

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT and the	:	CIVIL ACTION NO. 3:05-CV-01330(MRK)
GENERAL ASSEMBLY OF THE	:	
STATE OF CONNECTICUT	:	
<i>Plaintiffs,</i>	:	
	:	
v.	:	
	:	
MARGARET SPELLINGS,	:	
in her official capacity as	:	
SECRETARY OF EDUCATION,	:	
<i>Defendant.</i>	:	MARCH 19, 2007

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION
REGARDING THE ADMINISTRATIVE RECORD**

The plaintiffs State of Connecticut and General Assembly of the State of Connecticut (the “State”) hereby submit their brief in support of their motion regarding the administrative record.

BACKGROUND

The 2002 NCLB Act expressly prohibits the Secretary from declining a State’s plan unless and until she

- (i) offers the State an opportunity to revise its plan;
- (ii) provides the State with technical assistance in order to assist the State to meet the requirements of subsections 9(a)(b) and (c); and
- (iii) provides the State with a hearing.

20 U.S.C. § 6311(e)(1)(E). In her June 27, 2005 brief, the Secretary represented that her regulations required her to treat plan amendments in the same fashion as she treats plans. See Secretary’s 6/27/06 brief at 5, *citing* 34 C.F.R. § 76.142. See also Secretary’s 6/27/06 brief at 7-9 (State’s assertion on lack of clarity of how plan amendments are addressed described as “specious.”) The hearing requirement served

as the legal basis for the Administrative Procedures Act (APA) administrative review of the denial of plan amendments. See Secretary's 6/27/06 br. at 4-5; Secretary's 5/19/06 br. at 17-18.

In her August 11, 2006 brief the Secretary reversed her position taken six weeks earlier, and contended that a hearing was simply not necessary for the denial of a plan amendment. Secretary's 8/11/06 br. at 8-9. The Secretary did concede, however, that the APA provided administrative review of the denial of plan amendments. Id. In addition to completely reversing her legal position, the Secretary also failed to indicate what procedures should apply to plan amendments. Rather, she suggested that there are more procedural protections if the plan amendment is granted than if the plan amendment is denied. Secretary's 8/11/06 br. at 9, fn 6.

As the language of the statute and the Secretary's own regulation amply demonstrate, the Secretary's initial legal position is correct -- a hearing is required. Although this Court dismissed as moot the issue of whether a hearing was required, Connecticut v. Spellings, 453 F. Supp.2d 459, 503 (D. Conn. 2006), the legal issue nonetheless remains pertinent because it informs and shapes the dispute between the parties as to the content of the administrative record. The Secretary has adopted a "formal docket" approach to the administrative record, requiring that a document be "docketed" by the State with the Secretary in order to be included in the record. The Secretary deviates from her formal docket approach only to provide a more limited record, for she also excludes documents that she admittedly received from the State, but she deems as not serving as the basis for her decision.

The Secretary's formal docket approach is belied by the actual process used in this matter. Because the Secretary did not conform to the statutory and regulatory requirement for a hearing, the State's plan amendments were considered in an informal manner. The State's "application" was a few pages, and its subsequent submissions were primarily requests to meet and discuss the merits in greater detail. See Administrative Record ("AR") no. 18, January 14, 2005 Sternberg letter to Spellings. Even the submitted administrative record reflects that oral discussions were also part of the process. See, e.g., AR no. 7, April 27, 2005 Rabinowitz letter to Briggs. Within those discussions, the Secretary was presumed to have considered, either directly or indirectly, the materials known to be in her possession, plus nationally-known studies and research articles.

The administrative "record" for the State's plan amendments, therefore, should reflect the informal manner utilized by the Secretary. Although the State's plan amendments were informally considered, in her administrative record, the Secretary has adopted a rigid, formalistic approach to the Record. The Secretary has excluded from the administrative record the documents that are adverse to her position; a letter from the Connecticut Commissioner of Education to the Secretary personally; documents that she had physical possession of; and documents from her own website. The Secretary omits any memorandum on any policy positions (internal or external), and any information outside of the State of Connecticut that she might have considered (such as concerning Arizona, Texas or New York). She does not even provide a privilege log. For nationally-known studies and research publications, she has refused to indicate whether she had possession of them absent a Court order.

If there had been a hearing as required by law, the State would have known who advised the Secretary, what types of arguments had been presented, and what evidence and arguments were provided against the State's position. There would have been a formal docket sheet, and the content of the record would not be in dispute. The Secretary's informal approach, however, left the State ignorant of the record contents until it received the Secretary's administrative record listing on December 23, 2006. The parties were unable to resolve their differences regarding the record contents.

ARGUMENT

In order to more accurately reflect the actual, informal process utilized by the Secretary in her administrative consideration of the State's plan amendments, the State seeks to (i) complete the record with documents known to be in the Secretary's possession; (ii) supplement the record with evidence of the Secretary's bias; and (iii) include in the record the nationally known research and studies that the Secretary's staff indicated knowledge of. The State's Additional Administrative Record ("AAR") documents accompany this motion and are listed in Exhibit A. The State also moves the Court to require the Secretary to include any internal policy directives or statements and the experience of other states, specifically New York, Texas and Arizona, accompanied by a privilege log for any documents withheld from the administrative record. In the alternative, the State seeks permission to conduct limited discovery on the completeness of the administrative record.

I. LEGAL STANDARDS APPLICABLE TO AN APA ADMINISTRATIVE RECORD

The Administrative Procedures Act requires that in reviewing an agency's actions, "the court shall review the whole record or those parts of it cited by a party, and due

account shall be taken of the rule of prejudicial error.” 5 U.S.C. § 706. The “focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.” Camp v. Pitts, 411 U.S. 138, 142 (1973). See also Overton Park v. Volpe, 401 U.S. 402, 420 (1971) (“review is to be based on the full administrative record that was before the Secretary at the time he made his decision.”) “The complete administrative record consists of all documents and materials directly or indirectly considered by the agency.” Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993); Merritt Parkway Conservancy v. Mineta, 424 F. Supp. 2d 396, 403 (D. Conn. 2006). See also Thompson v. United States Dep't of Labor, 885 F.2d 551, 555-56 (9th Cir. 1989); Portland Audubon Society v. Endangered Species Committee, 984 F.2d 1534, 1548 (9th Cir. 1993) (the “whole record” for purposes of the APA includes “everything that was before the agency pertaining to the merits of its decision.”) “A document need not literally pass before the eyes of the final agency decisionmaker to be considered part of the administrative record.” Clairton Sportsmen's Club v. Pennsylvania Turnpike Commission, 882 F. Supp. 455, 465 (W.D. Pa. 1995).

“The agency may not skew the record in its favor by excluding pertinent but unfavorable information. Nor may the agency exclude information on the grounds that it did not ‘rely’ on the excluded information in its final decision.” Fund for Animals v. Williams, 245 F. Supp.2d 49, 55 (D.D.C. 2003) (internal citations omitted); Fund for Animals v. Williams, 391 F. Supp. 2d 191, 197 (D.D.C. 2005) (same). “The agency cannot redefine the record by compartmentalizing final decision-making as a predicate to omitting from the record all materials compiled by ‘the agency’ before rendering the

final decision.” Exxon Corp. v. Dept. of Energy, 91 F.R.D. 26, 36 (N.D. Tex. 1981). See also National Wildlife Fed. v. Evans, 2005 U.S. Dist. LEXIS 16655, *10-*11 (D. Or. 2005). Supplementing the administrative record is appropriate when the agency, either negligently or deliberately, “excluded from the record evidence adverse to its position.” Kent County v. U.S. EPA, 963 F.2d 391, 396 (D.C. Cir. 1992). See Public Citizen v. Heckler, 653 F. Supp. 1229, 1237 (D.D.C. 1986) (documents known to the agency at the time of the decision and adverse to the agency’s position are properly added to the administrative record).

“An agency may not unilaterally determine what constitutes the Administrative Record.” Bar MK Ranches, 994 F.2d at 739-740; Fund for Animals, 391 F. Supp. 2d at 197. Although “the agency enjoys a presumption that it properly designated the administrative record,” id., “plaintiffs need not show bad faith or improper motive to rebut the presumption.” California ex rel. Lockyer v. United States Dep’t of Agric., 2006 U.S. Dist. LEXIS 15761, *7-*10 (N.D. Cal. March 16, 2006). A district court’s decision regarding an administrative record is reviewed under an abuse of discretion standard. National Audubon Society v. Hoffman, 132 F.3d 7, 16 (2d Cir. 1997); Sierra Club v. Slater, 120 F.3d 623, 639 (6th Cir. 1997).

There is a distinction between completing the administrative record and supplementing the record with additional documents. Courts grant motions to supplement the administrative record only in exceptional cases. Voyageurs Nat’l Park Ass’n v. Norton, 381 F.3d 759, 766 (8th Cir. 2004); Esch v. Yeutter, 876 F.2d 976, 991-992 (D.C. Cir. 1989). There are several bases for permitting extra-record review:

- (1) when agency action is not adequately explained in the record before the court;
- (2) when the agency failed to consider factors which are relevant

to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.

Esch v. Yeutter, 876 F.2d 976 at 991; Fund for Animals v. Williams, 391 F. Supp. 2d at 197-198. Extra-record review is also appropriate to demonstrate bad faith or bias on the part of the decision-maker. National Audubon Society v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997) (“an extra-record investigation by the reviewing court may be appropriate when there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers or where the absence of formal administrative findings make such investigation necessary in order to determine the reasons for the agency’s choice.”) Schaghticoke Tribal Nation v. Norton, 2006 U.S. Dist. LEXIS 81387, *12-*22 (D. Conn. November 3, 2006) (same).

When there is no formal proceeding before the agency, the contents of the administrative record itself can become a disputed issue of fact. Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982) (reversed summary judgment for agency because factual dispute regarding completeness of record, requiring limited discovery). In cases where there was “no formal hearing,” all relevant documents should be included in the record. Thompson v. U.S. Dept. of Labor, 885 F.2d 551, 555 (9th Cir. 1989).

II. SPECIFIC DOCUMENTS TO COMPLETE & SUPPLEMENT THE ADMINISTRATIVE RECORD

With respect to its Additional Administrative Record (“AAR”) documents, the State seeks to

- (i) provide complete statements to two (2) Administrative Record (“AR”) entries that are incomplete (AR 5 and AR 21);
- (ii) complete the administrative record with eleven (11) documents that the Secretary had in her possession (AAR 25 - AAR 35);
- (iii) supplement the record with three (3) documents that demonstrate bias on the part of the Secretary (AAR 36 - AAR 38);
- (iv) complete and/or supplement the record with three (3) national and regional studies regarding the Secretary’s implementation of the NCLB Act, including her views on assessments for special education and English Language Learner students (AAR 39 - AAR 41); and
- (v) complete and/or supplement the record with seven (7) research articles on ELL testing requirements, all indicating that more than one year was necessary to adequately assess an ELL student in Spanish. Despite diligent efforts, the State was unable to find any accepted academic article that held that one year was adequate (AAR 42 - AAR 48).

Copies of all proposed additional administrative record documents are attached to Exhibit A to this motion, which consists of the listing of all additional administrative record documents. All of these additional administrative record items existed prior to the Secretary’s decision denying the State’s two plan amendments. With two exceptions, the State’s additional administrative record documents were provided to and discussed with the Secretary (through her counsel) during the parties’ discussions regarding the administrative record.¹ Despite being aware of the State’s contention that the additional

¹ The exceptions are AAR 37, the Secretary’s April 5, 2005 press release regarding the State’s upcoming lawsuit, proffered in response to the Secretary’s answer to the State’s Second Amended Complaint ¶ 127 and AAR 31, the Secretary’s March 2, 2005 testimony to Congress. The State also did not discuss the additional materials to

documents properly belonged in the administrative record, the Secretary refused to include the documents. Thus, the additional administrative record documents should be included in the administrative record for the following reasons:

A. Designated Record Documents that Are Incomplete (2)

As an initial matter, the State respectfully submits more complete versions of the Secretary's policy announcements of February 2004 regarding assessments for Limited English Proficient ("LEP") students (AR 21) and May 2005 regarding students with disabilities (AR 5). In her administrative record submitted to the Court, the Secretary only included the policy directives issued with each policy announcement. When announced, however, each directive was accompanied by a speech by the Secretary as well as public statements regarding the impact and import of the policy. All of those supporting documents accompany the policy announcements on the Secretary's website. The States rely upon all of the policy documents accompanying the Secretary's announcements and they should be included in the administrative record.

B. Documents that the Secretary Clearly had in her Possession (11).

The bulk of the additional administrative record documents proffered by the State are documents that were received by or sent from the Secretary during the administrative consideration of these issues, some of which are adverse to the Secretary's determination, and two of which directly address the gap between the State's costs and federal funding, thus, by implication, the Unfunded Mandates Provision of the NCLB Act. Documents received by an agency during the administrative process should be included in the administrative record. See, e.g., Northwest Bypass

complete AR 5 and AR 21 because the State did not know precisely what would be included until it received the actual record documents.

Group v. U.S. Army Corps of Engineers, 2007 U.S. Dist. LEXIS 1711 (D.N.H. January 5, 2007) (agency agreed that such documents should be included). In Dopico and Natural Resources Defense Council, Inc. v. Train, both courts reversed the district court's dismissal of the plaintiff's complaint because the plaintiff had made a substantial showing that the record was incomplete. Dopico, 687 F.2d at 654; Train, 519 F.2d at 291-292. The following eleven AAR documents (AAR 25 through AAR 35) clearly should be included in the administrative record.

1. AAR 33 and AAR 34 - Cost and Funding documents

The most important documents improperly omitted from the Secretary's administrative record are the two documents that demonstrate the discrepancy between federal funding for the State's NCLB assessments and the State's costs, AAR 33 and AAR 34. AAR 34 is the Secretary's own report on "U.S. Department of Education Funding for State Formula-Allocated and Selected Student Aid Programs for Connecticut," (the "Funding Report") that until a month or so ago, was posted on the U.S. Department of Education website.² The Secretary's Funding Report provides the actual federal funding for Connecticut NCLB assessments from 2001-2005 (AAR 34). The facts are not even contested -- the Secretary admits the level of federal funding for assessments in her answer to the Second Amended Complaint ¶82.

AAR 33 is an April 8, 2005 facsimile transmission from Barbara Beaudin to Valerie Ford. Consisting of 62 pages, the April 8, 2005 facsimile includes the 2004-2005

² When discussions regarding the administrative record were initiated, the Funding Report was prominently displayed on the Secretary's website, in the NCLB section. After receipt of the Secretary's designation of the record, it could not be readily located on the website. Although the State is only proffering the page regarding Connecticut, it downloaded the entire report and will provide the entire report for all 50 states to the Secretary and the Court, if required.

and 2005-2006 costs for Connecticut's NCLB assessments (at pp. 54-62), as well as the State's internal policies regarding assessments, including special education and LEP assessments (at pp.14-19). The facsimile was sent from Barbara Beaudin from the State's Bureau of Student Assessments to Valeria Ford at the U.S. Department of Education, at Ms. Ford's insistence. The State received a call indicating that Ms. Ford's "higher-ups" demanded that the information be provided immediately. Such a demand was highly unusual and the "higher-ups" were not identified.³ Immediately before the demand, moreover, both the Governor and the Commissioner had written to the Secretary and the Attorney General had announced that he was contemplating bringing suit against the Secretary regarding the implementation of the NCLB Act. See AR 10, AR 11, and AAR 37. See *also* Secretary's answers to 2d Amended Complaint ¶¶ 125-127. In view of the timing, it is unlikely that the unusual demand for immediate information regarding Connecticut's policies and costs for the implementation of NCLB-required assessments (including special education and LEP assessments) had nothing to do with the State's extensive and public dispute with the Secretary over the implementation of the NCLB Act's assessment provisions, including its requests regarding special education and LEP student assessments. These two documents, clearly within the Secretary's possession and on point, should be in the record.

³ If required, the State will provide affidavits regarding the demand. The State was informed that AAR 34 was excluded from the administrative record because "it was sent to the agency in an unrelated context" and the Secretary did not rely on it in her decision. Therefore the State is also simultaneously requesting permission to conduct limited discovery regarding the demand that resulted in the April 8, 2005 facsimile, why it was required, by whom, and how the information was used.

2. AAR 25 and AAR 26 - State Workbooks

The Connecticut Consolidated State Application Accountability Workbook (“Workbook” or “Plan”), is the State’s Plan to implement the NCLB Act. The Workbook serves as the foundational document for this administrative appeal -- specifically, the plan amendments were submitted to amend the State’s Plan as reflected in the Workbooks. These AAR documents are two of the initial versions, the July 15, 2003 version (AAR 25) and the October 24, 2003 version (AAR 26).⁴ Although the August 13, 2004 version of the State’s Workbook was included in the administrative record (AR 20), the State was informed that the two earlier versions would be excluded to order to not “burden the record.”⁵

Rather than being a “burden,” the earlier versions illuminate both the process and content of the State’s Plan regarding special education and LEP assessments at the direction of the U.S. Department of Education. From the start, the State had notified the U.S. Department of Education of its intention to permit the option for special education students to be tested at instructional level rather than grade level, and to permit LEP students up to three years to sit for the assessments, and those requests were expressly rejected. See AAR 25 at 27, 40-42 and AAR 26 at 27-28, 41-48. As reflected in the earlier versions, the U.S. Department of Education “required” the proposals “to be

⁴ To streamline bulk (and facilitate electronic filing), the State proffers excerpts from the two Workbook versions, but if requested, will submit full copies of the two versions. The State’s official copy of the 10/24/03 workbook contains the handwritten notations submitted in the proffered copy of AAR 26.

⁵ During their record discussions, the parties had agreed that the 6/14/04 version of the Workbook would be included in the Record. At the time of her designation, however, the Secretary substituted the 8/13/04 version. For purposes of the motion, the 8/13/04 version is substantially similar to the 6/14/04 version -- both versions fail to reflect the State’s plans rejected by the Secretary and the state statute.

eliminated,” thus demonstrating the informal (and high-handed) process applied to State NCLB plans by the U.S. Department of Education. Id.

Moreover, the two earlier versions include the State legislature’s statute requiring that the State spend no state funds or incur any costs not paid for under the Act. See Attachment D to AAR 25 and AAR 26. The administrative record version conspicuously lacks that Attachment.

The administrative record properly includes the Secretary’s progression of policies and approaches regarding special education and LEP assessments. See, e.g., AR 21 through AAR 24. The State’s progression on the exact same issues, in the Secretary’s possession and control, clearly also should be in the record. The Secretary was repeatedly placed on notice regarding the Connecticut State legislature’s statutory implementation of the NCLB Act, its interpretations of the NCLB Act’s funding provisions, and its approach on special education and LEP assessments. The State’s progression of plans clearly should be part of the administrative record on an appeal of the denial of the State’s plan amendments.

3. AAR 27 through AAR 29 -- Sternberg - Simon correspondence

The next three AAR documents consist of correspondence by and between the Connecticut Commissioner of Education and the U.S. Assistant Secretary for Education, specifically, the April 1, 2004 letter from Commissioner Sternberg to Assistant Secretary Simon (AAR 27); the June 16, 2004 letter from Commissioner Sternberg to Assistant Secretary Simon (AAR 28), and the August 18, 2004 letter from Assistant Secretary Simon to Commissioner Sternberg, with attachment (AAR 29). The three letters are all within the time period contained in the submitted administrative record (from October 30,

2003 to June 20, 2005). The three letters clearly were received by or from the Secretary or her designee. The three letters all address plan amendments, including out-of-level testing for special education students and how LEP students are assessed and defined. All three letters provide illumination of the differences between the various versions of the State's Plan, including the acceptance of the August 13, 2004 Plan included the Secretary's Administrative Record (AR 20). There simply is no reason not to include them in the administrative record.

4. AAR 30 - March 2, 2005 State Board materials

As set forth in more detail in the State's Second Amended Complaint, Deputy Secretary Raymond Simon appeared before the State Board of Education on March 2, 2005, accompanied by Senior Policy Advisor Dr. Kerri Briggs. Second Amended Complaint ¶ 123; AR 7. Until they received the Secretary's denial letter a few days prior, the State had assumed that Deputy Secretary Simon was appearing to discuss the State's requests set forth in the January 14, 2005 letter (including the special education and LEP assessment requests). *Id.* In a public hand-out during Simon's March 2, 2005 appearance before the Board, the State set forth the bases and rationale for their requests. Upon information and belief, those public meeting materials and hand-outs were provided either directly or indirectly to Deputy Secretary Simon, serving as the documentary basis for the discussion during Deputy Secretary Simon's visit. AAR 30. Those public State Board materials should be included in the administrative record.⁶

⁶ The State's Cost Study was adopted at the same Board meeting, and is included in the administrative record. See AR 14.

5. AAR 31 and AAR 32 -- Spellings' testimony and statement

The same day Deputy Secretary Simon appeared before the Connecticut State Board of Education, Secretary Spellings testified before the Senate Appropriations committee, Subcommittee on Labor, Health and Human Services, Education. In that testimony, Secretary Spellings addressed the claim that the NCLB Act was underfunded, and that in her implementation of the Act, she had significantly increased financial burdens on States or school districts. The Secretary testified:

Fourth, fully three years after the passage of No Child Left Behind, and during its third school year of implementation, I have yet to see a methodologically sound study providing any documentation of the charge that the law is underfunded. Does the law entail additional costs? The answer is yes, and our budgets have reflected those costs, but I have yet to see any evidence that we have significantly increased financial burdens on States or school districts, much less passed on any "unfunded mandate."

AAR 31 at 4.

Two days after Attorney General Blumenthal indicated that the State was contemplating suit, the Secretary announced "A New Path" for her implementation of the NCLB Act. Second Amended Complaint ¶¶ 127, 128. Under her "New Path," those states that followed the "bright lines" of the Act would be eligible for greater flexibility, and specifically, flexibility in testing special education students. AAR 32 at 5-7; Second Amended Complaint ¶¶ 128-130. States that were "looking for loopholes to simply take the federal funds, ignore the intent of the law, and have minimal results to show for their millions upon millions in federal funds," would "be disappointed." AAR 32 at 6-7.⁷

⁷ Needless to say, the State took great exception to the suggestion that it was looking for "loopholes," ignoring the intent of the law or failing to produce, but got the message that its efforts for flexibility had slim chance for success. See AR 8 at 1-2 ("We also see your

The Secretary's Congressional testimony and her announcement regarding greater flexibility for special education student assessments occurred as the public debate on Connecticut's requests became quite heated. Both documents reflect statements by the ultimate decision maker on the specific topics raised by the State's requests, namely funding and special education student assessments. Both documents also raise concerns regarding her impartiality. Both documents should be in the administrative record.

6. AAR 35 -- Sternberg letter to Spellings

In response to Secretary Spellings calling Connecticut "un-American" and bigoted for its requests regarding NCLB Act implementation, on April 11, 2005, Commissioner Sternberg wrote to Secretary Spellings demanding an apology and setting forth the bases for the State's requests. See AAR 35 (response to AAR 38, *infra*). Although the substantive topic of her letter was on alternate-grade testing, the overall theme of her letter was her concern that the Secretary was not, and would not, fairly address all of the State's requests. Given that the letter directly raises to the ultimate decision-maker the State's concerns that by her public statements, she cannot and would not be fair and impartial regarding the State's requests, it clearly belongs in the record.

C. Documents Regarding Bias by the Ultimate Decision Maker (3)

As the ultimate decision maker for plan amendments, the Secretary's public statements regarding Connecticut's plan unfortunately reflected substantially less than an impartial, fair and objective attitude and approach to the State's requests. As reflected in AAR 36 through AAR 38, the Secretary suggested that Connecticut was

promise of flexibility only if states 'follow the principles of NCLB' as something of a veiled threat.").

seeking to avoid the law, was bigoted and was “un-American” for pursuing its requests.⁸ The administrative record includes one response to these intemperate comments, AR 10, and the State seeks to include another response, AAR 35. The three documents demonstrate bias and lack of impartiality on the part of the ultimate decision-maker and thus should be properly within the administrative record.

D. NCLB National and Regional Studies (3)

The State notes that there are (at least) three nationally-known studies on the implementation of the NCLB Act, submitted here as AAR 39-AAR 41. The Secretary knew or should have known about them, and either directly or indirectly relied upon them when she ruled on the State’s plan amendments.⁹

These three studies provide background and context for the State’s requests, and all three of them deal with the national difficulties presented by the Secretary’s approach to special education and LEP student assessments. The Council of Chief State School Officers’ (“CCSSO’s”) study tracks state requests for amendments to state NCLB plans (AAR 39), including the variety of state requests concerning special education and LEP student assessments. Issued approximately on a yearly basis, the State seeks to include the September 2004 version in existence prior to the Secretary’s decision on the State’s plan amendments.

⁸ AAR 37, the Secretary’s April 5, 2005 press release regarding Connecticut’s contemplating suit, is proffered in response to the Secretary’s “insufficient knowledge” answer to Second Amended Complaint ¶ 127 (“On April 5, 2005, the Attorney General ... announced that he was contemplating bringing a lawsuit... .”)

⁹ The Secretary has taken the position that she would inform the State regarding whether she had possession of these studies only if so ordered by the Court. Thus, the State simultaneously is moving to conduct discovery to determine the Secretary’s possession of these studies.

A month after the CCSSO September 2004 report was issued, Yale issued a Connecticut specific study regarding the impact of the NCLB Act on Connecticut, again, including its impact on special education and LEP students. Finally in February 2005, the National Conference of State Legislatures (NCSL), Task Force on No Child Left Behind, issued a comprehensive Final Report on the implementation of the NCLB Act. AAR 41. The NCSL study extensively considers special education and LEP testing issues, and its conclusions support Connecticut's position on these issues. A pre-production copy of the summary of the NCSL study was included as attachment F to the March 2, 2005 State Board hand-out (AAR 30).

In Carlton v. Babbitt, 26 F. Supp.2d 102, 107 (D.D.C. 1998), the court granted a motion to supplement the record to include public materials on the issue, because the documents were "publicly available" at the time of the decision, and they "should have been considered by the agency." These three studies are publicly available, the Secretary most likely had them in her possession, and indeed, probably read, studied and analyzed them. These three studies clearly would have been directly and indirectly considered, support the State's position, and should be included in the administrative record.

E. Research Articles on LEP Testing Requirements (7)

The State also contends that seven research articles supporting its position regarding LEP testing should be included in the administrative record, AAR 42-48. A bit of background is necessary.

In her implementation of the NCLB Act, the Secretary is required to base her decisions on scientifically-sound research. See, e.g., 20 U.S.C. 6301(9). In its plan

amendment request, the State noted that “research has shown that it typically takes seven years for an English language learner (ELL) to achieve English proficiency.” AR 11 at 51. There was at least one discussion between the State and the U.S. Department of Education regarding the overwhelming research support for the State’s position, and the paucity of research supporting the Secretary’s position to require testing of LEP students within one year. In her April 27, 2005 letter to the Secretary’s senior policy advisor Dr. Kerri Briggs, Associate Commissioner Frances Rabinowitz closes her letter with “I remain interested in the research you offered to send to me that supports testing of ELL students in English after only one year in a U.S. school.” AR 7 at 2. As far as the State can determine, there is NO research that supports substantively testing LEP students after only one-year in the U.S. school system, and the established research, reflected in AAR 47 - AAR 53, demonstrates that one-year is woefully inadequate.

In Carlton v. Babbitt, 26 F. Supp.2d 102, 107 (D.D.C. 1998), the court implied that academic articles would and should have been included, but did not so hold because the agency admitted that the scientific literature supported the plaintiff’s position, and should be included in the administrative record. The parties discussed this research, it is well-known, and it served as the basis for the State’s plan request. These articles should be included in the administrative record.¹⁰

III. THE ADMINISTRATIVE RECORD IS NOT COMPLETE.

The State moves the Court to require the Secretary to complete the Administrative Record with the types of documents sought below, or in the alternative, to

¹⁰ As with the national and regional studies, the Secretary has declined to indicate whether she has possession of these articles.

permit the State to conduct limited, targeted discovery regarding the completeness of the record. The State also seeks the provision of a privilege log for all documents withheld from the Administrative Record.

A. Limited Discovery is Permitted Under the Administrative Procedures Act.

Under the Administrative Procedures Act it has been long-established that when “a showing is made that the record may not be complete, limited discovery is appropriate to resolve that question.” Bar MK Ranches, 994 F.2d at 740. This is because “reasoned decision-making must be judged against the record *as a whole*.” Dopico v. Goldschmidt, 687 F.2d 644, 654 (2d Cir. 1982) (emphasis in original) (reversing judgment for agency because disputes regarding administrative record were unresolved). See Natural Resources Defense Council, Inc. v. Train, 519 F.2d 287, 291-292 (D.C. Cir. 1975) (same). Thus, the federal courts have often permitted limited discovery on the completeness of the administrative record. See, e.g., Public Power Council v. Johnson, 674 F.2d 791, 793-795 (9th Cir. 1982); United States v. Hooker Chems. & Plastics Corp., 123 F.R.D. 3, 22 & n.38 (W.D.N.Y. 1988) and the numerous cases cited therein; Pension Ben. Guaranty Corp. v. LTV Steel Corp., 119 F.R.D. 339, 341-342 (S.D.N.Y. 1988); Moody Hill Farms Ltd Partnership v. U.S. Dept. of Interior, 1996 U.S. Dist. LEXIS 12110, *8-*11 (S.D.N.Y. 1996); Pleasant East Associates v. Martinez, 2002 U.S. Dist. LEXIS 21574 *2-*3 (S.D.N.Y. 2002); Williams v. Roche, 2002 U.S. Dist. LEXIS 24030, *6-*10 (E.D. La. 2002). Limited discovery on the completeness of the record is particularly appropriate when the administrative proceeding below is informal. Dopico, 687 F.2d at 654; Pleasant East Associates v. Martinez, 2002 U.S. Dist. LEXIS 21574 *2-*3 (S.D.N.Y. 2002); Pension Ben. Guaranty, 119 F.R.D. at 343.

The incompleteness of the record is often determined by its omissions. One glaring and obvious omission is the complete absence of any “internal and external agency documents relating to the decision-making process.” California v. U.S. Dept. of Agriculture, 2006 U.S. Dist. LEXIS 15761, *13 (N.D. Cal. 2006). See Alaska Trojan Partnership v. Gutierrez, 425 F.3d 620, 626 (9th Cir. 2005) (record included internal policy documents). If a draft document is not protected by the deliberative process privilege, it should be included in the administrative record. See Public Citizen v. Heckler, 653 F. Supp. 1229, 1237 (D.D.C. 1986); Spiller v. Walker, 2002 U.S. Dist. LEXIS 13194, * 22 (W.D. Tex. 2002). Another is the lack of any documents regarding how the agency dealt with the same arguments in other situations. As one federal district court has held:

It strains the Court’s imagination to assume that the administrative decision-makers reached their conclusions without reference to a variety of internal memoranda, guidelines, directives and manuals, and without considering how arguments similar to Tenneco’s were evaluated in prior decisions by the agency. [The agency] may not unilaterally determine what shall constitute the administrative record and thereby limit the scope of this Court’s inquiry.

Tenneco Oil Co. v. Dept. of Energy, 475 F. Supp. 299, 317 (D. Del. 1979).

There is no need to allege or prove bad faith or bias on behalf of the agency in order to obtain limited discovery in an administrative appeal. Exxon Corp. v. Department of Energy, 91 F.R.D. 26, 33-34 (N.D. Tex. 1981). Nonetheless, if there is a concern about bad faith or bias in the administrative decision-making process, limited discovery is also available and appropriate. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); National Audubon Society v. Hoffman, 132 F.3d 7,

14 (2d Cir. 1997); Tummino v. von Eschenbach, 427 F. Supp.2d 212, 230 (E.D.N.Y. 2006).

B. The State Seeks Either Production Of The Full Administrative Record Or Permission To Conduct Limited, Targeted Discovery.

The State requests the Court to order the Secretary to produce the items listed below or in the alternative to permit the State to conduct limited, targeted discovery into the completeness of the administrative record.

The State seeks all documents, including emails, drafts, memoranda, telephone notes, reports and recommendations regarding Connecticut's requests regarding implementation of the NCLB Act, from October 30, 2003 through and including June 20, 2005, including any internal policy memorandum or guidance regarding special education and LEP assessments. The submitted record is sanitized and sparse. Like the Tenneco Oil court, it "strains the imagination" that there were no internal documents, not a single email, or report reviewed in the Secretary's consideration of the State's requests. See Tenneco Oil, 475 F. Supp. at 317. See also California v. U.S. Dept. of Agriculture, 2006 U.S. Dist. LEXIS 15761, *13-*16 (N.D. Cal. 2006) (ordered to provide internal documents as part of record).

In addition, to the extent the Secretary maintains her objection to the inclusion of at AAR 33 (the April 8, 2005 fax of materials from the State to the U.S. Department of Education), the State respectfully seeks discovery regarding the demand for the information, why it was required, by whom, and how the information was used. The State understood that the information was demanded by "higher-ups" in the Department, immediately, and by context and content, presumed the demand to concern the State's

pending requests. To the extent the Secretary contends otherwise, the State seeks discovery.

With respect to AAR 39-AAR 48, the State seeks discovery regarding whether the Secretary (or her staff at the U.S. Department of Education) had possession of, evaluated or analyzed any of these studies. The State presumes that the U.S. Department of Education reads the paper, and keeps up on current research and studies the NCLB Act and related issues, and presumably had all of these materials. Because absent a court order the Secretary refuses to even disclose whether she had possession of the information, the State finds itself in the position of having no choice but to seek such an order.

Moreover, the Secretary clearly was dealing with similar requests from other States, and it defies common sense to assert that she did not consider requests from other States when she considered Connecticut's amendments regarding special education and LEP students. In this regard, only the Secretary has full information. In its lawsuit, Arizona contends that the Secretary agreed to permit Arizona to delay testing its LEP students. The Secretary permitted Texas to exempt a significant percentage of its special education students for one year (with the payment of a relatively small fine). Recent press accounts indicate that New York was permitted to assess a percentage of its special education students at instructional level rather than grade level. Based upon these published, public reports, Connecticut contends that the Secretary should provide how she addressed plan amendments regarding special education and LEP student assessments from other states, or the State should be provided with the opportunity to conduct limited discovery regarding same.

C. The State Requests a Privilege Log.

To the extent the agency withholds documents from the administrative record on the basis of privilege, a privilege log is typically provided or required. See Tummino, 427 F. Supp.2d at 235 (agency ordered to provide privilege log); California v. U.S. Dept. of Agriculture, 2006 U.S. Dist. LEXIS 15761, *15-*16 (N.D. Cal. 2006) (agency ordered to include internal documents in the administrative record and provide a privilege log for all documents withheld); Center for Biological Diversity v. Norton, 336 F. Supp.2d 1155, 1157 (D.N.M. 2004) (agency submitted privilege log for documents withheld from administrative record); Bonnischen v. United States, 217 F. Supp. 2d 1116, 1167 (D. Or. 2002) (same); Spiller v. Walker, 2002 U.S. Dist. LEXIS 13194, *11 (W.D. Tex. 2002) (same); Maine v. Norton, 208 F. Supp. 2d 63, 65 (D. Me 2002) (same); Eugene Burger Mgmt. Corp. v. United States HUD, 192 F.R.D. 1, 4 (D.D.C. 1999) (same); South Carolina Dep't of Health and Envtl. Control v. Atlantic Steel Indus., 85 F. Supp. 2d 596, 598 (D.S.C. 1999) (privilege log ordered produced).

The State respectfully requests the Court to order the Secretary to provide a privilege log for all administrative record documents that were withheld.

CONCLUSION

The Secretary decided to consider the State's plan amendments through an informal process rather than via the formal hearing required by the Act. As such, there is no formal docket sheet where documents were "entered" into the record -- rather, there was a give-and-take process. The State respectfully requests the Court to incorporate the additional administrative record documents submitted by the State into the administrative record, to require the Secretary to provide additional documents in the

record, or in the alternative to permit limited discovery into the completeness of the record, and to require the Secretary to provide a privilege log for all documents withheld from the administrative record.

PLAINTIFFS, STATE OF CONNECTICUT AND
THE GENERAL ASSEMBLY OF THE STATE
OF CONNECTICUT,

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CERTIFICATION

I hereby certify that on March 19, 2007, a true and accurate copy of the foregoing Memorandum in Support of Plaintiffs' Motion Regarding the Administrative Record was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of electronic Filing. Parties access this filing through the court's CM/ECF System. I further certify that pursuant to the Court's standing order, a courtesy copy of this memorandum was provided to chambers by overnight mail.

/s/ Clare E. Kindall
Clare E. Kindall
Assistant Attorney General