State academic achievement standards. *See* NCLB § 1001, codified at 20 U.S.C. § 6301.

27. The broad language of the NCLB Act required the USDOE to issue extensive clarification to States and local school districts. In the first two years after the enactment of the NCLB Act, the USDOE had already issued dozens of guidance documents, at least twenty letters to chief state school officials, hundreds of letters to State and local officers, and three sets of formal regulations.

28. The regulations address key issues, including public school choice requirements, standards and assessments, the definition of "highly qualified teacher," and the inclusion of students with significant cognitive disabilities.

29. Under the NCLB Act, every State, the District of Columbia and Puerto Rico was required to submit a draft NCLB Accountability Plan to USDOE, in "workbook" form, by January 2003. The workbook plan was then subjected to negotiations and discussions with USDOE officials. Connecticut's plan was amended several times and tentatively approved by USDOE in June 2003. Since then, Connecticut and many other states have submitted to USDOE several amendments to their NCLB Accountability Plans. The USDOE has rejected many and accepted some of the submitted amendments.

30. The NCLB Act imposes progressively severe consequences for failing to make Adequate Yearly Progress (AYP).

31. A school fails to make its requisite AYP if the required percentage of any subgroup of its students, in any grade, fails to satisfy the State's proficiency standard. Such subgroups consist of economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency. 20 U.S.C. § 6311(b)(2)(C).

32. States and school districts are required to take corrective action in Title I schools and school districts in which any subgroup of their students fails to make AYP on the State assessments, including:

a) offering all students in Title I schools that fail to make AYP for two years the option to transfer to another public school within the school district (regardless of whether the other school has the capacity for more students) (20 U.S.C. § 6316(b)(1)(E)). One way a school would fail to make AYP for two years is if one subgroup fails to satisfy the State's proficiency standard in one year, and a different subgroup fails to satisfy the State's proficiency standard for the next year and yet all students including those whose subgroup is making AYP have the option to transfer;

b) providing supplemental education services to students in schools that fail to make AYP for three years (20 U.S.C. § 6316(b)(5)(B));

c) implementing "corrective action" in schools that fail to make AYP for four years (20 U.S.C. § 6316(b)(7)); and

d) restructuring schools that fail to make AYP after one full year of corrective action (20 U.S.C. § 6316(b)(8)).

33. If a State decides to opt-out of the NCLB Act, or to not comply with the mandates of the NCLB Act as interpreted by USDOE, the penalties are severe. For example, the USDOE will cut or eliminate all of a State's Title I funding for non-compliance with its interpretation of the NCLB mandates.

34. Since 1965, the States, including Connecticut, have heavily relied upon federal Title I funds to provide educational opportunities to their neediest students.

35. The consequences of opting-out are not limited to Title I funding. The State of Utah formally posed the question of opting-out of the mandates of the NCLB Act to the USDOE. In 2004, the USDOE responded that not only would Utah lose it's NLCB funds and its Title I funds, it also would forfeit nearly twice that much in other formula and categorical funds because all federal funding that relied upon the Title I formula would also be forfeited. Unrelated programs such as technology, safe and

drug-free schools, after-school programs, literacy programs for parents, and comprehensive school reform would be negatively affected.

36. Applying USDOE's response to Utah's request to Connecticut's situation, Connecticut would lose hundreds of millions of dollars in Title I funds and unrelated federal education funds if it opted out of the NCLB mandates imposed by USDOE.

NCLB PROHIBITION AGAINST UNFUNDED MANDATES

37. The Unfunded Mandates Provision of the NCLB Act provides in full as follows:

> (a) GENERAL PROHIBITION. **Nothing in this chapter shall be construed to** authorize an officer or employee of the Federal Government to **mandate, direct, or control** a State, local educational 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 chapter.**

Section 9527(a), as codified at 20 U.S.C. §7907(a) (emphasis added).

38. The language in the Unfunded Mandates Provision was carried over from the 1994 reauthorization of the ESEA, where it was included for the express purpose of prohibiting the ESEA from imposing "unfunded mandates" on States and school districts.

39. By its terms, the Unfunded Mandates Provision prohibits the federal government from requiring States or school districts to spend their own funds in order to comply with the requirements of the NCLB Act.

40. In its enactment in 2002, the NCLB Act contained the unusual provision of establishing authorized funding levels from 2002 through 2007. (20 U.S.C. § 6302).

When it enacted the NCLB Act, Congress anticipated $13.5 billion in appropriations for fiscal year 2002, increasing annually to $25 billion by fiscal year 2007.

41. Actual NCLB appropriations, however, have fallen far short of authorized appropriations. To date, national NCLB appropriations have been short of the authorized appropriation levels envisioned in the original Act by billions of dollars.

42. The General Accounting Office (GAO) has estimated that from 2002 through 2008, the States will spend approximately $3.9 billion to $5.3 billion simply on developing and administering the annual assessments required by the NCLB Act, not including the tests required for special education students and English language learners.

43. The unfunded burden on the State of Connecticut (at the State level, as opposed to the local level) of meeting the NCLB Act assessment requirements through fiscal year 2008 will be in the tens of millions of dollars. The GAO estimated that the federal benchmark appropriations would meet only 59% of Connecticut's estimated expenses for NCLB Act assessments.

44. The unfunded burden on the local school districts in the State of Connecticut of meeting the NCLB Act requirements through fiscal year 2008 will be in the hundreds of millions of dollars.

45. Pursuant to the plain language of the NCLB'S Unfunded Mandates Provision, the USDOE and its officials cannot "mandate, direct or control" the allocation of any State or local resources.

46. Pursuant to the plain language of NCLB'S Unfunded Mandates Provision, the USDOE and its officials cannot require any State or subdivision of a State to take actions under the NCLB Act that would require the State or subdivision to draw upon its own monetary resources.

CONNECTICUT'S MASTERY TESTS

47. Since 1985, Connecticut's public school students in grades 4, 6 and 8 have been annually required to take the Connecticut Mastery Test (CMT), seven hours of testing on reading, writing and mathematics, conducted over a one to two and a half week period. Designed to measure higher-level thinking and communication skills, the CMT utilizes short essays and written explanations as well as multiple choice questions. For every one of the past twenty years, annual CMT testing has occurred in alternate grades.

48. For over twenty years, well before the enactment of NCLB in January 2002, the State of Connecticut has implemented effective, high standards and accountability measures for its school districts.

49. Connecticut's Mastery Tests are among the most rigorous in the nation.

50. Since 1990, special education students have had the option of having the student's individualized education plan permit the student to take the CMT at the student's instructional level rather than take the CMT at their grade level when appropriate. For example, a 10^{th} grader who was being instructed at an 8^{th} grade level for mathematics, pursuant to the student's individualized education plan, would be able to take the 8^{th} grade CMT mathematics test.

51. For twenty years, the State of Connecticut has tested its ELL students. The State historically permitted ELL students three years (or thirty months) in the United States school systems before being required to take CMT testing. In response to federal government requirements and at the direction of USDOE, the state reluctantly modified its requirements to conform with the federal government's requirements. The CMT testing has only been offered in English, and has not been developed or offered in any foreign language. Providing tests in the 150 languages spoken by ELL students in Connecticut would cost millions of dollars.

52. Proficiency in English is necessary for all elements of the CMT testing. For example, Connecticut's mathematics tests include word problems requiring written explanatory answers as well as numeric calculations, and thus English proficiency is necessary in order to take the CMT mathematics tests.

53. For over a decade, the State of Connecticut has annually profiled and published its school districts and schools for accountability and student achievement pursuant to demographic and racial indices, including subcategories of student performance, together with a subcategory based on a high percentage of students eligible for free or reduced price lunches.

54. For over twenty years, the State of Connecticut has directed additional resources for school readiness and reading programs, and school construction projects to school districts with a high concentration of students performing below the level of proficiency.

55. Since 1997-1998, Connecticut has spent over $600 million in new funds on preschools, early reading instruction, after-school programs, and a wide variety of other instructional support programs.

56. According to the latest results from the National Assessment of Educational Progress assessments, Connecticut's students are among the top performing students in the nation. For example, during the last assessments, Connecticut's fourth grade students scored the highest in the nation in writing and tied for highest with four other jurisdictions in reading. For mathematics, fourth grade students in only one other jurisdiction scored higher than Connecticut's students.

CONNECTICUT'S WAIVER REQUESTS

57. The "Secretary may waive any statutory or regulatory requirement" of the NCLB Act, as set forth in § 9401 and codified at 20 U.S.C. § 7861.

58. When States have requested waivers from specific provisions of the NCLB Act due to insufficient funding from the federal government, the USDOE, its Secretary and/or officials have consistently denied such waiver requests.

59. On January 14, 2005, the State of Connecticut Commissioner of Education Betty J. Sternberg ("Commissioner Sternberg"), submitted a letter to the defendant Secretary Spellings, requesting waivers from the USDOE's interpretations of the NCLB Mandates to permit Connecticut to maintain its successful CMT statutory scheme in the following areas:

a) for annual testing to take place in alternate grades rather than every grade and to instead conduct formative testing in the alternate years (grades 3, 5 and 7);

b) for the option to conduct a "cohort" analysis – comparing how a group of students progress over time (from year to year) rather than, for example, comparing this year's third grade with last year's;

c) for the ability to assess special education students at their instructional level rather than their grade level; and

d) for the ELL students to be permitted three years in U.S. school systems to learn English rather than one year before applying the tests.

60. Connecticut's waiver requests were based on its over twenty-years of success with its CMT statutory regime, and were grounded upon scientifically based research.

61. The federal educational funding allocated to Connecticut failed to meet the costs of creating, administering and grading Connecticut tests for every grade, of developing alternate assessments for special education students and of developing assessments in foreign languages.

62. In her January 14, 2005 letter, Commissioner Sternberg acknowledged that USDOE suggested that the States could administer the required tests to ELL students by creating the tests in their native languages. Such a suggestion is not practical, however, because Connecticut has over 150 languages spoken in the homes of its students, and thus to create, administer and grade such a broad range of foreign language tests would cost tens of millions of dollars, the costs of which are not covered by the allocated federal funding.

63. The USDOE has interpreted the provisions on ELL student assessments as requiring that ELL students take mathematics assessments upon entry into the

school system, even if the mathematics assessments consist of word problems in English only. Moreover, if a State does not offer its assessment in an ELL student's native language, the ELL student must take the assessment in language arts within one year of entry into the United States school system. If, however, a State offers its assessments in the ELL student's native language, the student may be assessed in his or her native language for three years, and thereafter must be assessed in English. Connecticut only offers its CMT in English.

64. On February 28, 2005, defendant Secretary Spellings denied Commissioner Sternberg's waiver request with respect to alternate year testing, and the three-year phase-in for English language learners. She asked for more information on cohort analysis, and indicated that a policy change on special education testing was under consideration.

65. Since issuing her denial to Commissioner Sternberg's waiver request, Secretary Spellings has made numerous public statements that testing in every grade (for grades 3 through 8) is one of the "bright lines" of the NCLB Act and the requirement will not be waived.

66. The Secretary's rigid enforcement of the NCLB Act's every grade testing requirement will compel Connecticut to spend millions of dollars over and above the federal funds provided in order to satisfy the NCLB every grade testing mandate.

67. Although the next set of testing is not scheduled until Spring 2006, the Connecticut Department of Education has already been required to hire private

contractors to develop and pilot the new tests for grades 3, 5 and 7, in order to meet the deadline.

68. On March 31, 2005, Commissioner Sternberg once again wrote to the federal Department of Education, requesting, in part, waivers from USDOE's policy interpretations pursuant to § 9401 of NCLB. In her March 31, 2005 letter, Commissioner Sternberg renewed her prior request for annual, alternate-grade testing with formative testing in the alternate years, and for a three year phase-in for testing of ELL students.

69. On April 5, 2005, the Attorney General for the State of Connecticut announced that he was contemplating bringing a lawsuit regarding the federal Department of Education's implementation of the NCLB Act.

70. On April 7, 2005, Secretary Spellings announced a new, more "workable, common sense" policy for the granting of waivers from the rigid special education testing requirements. At that time, Secretary Spellings stated that States that did not have annual every-grade testing would not be eligible for the waiver, and that only states that "follow the principles" of NCLB "will be eligible" for the waiver.

71. Secretary Spellings new "workable" proposed policy for special education testing does not permit testing at instructional level. Rather, it contemplates permitting up to 2% of students to be tested using "modified' or alternate assessments. The alternate assessments would require the development and administration of a separate, parallel testing regime for each grade, with "modifications" for special education students.

72. In order to develop and administer the special education alternate assessment testing regime, Connecticut will incur millions of dollars of additional expenses, expenses that are not covered by federal educational funding.

73. On April 18, 2005, Commissioner Sternberg and the Chair of the State Board of Education met with Secretary Spellings and Deputy Secretary Raymond Simon to discuss Connecticut's waiver requests. Immediately subsequent to that meeting, Mr. Simon suggested that Connecticut could offer testing in every grade, but simply eliminate written response testing in grades 3, 5 and 7. It was also subsequently suggested that Connecticut eliminate its writing test as its third academic indicator, and replace it with average daily attendance.

74. On April 22, 2005, Commissioner Sternberg wrote to Secretary Spellings, explaining why applying lower-quality testing in grades 3, 5 and 7 was unworkable, and reiterating Connecticut's request for instructional level testing for its special education students.

75. On April 27, 2005, Connecticut Department of Education staff sent further information to USDOE in support of Connecticut's request for a three-year phase-in period for its ELL students.

76. On May 3, 2005, Secretary Spellings renewed her denial of the request for alternate grade testing, and suggested that Connecticut simply divert federal funds from other programs, such as reading tutors for inner city youths, to pay for the additional testing costs. She indicated that Connecticut's renewed waiver requests regarding ELL students and special education testing were pending.

77. On May 18, 2005, Commissioner Sternberg once again wrote to Secretary Spellings, noting that extensive scientific research supported Connecticut's proposal for formative testing, and that there was no research to support the proposition that testing in every grade was more (or even as) effective than alternate grade testing. Commissioner Sternberg also submitted additional information and arguments in support of Connecticut's waiver requests with respect to ELL students and special education testing.

78. On May 27, 2005, Commissioner Sternberg submitted Connecticut's updated amendments to its accountability plan and renewed waiver requests to Deputy Secretary Simon. In her submission, Commissioner Sternberg renewed and reiterated Connecticut's waiver requests regarding alternate grade testing, three-year phase-in for ELL students, and the option to test at instructional level for special education students.

79. On June 8, 2005, Commissioner Sternberg formally requested the "interim flexibility" for testing special education students, under the "new, workable" policy announced by Secretary Spellings on April 7, 2005. At the end of July 2005, Connecticut was granted oral permission to test up to 2% of its special education students under an "alternative assessment."

80. Testing special education students at instructional level rather than grade level does not qualify as an "alternative assessment". Rather, in order to take advantage of the alternative assessment waiver, Connecticut would be required to develop an entirely new testing regime for special education students for each grade to be tested. There is woefully insufficient federal funding for the development or

administration of these alternative assessments and on a per-pupil basis, the special education alternate assessment expenses for Connecticut will be approximately ten times the cost for the testing of regular education students.

81. On June 20, 2005, Deputy Secretary Simon informed Commissioner Sternberg that Connecticut's waiver requests for three-year phase-in for ELL students, and testing at instructional level for special education students had been denied.

82. The Secretary's persistent denials of Connecticut's waiver requests constitute a final decision of an administrative agency.

83. The Secretary's insistence upon every-grade standardized testing rather than alternate-grade standardized testing with formative testing is unsupported by significant scientific research, and is arbitrary, capricious and contrary to law. Connecticut's request is supported by over twenty years of success and significant scientific research.

84. The Secretary's insistence that ELL students be tested within one year rather than three years is unsupported by significant scientific research, and is arbitrary, capricious and contrary to law. Connecticut's request is supported by its years of success and significant scientific research.

85. The Secretary's determination that States that have native language assessments may have three years to assess ELL students in English, whereas States that have not developed native language assessments must assess ELL students, in English for language arts within one year, and in mathematics immediately, is arbitrary and capricious and contrary to law.

86. The Secretary's rigid, arbitrary and capricious interpretation requiring ELL students to be tested within one year rather than three years leaves Connecticut with the harsh dilemma of either spending millions of dollars of State funds to create, administer and grade native language tests in contravention of state law and in violation of the Unfunded Mandates provision of NCLB, or suffer the series of escalating consequences when its school districts and schools fail to make their AYP because their ELL students cannot understand the tests.

87. The Secretary's insistence that special education students cannot be offered the option of being tested at instructional level rather than grade level, regardless of their individualized educational needs, is unsupported by significant scientific research, and is arbitrary, capricious and contrary to law. Connecticut's request is supported by twenty years of success and significant scientific research.

88. The Secretary's rigid, arbitrary and capricious refusal to permit special education students to be tested at instructional level rather than grade level will require Connecticut to incur substantial additional unfunded costs to create a parallel alternate assessment scheme for a small portion of the special education student population.

89. Because Secretary Spellings contends that the State of Connecticut and its school districts must comply fully with all of the mandates imposed upon them by the NCLB Act and USDOE's arbitrary interpretation of its requirements, even if the federal funds that they receive are insufficient to pay for such compliance, the State of Connecticut and its school districts have been, and will be, required to spend substantial amounts of non-NCLB funds to comply with the NCLB mandates. Otherwise, the State

and its school districts will fall short in their compliance efforts resulting in their schools and school districts being unfairly labeled as schools or school districts that have not made AYP, and the State and its school districts will be required to expend substantial sums to comply with NCLB's progressive sanctions.

90. The State and its General Assembly have been and continue to be irreparably harmed by the acts and omissions of the Secretary as alleged herein. The State and the General Assembly have suffered a legal wrong and are adversely affected and are aggrieved by such acts and omissions.

91. The State of Connecticut and its General Assembly will be harmed by the diversion of non-NCLB funds to NCLB compliance efforts. The State of Connecticut and the General Assembly will be harmed by having Connecticut's schools and school districts unfairly labeled as failing when the federal government has not provided sufficient funding to comply with all of the NCLB mandates as required by USDOE and the Secretary.

92. The Secretary's rigid interpretations of the NCLB's assessment requirements and arbitrary and capricious refusal to grant reasonable waivers will compel Connecticut to spend millions of dollars over and above the federal funds provided in order to satisfy the NCLB assessment mandates, in direct violation of Conn. Gen. Stat. §10-14n(g) and the Unfunded Mandates Provision of the NCLB Act.

FIRST CAUSE OF ACTION

[Under the Unfunded Mandates Prohibition of the NCLB, 20 U.S.C. §7907(a)]

93. The allegations in Paragraphs 1-92 are alleged and incorporated herein by reference.

94. Section 9527(a) of the NCLB Act provides that, in complying with the NCLB mandates, States and their school districts cannot be required to "spend any funds or incur any costs not paid for under this chapter." 20 U.S.C. § 7907(a).

95. Section 9527(a) of the NCLB Act provides that no officer or employee of the federal government may mandate, direct or control the allocation of State or local resources.

96. By requiring the State of Connecticut and its school districts to comply fully with USDOE's rigid, arbitrary and capricious interpretation of the NCLB mandates even though the federal funds that they receive are insufficient to pay for such compliance and even though the Secretary may waive NCLB mandates, Defendant Secretary Spellings is violating Section 9527(a) of the NCLB.

97. By requiring the State of Connecticut and its school districts to comply fully with USDOE's rigid, arbitrary and capricious interpretation of the NCLB mandates even if the federal funds that they receive are insufficient to pay for such compliance and even though the Secretary may waive NCLB mandates, Defendant Spellings is violating Section 9527(a) of the NCLB Act by mandating, directing and/or controlling the allocation of State or local resources.

SECOND CAUSE OF ACTION

[Under the Spending Clause of the United States Constitution, Article I, Section 8 and the Tenth Amendment of the United States Constitution]

98. The allegations in Paragraphs 1-92 are alleged and incorporated herein by reference.

99. In enacting the NCLB Act, Congress set forth the conditions under which States and their school districts would be eligible to receive federal funds. One of those conditions 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).

100. By requiring the State of Connecticut and its school districts to comply fully with USDOE's rigid, arbitrary and capricious interpretation of the NCLB mandates even if the federal funds that they receive are insufficient to pay for such compliance and even though the Secretary may waive NCLB mandates, Defendant Spellings is exceeding her powers under the Spending Clause and violating the Tenth Amendment of the U.S. Constitution by mandating, directing and/or controlling the allocation of State or local resources and coercing the State of Connecticut to take actions that Congress could not otherwise compel it to take.

101. By requiring the State of Connecticut and its school districts to comply fully with USDOE's rigid, arbitrary and capricious interpretation of the NCLB mandates even if the federal funds that they receive are insufficient to pay for such compliance and even though the Secretary may waive NCLB mandates, Defendant Spellings is exceeding her powers under the Spending Clause and violating the Tenth Amendment of the U.S. Constitution by changing one of the conditions pursuant to which States

accepted federal funds under the NCLB – namely, that the State and its school districts would not be required to "spend any funds or incur any costs not paid for" under this Act – thereby precluding the State from exercising its choice to participate in the NCLB Act knowingly, cognizant of the consequences of its participation.

102. The Secretary's penalties for not complying with USDOE's rigid, arbitrary and capricious interpretation of the NCLB mandates are so harsh and unrelated to the conditions upon which the State accepted the funds that they violate the Tenth Amendment.

THIRD CAUSE OF ACTION
[Under Administrative Procedures Act]

103. The allegations in Paragraphs 1-102 are alleged and incorporated herein by reference.

104. The Secretary's decisions to deny Connecticut its requested waivers constitute final decisions of an administrative agency.

105. The Secretary's decisions to deny Connecticut its requested waivers are unlawful and contrary to constitutional right, power or privilege, are unsupported by the record and violate the Administrative Procedure Act. 5 U.S.C. § 706(2).

106. The Secretary's decisions to deny Connecticut its requested waivers are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, privilege or immunity, in excess of statutory jurisdiction, authority or limit, or short of statutory right.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(1) Issue an order declaring that the Plaintiffs and its school districts are not required to spend State, local or non-NCLB funds to comply with the USDOE's rigid, arbitrary and capricious interpretations of the NCLB mandates;

(2) Issue an order declaring that a failure to comply with the USDOE's rigid, arbitrary and capricious interpretations of the NCLB mandates due to lack of full federal funding for the NCLB Act does not provide a basis for withholding any federal funds, benefits, approval of State plans or granting of waivers to which the State of Connecticut and its school districts otherwise are entitled under the NCLB Act;

(3) Enjoin Defendant and any other officer or employee of USDOE from mandating, directing or controlling the allocation of State or local resources;

(4) Enjoin Defendant and any other officer or employee of USDOE from withholding from the State of Connecticut and its school districts any federal funds to which they are entitled under the NCLB Act or any other federal statute or regulation because of a failure to comply with any mandate of the NCLB Act that is attributable to Connecticut's refusal to expend its own funds to achieve such compliance and/or the Secretary's rigid, arbitrary and capricious interpretation of assessment requirements;

(5) Enjoin Defendant and any other officer or employee of USDOE from withholding approval of the State of Connecticut's NCLB Accountability Plan, as amended because of a failure to comply with any mandate of the NCLB that is attributable to Connecticut's refusal to expend its own funds to achieve such compliance

and/or the USDOE's rigid, arbitrary and capricious interpretation of assessment requirements;

(6) Enjoin Defendant and any other officer or employee of USDOE from denying a waiver of the requirements of the NCLB (including, but not limited to, special education testing) to the State of Connecticut's plans because of a failure to comply with any mandate of the NCLB that is attributable to Connecticut's refusal to expend its own funds to achieve such compliance and/or the USDOE's rigid, arbitrary and capricious interpretation of assessment requirements;

(7) Enjoin Defendant and any other officer or employee of USDOE from taking any adverse action against the State of Connecticut because of a failure to comply with any mandate of the NCLB that is attributable to Connecticut's refusal to expend its own funds to achieve such compliance and/or the USDOE's rigid, arbitrary and capricious interpretation of assessment requirements;

(8) Order Defendant to grant Connecticut's waiver requests at issue;

(9) Award to the 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

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

PLAINTIFFS
THE STATE OF CONNECTICUT
and the GENERAL ASSEMBLY OF
THE STATE OF CONNECTICUT

BY: /s/ RICHARD BLUMENTHAL

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