08-2437-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

STATE OF CONNECTICUT,
GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT,

Plaintiff-Appellant,

—against—

CONNECTICUT STATE CONFERENCE OF THE NAACP,
INDIVIDUAL MINORITY PARENTS AND STUDENTS IN CT,

Intervenor-Plaintiff-Appellee,

MARGARET SPELLINGS,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT (NEW HAVEN)
JANUARY 15, 2009

BRIEF FOR INTERVENOR-PLAINTIFF-APPELLEE

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INTERVENOR-APPELLEES' RULE 26.1 STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Intervenor-Appellee the Connecticut State Conference of the NAACP, is a nongovernmental, nonprofit organization. It therefore has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATUTES and RULES

OTHER AUTHORITIES

SECONDARY AUTHORITIES

COUNTER-STATEMENT OF ISSUES PRESENTED

1) Whether the so-called "unfunded mandate provision" of the No Child Left Behind Act (the "Act"), 20 U.S.C. § 7907(a), relieves Connecticut of its obligations under the Act when federal funding does not cover the entire cost of the State's compliance?

INTERVENORS' STATEMENT

This brief is submitted on behalf of Intervenors the Connecticut State Conference of the National Association for the Advancement of Colored People (the "Connecticut NAACP")[1] and individual students enrolled in three of Connecticut's lowest performing schools and their parents[2] (the "Intervenors").

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[1] The Connecticut NAACP is a non-profit organization that seeks to ensure the political, social, educational, and economic equality of rights of all persons, and to eliminate racial hatred and discrimination. Its members include minority children who attend public schools in the State of Connecticut – and, in particular, schools receiving funds under Title I of the Elementary and Secondary Education Act of 1965 ("ESEA") – and the parents of those children.

[2] Intervenor Sonia Ruiz, aged 9, is a *Latina* student who lives with her family in Hartford, Connecticut. She attends Hartford's Parkville Community School, which has not made adequate yearly progress ("AYP") and is a "school in need of improvement" under Title I. Her mother is Brandie Marie Gonzalez.

Intervenor Demont Murphy, aged 7, is a biracial (African-American and *Latino*) student who lives with his family in Hartford, Connecticut, and attends Hartford's Simpson-Waverly Elementary School, which has not made AYP. His mother is Jacqueline D. Medina.

Intervenor Manaicha Gonzalez, aged 14, is a *Latina* student with a disability who lives with her family in Hartford, Connecticut, and attends Hartford's Quirk Middle School, which has not made AYP and is a "school in need of improvement." Her mother is Elizabeth Villanueva.

Intervenors sought and obtained Rule 24(b) intervention in the District Court to protect their interest in Connecticut's full and complete compliance with the letter and spirit of the No Child Left Behind Act ("NCLB"). Joint Appendix ("JA") at A154. Intervenors seek to secure the enhanced educational opportunities and outcomes that Congress intended when it approved NCLB with overwhelming bipartisan support in 2001. These tangible benefits will be impaired if Connecticut succeeds in its campaign to avoid its responsibilities under the Act.

The District Court ruled that it lacked subject matter jurisdiction over all but one of Connecticut's claims because they were pre-enforcement challenges (and/or were procedurally unripe) and held on the remaining claim that the Department of Education properly denied Connecticut's plan amendments pursuant to NCLB and the Administrative Procedures Act ("APA"). (SPA27, SPA96). The Court therefore did not reach the merits of Connecticut's argument that the "unfunded mandates provision" of NCLB, 20 U.S.C. § 7907(a), means that "the Secretary cannot require a state to spend any funds or incur any costs not paid for under the Act." Appellant's Br. at 39. Connecticut has nevertheless asked this Court to rule on this issue as a matter of law. Intervenors' brief focuses on this request.

If the Court reaches the merits and adopts Connecticut's position, then Connecticut will not have to follow NCLB unless the federal government provides 100% of the funding for implementation. But NCLB, like most grant-in-aid

programs meant to improve education and fight poverty, is not designed for the federal government to provide 100% of the funding. Such grant-in-aid programs are explicitly designed to be federal-state partnerships. This type of partnership is especially important in education, where the federal government can provide some financial assistance but where the states continue to be the dominant source of funding.

Connecticut's understanding of the law imperils not only NCLB, but potentially all federal grant-in-aid programs. If states can latch on to an arguably ambiguous provision in the body of long and complex statutes to claim they were unaware they were required to contribute funds, they would be free to take the federal government's money while treating the federal government's priorities as mere suggestions. There could be no nationwide strategy to improve education. In its effort to duck its responsibilities under NCLB, Connecticut is striking at the heart of all the efforts of those who value civil rights to craft a bipartisan, nationwide strategy to close the achievement gap for poor and minority students. This Court should deny Connecticut's request for substantive relief.

STATUTORY BACKGROUND

I. THE UNITED STATES EDUCATIONAL SYSTEM HAS FAILED MINORITY AND LOW-INCOME STUDENTS.

Despite the promise of *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954),[3] American public school systems – the "engine of the American dream" – have failed to provide a great many minority and low-income students with an equal opportunity for success through quality education. NCLB-Conf. Report, 147 Cong. Rec. S13322-03, S13327 (2001). In far too many communities, low-income and minority students lack equal access to "challenging curricula and instruction, fair tests and testing practices, fair discipline rates and punishments, fair identification for special education and gifted programs, financial resources, human resources, race and social class diversity in schools and classrooms, and motivated, high achieving classmates who create an academic climate that sustains high achievement for all students." C. Joy Farmer, *The No Child Left Behind Act:*

[3] In *Brown*, the United States Supreme Court recognized that "education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown*, 347 U.S. at 493.

Will It Produce A New Breed Of School Financing Litigation?, 38 Colum. J.L. & Soc. Probs. 443, 452 (2005).[4]

The failure to provide equal educational opportunities to minority and low-income students has resulted in a substantial achievement gap between these students and their non-minority and affluent counterparts – an achievement gap that begins as early as pre-kindergarten and continues and widens through and beyond the high school level.[5] Students "left behind" by the public school systems – the vast majority of whom are African American, Hispanic, English-learners, have a disability or are from low-income families – under-perform on standardized tests, and are under-represented in higher academic tracks. They are also more likely than others to be suspended or expelled from school, held back, or drop out

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[4] *See also, e.g.,* Amy Reichbach, *The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education*, 45 B.C. L. Rev. 667, 668-69 (2004) ("Despite the Supreme Court's promise in *Brown* that once a state has undertaken to provide its children with an education, it must do so on equal terms, significant inequalities persist between high-poverty and low-poverty schools."); Daniel J. Losen, *Challenging Racial Disparities: The Promise And Pitfalls Of The No Child Left Behind Act's Race-Conscious Accountability*, 47 How. L.J. 243, 251 (2004) (students in predominantly minority school districts are "substantially more likely than others to be educated by uncertified or inexperienced teachers who lack the educational background to teach the subject matter they are teaching.").

[5] *E.g.*, Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 Tex. F. on C.L. & C.R. 1, 2 (2002); Farmer, *supra*, 38 Colum. J.L. & Soc. Probs. at 450-452 (2005); NCLB-Conf. Report, 147 Cong. Rec. at S13324; *see also* U.S. Dep't of Educ, Educational Achievement and Black-White Inequality 42 (NCES 2001-061), available at http:// nces.ed.gov/pubs2001/2001061.pdf.

of school before obtaining high school diplomas.[6] After high school, minority and low-income students not only earn significantly less income than their peers, but are also significantly more likely to end up in the criminal justice system.[7]

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[6] *E.g.*, Floyd D. Weatherspoon, *Racial Justice And Equity For African-American Males In The American Educational System: A Dream Forever Deferred*, 29 N.C. Cent. L.J. 1, 14 (2006) (African-American male graduation rates, dropout rates, suspension and expulsion rates, placement in special education classes, low test scores, and lack of placement in advance placement classes "illustrate their underclass status in public schools."); Kevin Brown, *The Supreme Court's Role in the Growing School Choice Movement*, 67 Ohio St. L.J. 37, 41-42 (2006); Farmer, *supra*, 38 Colum. J.L. & Soc. Probs. at 450-452; *see generally* Comm. on Improving Measures of Access to Equal Educ. Opportunity, Nat'l Research Council, *Measuring Access to Learning Opportunities* (Willis D. Hawley & Timothy Ready eds., 2003), available at http://books.nap.edu/books/0309088976/html/R1.html#pagetop; *see generally*, U.S. Dep't of Ed., National Center for Education Statistics, *Status and Trends in the Education of Racial and Ethnic Minorities*, at 64 (September 2007), available at http://nces.ed.gov/pubs2007/2007039.pdf.; *Picking Up The Pieces After PICS: Evaluating Current Efforts To Narrow The Education Gap*, 11 Harv. Latino L. Rev. 263, 263 (2008).

[7] *See e.g.*, V. Goode & J. Goode, *De Facto Zero Tolerance: An Exploratory Study of Race & Safe School Violations*, *in* TEACHING CITY KIDS: UNDERSTANDING & APPRECIATING THEM 85, 93 (Joe L. Kincheloe & Kecia Hayes eds., 2007) ("While recognizing the potential benefits of safe school initiatives, the concern here was with how safe school violations can be yet another way in which minority, disadvantages youth are disproportionately sent through the juvenile justice system. One of the most interesting findings was the triviality and ambiguity of many of the safe school violations."); Weatherspoon, *supra* note 6, at 4; Michael Olneck, *Economic Consequences Of The Academic Achievement Gap For African Americans*, 89 Marq. L. Rev. 95, 104 (2005); Daniel J. Losen, *Challenging Racial Disparities: The Promise And Pitfalls Of The No Child Left Behind Act's Race-Conscious Accountability*, 47 How. L.J. 243, 251 (2004) (many youths of color fall into "a school-to-prison pipeline.").

II. CONGRESSIONAL ATTEMPTS TO CLOSE THE ACHIEVEMENT GAP BEFORE NCLB FELL SHY OF THE MARK.

Civil rights advocates and the families of minority and poor children have long been able to identify a stark achievement gap in American public schools, and for decades have "worked tenaciously to identify, implement, and sustain effective means to achieve ... access to a high-quality education for their children and others like them, in order to prepare them to participate fully in the American dream – the promise of the pursuit of happiness and equal opportunity to do so." *See, Making Excellence Inclusive In Education And Beyond*, 35 Pepp. L. Rev. 611, 613 (2008). Nevertheless, prior to the enactment of NCLB, their efforts were generally unsuccessful. *See, e.g.*, William L. Taylor, *The Continuing Struggle for Equal Educational Opportunity*, 71 N.C. L. Rev. 1693, 1697 (1993). Courts presented with clear evidence of pervasive achievement gaps uniformly refused to require school districts even to *attempt* to close them in the absence of evidence that gaps were directly caused by intentional discrimination,[8] notwithstanding clear evidence

[8] *See, e.g., People Who Care v. Rockford Bd. of Educ., School Dist.*, 205 246 F.3d 1073, 1076 (7th Cir. 2001) (holding that a school district "may have a moral duty" to attempt to close stark achievement gap between minority and which students, but "it has no federal constitutional duty."); *see also NAACP v. Duval County Sch.*, 273 F.3d 960, 975 (11th Cir. 2001) ("The Constitution does not require a school board to remedy racial imbalances caused by external factors, such as demographic shifts, which are not the result of segregation and are beyond the board's control." (citing *Freeman v. Pitts*, 503 U.S. 467, 495 (1992)).

that school policies directly contributed to and perpetuated the gaps.[9] These decisions placed a nearly impossible burden on civil rights advocates and the poor and minority children fighting for an adequate education. *See, e.g.*, *Wessmann v. Gittens*, 160 F.3d 790, 803 (1st Cir. 1998) ("[T]he raw achievement gap statistics presented in this case do not by themselves isolate any particular locus of discrimination for measurement. Without such a focus, the achievement gap statistics cannot possibly be said to measure the causal effect of any particular phenomenon, whether it be discrimination or anything else.").[10]

While civil rights advocates struggled in the courts, a growing body of research "identified strategies schools can use to reduce an achievement gap between black and white students, regardless of the cause(s) of the gap." Klein, *supra* note 9, at 443-44 (noting that the "implication of these programs is that a school system can reduce an achievement gap regardless of whether the school system, parents' lack of education, or residential housing patterns caused the

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[9] *See generally* Dora W. Klein, *Beyond Brown v. Board Of Education: The Need To Remedy The Achievement Gap*, 31 J.L. & Educ. 431, 441-42, 445-46 (describing inability to remedy the achievement gaps using the Fourteenth Amendment and prior federal civil rights statutes). For example, courts and commentators have frequently noted that when school districts group students based on their perceived ability, they place a disproportionate number of minority and low-income children in lower ability groups when they first arrive at school, resulting in lasting and extreme achievement gaps. *See, e.g.*, Ross Wiener, *Opportunity Gaps: The Injustice Underneath Achievement Gaps In Our Public Schools*, 85 N.C. L. Rev. 1315, 1329-30 (2007).

[10] *See also* Klein, *supra* note 9, at 441-42.

achievement gap."); *see also* Wiener, *supra* note 9, at 1317 (arguing that research confirms that disadvantaged students "can and do achieve at the highest levels when we give them the right opportunities and supports."). One of the most powerful strategies is for schools simply to believe in their disadvantaged students. The achievement gaps experienced by poor and minority students stem in large part from stereotypical biases that they "lack the intelligence, motivation, and support from their parents to be successful," biases that manifest themselves as low expectations for achievement toward these students. Weatherspoon, *supra* note 6, at 24-25. Once educators develop these low expectations, "the self-fulfilling prophecy becomes a reality." *Id.*[11]

Congress recognized this explicitly in the Improving America's Schools Act of 1994 (the predecessor of NCLB) when it stated "this title (Title I) builds upon what has been learned: (1) All children can master challenging content and complex problem-solving skills and research clearly shows that children, including

[11] *See also* Wiener, *supra* note 9, at 1330-31, 1343 (explaining that "[a]t root, the disparate opportunities we afford to these students are a manifestation of the deep-seated belief that these students simply cannot achieve at the highest levels" and that certain disadvantaged schools and students are often "pegged at such low-level expectations that students will not learn to high levels even if they successfully complete everything that is asked of them."); *id* at 1315 (explaining how achievement gaps are perpetuated by a "mistaken belief that poor students are destined for academic failure.").

low achieving children, can succeed when expectations are high and they are given the opportunity to learn challenging material. Improving America's Schools Act of 1994, tit. 1, § 1001c(1), 140 Cong. Rec. H920-01, H920 (1994). The "soft bigotry of low expectations" was expressly cited by both Congress and the President as a reason for NCLB's enactment. 147 Cong. Rec. S13322-03, S13331 (December 17, 2001); George W. Bush, Remarks by the President in "Ask President Bush" Event (Fond Du Lac, Wis., July 14, 2004), in White House Press Releases and Documents (2004 WLNR 2541352).

III. NCLB HAS MADE SIGNIFICANT PROGRESS TOWARD CLOSING THE ACHIEVEMENT GAP.

NCLB is considered by many to be one of the most far-reaching civil rights laws in recent history, so much so that it offers "the Civil Rights Movement that rarest of gifts: a historic second chance." James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1705 (2003); *see* Cynthia G. Brown, *Federal Nagging: How Congress Should Promote Equity and Common High Standards in Public Schools*, 116 YLJPP 163 (2006) ("NCLB's education goals were the most equitable – in the sense of fostering greater equality across incomes and races – since the Civil Rights Act of 1964 and the federal legislation of the 1970s").

In enacting NCLB, Congress recognized that "the failure to educate generation after generation of low-income children, especially children from

minority backgrounds, was dividing our country. We were balkanizing ourselves based on education and the failure of … large cultural segments of our population[] … to be economically … or socially successful[.]" NCLB-Conf. Report, 147 Cong. Rec. at S13327. New direction was needed to end what Congress called "gross educational malpractice" in public schools resulting from "a policy of acceptable losses" in which far too many poor and minority children were "written off." 147 Cong. Rec. H2310-02, H2312 (May 17, 2001) (noting that in many cases poor and minority students graduate from public school "only to find out that they have not received a quality education they need and that they ought to be entitled to.").[12]

With NCLB, the federal government established that the "achievement gap between rich and poor students and minority and non-minority students that has plagued our educational system for decades" is "inexcusable." Conference Report On H.R. 1, No Child Left Behind Act O F 2001, 147 Cong. Rec. H10082-02, H10083 (December 13, 2001). The Act was cast in historic terms: Senator

[12] This system had "allowed our most disadvantaged children to be promoted through our public schools without regard to actual achievement," and left these children "unable to participate fully in the American dream." Conference Report on H.R. 1, No Child Left Behind Act of 2001, 147 Cong. Rec. H10082-02, H10083, H10094 (December 13, 2001). Congress acknowledged that, tragically, the public school system had left many of these children trapped "in ghettos of ignorance and, therefore, ghettos of poverty." Conference Report on H.R. 1, No Child Left Behind Act of 2001, 147 Cong. Rec. H10082-02, H10098 (December 13, 2001).

Kennedy, for example, discussed efforts by the women's movement and by the civil rights movement to obtain educational equity, and praised the NCLB as being part of "the great march of history, to fulfill the promise of a good education and greater opportunity to all children in America-whether they are black or white, from the cities or the suburbs or the rural areas, from the North to the South to the East to the West." 147 Cong. Rec. S13322-03, S13323. (December 17, 2001). Congress also expressed "shame that it has taken us from 1965 to call for a quality and equity in education" and in passing the Act intended to finally fulfill the "promise to ensure that all children have an opportunity to learn regardless of income, background or ethnic identity." Conference Report On H.R. 1, No Child Left Behind Act O F 2001, 147 Cong. Rec. H10082-02, H10098 (December 13, 2001).

A. NCLB MANDATES ACCOUNTABILITY.

The touchstone of NCLB is accountability.[13] States that choose to accept NCLB funding must, irrespective of the cost of compliance, provide specified educational services and resources to students, including:

(a) State-administered annual assessments in English language arts and mathematics, with results provided to parents;

(b) Report cards on student test scores and other measures, with

[13] *See, e.g.*, Wiener, *supra* note 9, at 1315 (arguing that setting achievement goals and expecting changes when goals are not met is "absolutely essential" to making public schools change).

information reported by school, school district, and the state;

(c) Keeping parents informed on such matters as school improvement, English proficiency, and school safety;

(d) An effective state accountability and school improvement system to ensure that students attain the state's "proficient" standards of achievement by 2014;

(e) Parental options to transfer children to a better school or to obtain tutoring when schools fail to make sufficient progress; and

(f) Qualified teachers who meet rigorous requirements for subject-matter knowledge and state certification.[14]

20 U.S.C. §§ 6311 (h)(1)(C), 6311(h)(2)(B), 6311(h)(2)(E), 6316.

The law requires schools and school districts that receive Title I funding to show "adequate yearly progress" ("AYP") for students in historically-disadvantaged groups. If AYP is not met, the Act prescribes a set of remedies for schools and school districts. 20 U.S.C. § 6316. The Act requires school districts to confront and address achievement gaps directly by disaggregating the achievement scores of low-income and minority students and those with limited English proficiency or disabilities. Schools can thus no longer bury the performance of these students beneath misleading averages. *See, e.g.*, NCLB-Conf. Report, 147 Cong. Rec. at S13328 ("No more burying the child who maybe does not make it in

[14] *See* Gordon Whiteman, *Making Accountability Work*, 28 N.Y.U. L. & Soc. Change 361, 366-367 (2003) (discussing the importance of this provision to improving the education of poor and minority children).

a group of people who do not make it covered by a group of people who do make it."). And schools where minority or low-income students persistently fail to meet achievement benchmarks must make "fundamental reforms," which may include remedies as broad as replacing all or most of the school staff, or reopening the school as a public charter school. 20 U.S.C. § 6316(b).

Finally, students assigned to schools in which poor and minority students are not making adequate progress are given two groundbreaking choices: the Act's "School Choice" provision gives students the option of having the school system transfer them to a higher performing public school. *See, e.g.*, 20 U.S.C. § 6316(b)(1)(E), and students who continue to attend a school designated as in need of improvement are entitled to supplemental educational services including after-school tutoring and instruction. *See, e.g.*, 20 U.S.C. § 6316(e).

B. MINORITY AND LOW INCOME STUDENT PERFORMANCE HAS IMPROVED SINCE THE PASSAGE OF NCLB.

Overall, the benefits provided by NCLB to poor and minority children have proven to be very significant. For example, when an Alabama school district redrew school zone boundaries in a manner which would "force hundreds of African American students to move from well-performing, racially diverse schools to failing, racially isolated schools" parents of these students successfully asserted a right to "use NCLB's transfer program to return their children to well-performing

schools." Alexander Villarreal O'Rourke, *Picking Up The Pieces After Pics: Evaluating Current Efforts To Narrow The Education Gap*, 11 Harv. Latino L. Rev. 263, 271 (2008).

Moreover, since the enactment of NCLB, schools have begun implementing programs aimed at closing achievement gaps with notable success. According to a report released in June 2008 by the Center on Education Policy ("CEP"), reading and math scores have increased steadily in most states, particularly at the elementary school level, since 2002. The report also shows that achievement gaps are narrowing in more instances than they are widening. The majority of these gains fall into the moderate-to-large category based on the CEP report. While the report does not expressly link these increases to NCLB, the CEP has confirmed that the gains seen after NCLB are greater than pre-NCLB trends for states that had available data. *Has Student Achievement Increased Since 2002? State Test Score Trends Through 2006-07*, CEP (June 2008); *see also* Wiener, *supra* note 9, at 1334.

In addition the latest reports of the widely respected National Assessment of Educational Progress show that many large urban school districts are now effectively responding to the needs of disadvantaged students. NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, *Beating the Odds: An Analysis of Student Performance and Achievement Gaps on State Assessments* (April 2008) (finding narrowing racial and ethnic achievement gaps as a result of NCLB in both

math and reading test scores); *see also* Secretary Spellings' Prepared Statement Before the U.S. House of Representatives Appropriations Subcommittee on Labor, HHS, and Education (March 12, 2007), available at http://www.ed.gov/news/speeches/2005/09/09292005.html ("African-American and Hispanic students are reaching all-time highs in reading and math. Achievement gaps between poor and minority students and their peers are finally beginning to close. More than 60,000 schools—over 70 percent overall—are meeting No Child Left Behind's annual performance goals."); *see generally* 2007 National Assessment of Educational Progress, available at http://nces.ed.gov/nationsreportcard.

IV. CONNECTICUT IS FAILING ITS LOW INCOME AND MINORITY STUDENTS.

Unfortunately, Connecticut is failing its most disempowered children. A vast chasm separates the state's affluent, mainly white schools from its poor and predominantly minority schools. This discrepancy was noted by the Connecticut Supreme Court in the landmark decision *Sheff v. O'Neill*, 678 A.2d 1267, 1270 (Conn. 1996). The court concluded that the Hartford, Connecticut public schools were racially and ethnically isolated, and that Hartford public school students had not been provided with a substantially equal or adequate education as required by the Connecticut state constitution. Although the court ordered the state to remedy the constitutional violations, minority and poor students in Hartford and other parts of Connecticut continue to receive a woefully inadequate education.

The educational inadequacies outlined ten years ago by the Connecticut Supreme Court persist today, not only in the Hartford schools, but in public schools throughout the state. Among all states, Connecticut has the widest gap in achievement between poor and non-poor students. *See* Editorial Projects in Education, "Quality Counts Report 2006: Connecticut."

These inadequacies and the immense gap in achievement are exemplified by the remarkably disparate test scores that Connecticut students receive on the Connecticut Mastery Test ("CMT"), the statewide proficiency exam. For example, while 88.8% of white fourth-grade students are considered proficient in math, only 57% of African-American students are proficient. *See* Summary of Student Achievement on the Connecticut Mastery Test 2006, available at www.cmtreports.com/CMTCode/Report.aspx. Similarly, while 89.8% of white fourth-grade students are proficient in Reading, only 41% of African-American students score as such. *Id.* These disparities persist and grow through eighth grade and into high school. *Id.*

SUMMARY OF ARGUMENT

Instead of embracing NCLB's bipartisan and effective effort to solve the problem of underperforming schools, the State of Connecticut has spent its resources on a court battle, hoping that the Courts will allow it to ignore NCLB while it spends the federal dollars it receives under the Act largely as it pleases. As

set forth above, NCLB is one of the most important federal civil rights laws in recent times. More than just providing federal funding for poor and minority students – students too often left behind notwithstanding attempts at educational reform – NCLB inaugurates a nationwide strategy of accountability and reform to close the achievement gap between wealthy and underperforming (and largely minority) schools. NCLB is a concrete step designed ultimately to ensure that poor and minority students receive a quality education. As shown above, NCLB, now almost seven years old, is working. Whether it is the best approach to the problem of underperforming schools can and will be debated in Congress. But what is not in doubt is that once a state agrees to accept federal funds under NCLB, it is bound to follow the law.

Like so many programs before it, NCLB is a voluntary partnership between the federal and state governments, by which states, in exchange for federal funds, agree to implement national priorities in areas that are largely under state jurisdiction. These programs allow for a nationwide strategy to combat ills such as (in the case of NCLB) gaps between the performance of wealthier schools and those trapped in a cycle of poverty and dysfunction, while also respecting state sovereignty. The fact that such programs are financed by a mixture of federal and state monies is common and, this is especially true in the field of education, where the federal government has never shouldered more than 10% of the overall

financial burden while imposing major obligations such as those delineated in *Brown v. Board of Education*. NCLB recognizes that all the states' education systems are starting from different places and have different needs—it is not a one-size-fits-all approach. But there are certain core elements of NCLB that states must agree to if they are to accept federal NCLB funding.

Connecticut, however, would like to accept federal funding without meeting its obligations. Focusing on a single line of a long, complex statute – the so-called "unfunded mandate provision" – Connecticut argues that it is relieved of any duty to implement portions of NCLB that the federal government does not entirely finance. An analysis of the language and overall structure of NCLB exposes this argument as disingenuous.

The provision Connecticut relies on cannot mean what Connecticut wants it to mean. On its face, the "unfunded mandate provision" merely restrains any "officer or employee of the Federal Government" from requiring a state to spend money by administrative fiat. Connecticut's interpretation is belied by review of the entire statute, which explicitly contemplates a mixture of federal and state funding, includes "nonsupplanting" or "maintenance of efforts" conditions to ensure that funds provided to the states will be used only to supplement, and not supplant, ongoing state funding, and provides that a state must continue to develop yearly assessments regardless of federal funding levels. It is common and

perfectly appropriate for NCLB itself to require states to allocate funds, as it does repeatedly. To hold otherwise would lead to an absurd result.

It would also eviscerate NCLB and, in the process, hurt the poor and minority students who so desperately need it. If this Court were to rule in favor of Connecticut on the merits of its claims, there would be nothing to stop states from pocketing federal NCLB dollars while walking away from their commitments to meet the conditions contained in the law. There would also be nothing to stop states from ignoring conditions in other grant-in-aid programs, such as those for school lunches, foster care, and education for persons with disabilities, to name just a few.

If this Court considers the merits of Connecticut's argument regarding the proper reading of the so-called "unfunded mandate provision," it should reject Connecticut's interpretation of NCLB and affirm the District Court's dismissal of the complaint.

STANDARD OF REVIEW

This court reviews issues of statutory interpretation de novo. *U.S. v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008) (citing *United States v. Rood*, 281 F.3d 353, 355 (2d Cir.2002)).

ARGUMENT

I. NCLB SPECIFICALLY CONTEMPLATES THE USE OF STATE FUNDS.

A. NCLB Is a Voluntary Partnership Between the Federal and State Governments that Explicitly Relies on Funding from Both.

By choosing to participate in the Act, Connecticut agreed to meet certain statutory requirements in exchange for federal funds. Such quid pro quos are common and perfectly legal. *See, e.g., Padavan v. United States*, 82 F.3d 23, 29 (2d Cir. 1996) (ruling state is not "mandated" to participate in voluntary federal funding programs); *see also New York v. United States*, 505 U.S. 144, 167 (1992) (finding no constitutional problem with Congress urging the states to adopt particular programs through use of the spending power).

A central premise of NCLB was that once states agreed to accept federal funding under the Act they were accountable for taking the actions specified in the law to improve education and close the achievement gap. Congress thus refused to accept that disadvantaged students could not achieve at high levels, and provided

states which accepted federal funding under the Act with a clear obligation to take steps to address the achievement gap.[15]

No sensible education or other public official could read the statute and conclude that the federal government was committing itself to absorb all the costs of educational improvement. In fact Congress has appropriated substantially more revenue under NCLB than it did in prior years to implement the act. But even with those increases, the federal government's share of educational funding has never exceeded 10%. *See* Tom Loveless, *The Peculiar Politics of No Child Left Behind*, The Brookings Institution (2006) at 20-21, available at www.brookings.edu/~/media/Files/rc/papers/2006/08k12education_loveless.pdf.

To invoke the concept of "unfunded mandates" set forth in a simple ambiguous sentence as permitting acceptance of federal funds without acceptance of federal conditions makes no sense and conflicts with the law. "Where a State

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[15] Indeed the stated purpose of NCLB is to "ensure that all children have a fair, equal and significant opportunity to obtain a high-quality education" by, *inter alia*, establishing "high-quality academic assessments [and] accountability systems ... so that students, teachers, parents, and administrators can measure progress"; by "meeting the educational needs of low-achieving children in our Nation's highest-poverty schools, [including] limited English proficient children, migratory children, [and] children with disabilities"; and by closing "the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers." 20 U.S.C. § 6301. As Rep. John A. Boehner (R-Ohio), who led the joint House-Senate committee that finalized NCLB stated on the floor of the House at the time, "enough is enough. No more false hope for our children, no more broken promises, and no more mixed results." 147 Cong. Rec. H10082-02, H10092 (2001).

obtains grants by providing assurances that the funds will be used on programs that comply with Title I, the State has no right to retain funds that are in fact misused." *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 664 (1985) (holding that the State of Kentucky could not use federal funds to supplant state educational money, even if it did so in "good faith"). While "'Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds,' ... [t]he requisite clarity in this case [and in the case at bar] is provided by Title I; States that chose to participate in the program agreed to abide by the requirements of Title I as a condition for receiving funds." *Id.* at 665-66 (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 24 (1981), and citing *Bell v. New Jersey*, 461 U.S. 773, 790 (1983)).

B. CONNECTICUT'S ARGUMENTS IGNORE THE PLAIN LANGUAGE OF NCLB.

Connecticut's position is predicated entirely on the so-called "Unfunded Mandate Provision" of NCLB which provides that "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).

But, as the Government explains in its brief, that provision clearly acts as a restriction only on the actions of federal employees and officers. The full relevant text reads,

> 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 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 Act.

20 U.S.C. § 7907(a). To hold as Connecticut requests would be to substitute the word "Congress" for the words "officer or employee of the Federal Government" in the statutory language – in other words, the Act does not authorize *Congress* "to mandate . . . a State . . . [to] incur any costs not paid for under this Act." At least in some circumstances this construction would allow the states to ignore the substantive requirements of the law in the absence of 100% federal funding.

Connecticut's claim is further undermined by the Act's repeated references to the use of both state and local funds in its implementation. *See, e.g.*, 20 U.S.C. § 6321(b)(1) ("State educational agency or local educational agency shall use Federal funds received under this part only to supplement the funds that would ... be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds"); 20 U.S.C. § 7217(a); *see also* 20 U.S.C. § 6381a(c)(5); 20 U.S.C. § 7255d(b)(3); 20 U.S.C. § 6535(c)(3).

The most significant reference to the use of state funds involves the Act's outline of a state's responsibility to develop and implement yearly assessments in

the event that federal funding falls below a certain level. That provision reads in pertinent part:

> A state may defer the commencement, or suspend the administration *but not cease* the development of the assessments described in this paragraph that were not required prior to the date of enactment of the No Child Left Behind Act of 2001, for 1 year each year for which the amount appropriated for grants under 6113(a)(2) is less than—
>
> (i) $370,000,000 for fiscal year 2002;
>
> (ii) $380,000,000 for fiscal year 2003;
>
> (iii) $390,000,000 for fiscal year 2004; and
>
> (iv) $400,000,000 for fiscal years 2005 through 2007

20 U.S.C. § 6311(b)(3)(D) (emphasis added). Section 6311(b)(3)(D) makes clear that a state may defer the administration of yearly assessments if federal funding falls below a certain level, but that the state must continue to develop yearly assessments regardless of federal funding levels.[16] Also, as set forth in this section,

[16] Congressional funding has met or exceeded these amounts every year. *See* Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2002, Pub.L. No. 107-116, 115 Stat. 2177,2202-03 ($387 million for fiscal year 2002); Consolidated Appropriations Resolution, 2003, Pub.L. No. 108-7, 117 Stat. 11,328 ($387 million for fiscal year 2003); Consolidated Appropriations Act, 2004, Pub.L. No. 108-199, 118 Stat. 3,257 ($391.6 million for fiscal year 2004); Consolidated Appropriations Act, 2005, Pub.L. No. 108-447, 118 Stat. 2809,3144 ($400 million for fiscal year 2005).

as long as Congress provides the specified level of funding each fiscal year, states are required to implement the yearly assessments, notwithstanding any additional costs they may incur.

NCLB also places "nonsupplanting" and/or "maintenance of effort" conditions on federal funds, which Congress often includes in statutes to ensure that funds provided to the state will not be used to replace state funds now being expended.[17] *See* Roderick M. Hills, *The Political Economy of Federalism: Why State Autonomy Makes Sense and Dual Sovereignty Doesn't*, 96 Mich. L. Rev., 813, 875 (1998); Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost For Analyzing Public Policy*, 85 Iowa L. Rev. 1691, 1743-44 (2000). It is clear then that Congress intended states to continue to fund efforts to improve education with federal funds to be used as a supplement.

Finally, NCLB sets out a specific set of obligations that states and school districts must accept and carry out if they choose to receive funds. These requirements include, *inter alia*, disaggregation of subgroups – by race, ELL status,

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[17] *See, e.g.*, 42 U.S.C. § 1396a(C) (1988) (enacting a "maintenance of effort" provision for the Medicare Catastrophic Coverage Act of 1988); See IDEA § 612(a)(18), 20 U.S.C. § 1412(a)(18) (1994 & Supp. IV 1998) (prohibiting commingling of funds or supplanting of funds at the state level); § 612(a)(19), 20 U.S.C. § 1412(a)(19) (1994 & Supp. IV 1998) (mandating that the state maintain or increase its fiscal expenditures on disability services); Rehabilitation Act of 1973 § 101(a)(8), 29 U.S.C. § 721(a)(8) (1994 & Supp. IV 1998) (requiring state agencies to exhaust other funding before using federal money).

disability, and poverty – for purposes of determining compliance with adequate yearly progress requirements; validation of testing requirements; and adoption of reasonable accommodations in testing for students with disabilities and English language learners. Many of these obligations relate to testing, but there are others – some of which are more costly – including expanded reporting requirements to parents such as state and local report cards, *see, e.g.*, 20 U.S.C. § 6316(a)(1)(C); and closing or restructuring schools that fail for a number of years. *See, e.g.*, 20 U.S.C. § 6316(b)(8).

Notably, although NCLB requires local educational agencies to provide supplemental educational services to students enrolled in identified schools, it specifies the portion of its allocation that a local educational agency must spend on these services. 20 U.S.C. § 6316(b)(10)(A)(ii)-(iii). It further specifies that if there are insufficient funds to provide these services to each child whose parents request them, the local educational authority shall give priority to the lowest achieving children. *Id.* at § 6316(b)(10)(C). If Congress intended to condition compliance with NCLB's requirements on the availability of federal funding for compliance, it could have done so, as it did with respect to the provision of these supplemental educational services.

II. CONNECTICUT'S POSITION WOULD UNDERMINE NCLB AND HURT THE POOR AND MINORITY STUDENTS CONGRESS INTENDED TO HELP.

While there is much debate over how to improve ESEA and NCLB, these statutes have benefited many disadvantaged children by increasing the availability of educational resources and by holding state and local recipients accountable for improving student performance. (*See* section I, *supra.*) Adopting Connecticut's position would curtail these advances and undermine the progress achieved through NCLB. Under Connecticut's reading of NCLB, a state could, for example, argue that it lacks the funds to measure adequate yearly progress for minority and disadvantaged students separately and that it can only afford to measure aggregate adequate yearly progress across a broader spectrum. But aggregation of data would disguise the achievement gap that NCLB seeks to close. Similarly, a state could argue that, due to inadequate federal funds, it need not notify parents that their child's school failed to make adequate yearly progress and that they have the option to transfer their child to another school. This would leave parents of minority and disadvantaged children unaware of the failings of their children's school and their option to transfer their child. Finally, a state could argue that it is not required to spend its own funds to implement corrective actions in schools that have failed to make adequate yearly progress. But the schools most likely to be identified as needing corrective action are those serving minority and

disadvantaged students. Because compliance with each of these requirements is necessary to achieve NCLB's goals, a state should not be permitted to accept NCLB funding and then comply with only those requirements for which it can pay with federal funding. *See generally, Pontiac v. Sec'y of the U.S. Dept. of Educ.*, 512 F.3d 252, 273-84 (2008) (McKeague, J., dissenting) (majority opinion vacated and rehearing en banc granted May 1, 2008).

Moreover, the effect of the decision is not limited to NCLB. Its reasoning could imperil numerous other federally funded programs, including those that benefit low income and minority children, who are dependent on grant-in-aid programs – school lunches, foster care, education for persons with disabilities, to name only a few – that condition the use of federal money on specific requirements.[18] In the last half of the 20th century, the U.S. Government enacted hundreds of grant-in-aid programs that provide funding to states to benefit a targeted group of individuals. *See, e.g.*, Lisa Key, *Private Enforcement of Federal Funding Conditions Under Section 1983: The Supreme Court's Failure to Adhere*

[18] *See, e.g.,* National School Lunch Act, 42 U.S.C. §§ 1751-1769; Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-628, 670-679 (a); Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1461. Many grant-in-aid programs were enacted during the 1930s and 1940s to help States and localities protect the health, housing and educational opportunities of the neediest members of society.

to the Doctrine of Separation of Powers, 29 U.C. Davis L. Rev. 283, 293-94 (1996). These programs require that participating states meet certain statutory conditions, which often entail spending by the states themselves. *See id.*

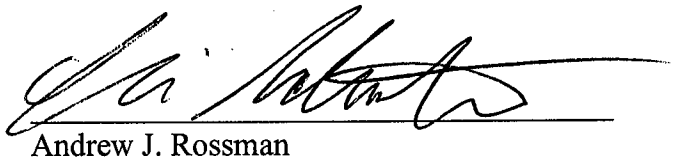
If this Court considers the merits of Connecticut's argument regarding the proper reading of the so-called "unfunded mandate" provision, it should reject Connecticut's interpretation of NCLB and affirm the District Court's dismissal of the complaint.

CONCLUSION

For the foregoing reasons and the reasons stated in the Government's brief, this Court should affirm the District Court's decision granting the Motion to Dismiss on all counts.

Dated: January 15, 2009
New York, New York

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief complies with the type volume limitation set forth under Federal Rule of Appellate Procedure 32(a)(7)(B), that the word processing system used to prepare the brief indicates that it contains no more than 14,000 words, and that the brief uses a proportionately-spaced font of 14-point type.

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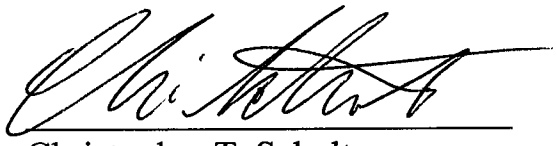

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CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of January 2009, I caused to be delivered a true and correct copy of the *Brief of Intervenor-Appellees* on the following counsel as follows:

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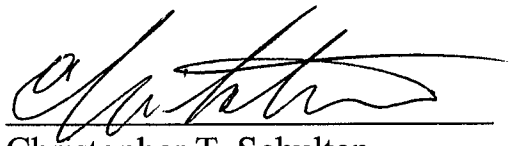

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