

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT, and)
THE GENERAL ASSEMBLY OF THE)
STATE OF CONNECTICUT)
Plaintiffs)
)
v.)
)
MARGARET SPELLINGS,)
SECRETARY OF EDUCATION)
Defendant)
)

CIVIL ACTION NO. 3:05cv1330 (MRK)

MAY 19, 2006

STATE'S SUPPLEMENTAL BRIEF ON MATTERS RAISED
DURING THE APRIL 28, 2006 ORAL ARGUMENT

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

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INTRODUCTION

Pursuant to the Court's Order of April 28, 2006, the plaintiffs State of Connecticut and its legislature (collectively the "State") respectfully submit this supplemental brief on the three legal issues requested by the court. Specifically, the State hereby submits:

(i) that the due process and fundamental fairness limitations inherent in the Supreme Court's analysis in Thunder Basin v. Reich, 510 U.S. 200 (1994) are violated by the Secretary's proposed judicial review process;

(ii) that the Secretary's suggestion that the State pursue a plan amendment under 20 U.S.C. §6311(e)(1)(E) is factually unfounded and undermines the Secretary's Thunder Basin challenge; and

(iii) that the Second Circuit's analysis in Riverkeeper v. Collins, 359 F.3d 156 (2004) confirms both that the No Child Left Behind (NCLB) Act provides more than adequate statutory standards for the Court to evaluate the State's administrative appeal, and that an abdication of statutory authority is a viable judicial inquiry.¹

All three legal arguments address only the Secretary's jurisdictional challenges to the State's suit. For its three causes of action, the State continues to seek a judicial determination as to the meaning of the Unfunded Mandates Provision of the NCLB Act, NCLB Act § 9527(a), codified at 20 U.S.C. § 7907(a). Because the Secretary's ever-shifting jurisdictional hurdles to the State obtaining such a judicial determination remain unavailing, the Secretary's motion to dismiss should be denied.

¹ The State also respectfully must correct a misstatement made in the April 26, 2006 brief submitted by the proposed intervenors NAACP *et al.* On page 7 of their brief, the proposed intervenors represented that the State seeks to exempt 100% of their special education students from grade level testing. This is incorrect. The State seeks the option of testing at instructional level rather than at grade level to be provided to and utilized by no more than 2% of its special education student population.

ARGUMENT

I. THE SECRETARY'S PROPOSED JUDICIAL REVIEW PROCESS VIOLATES DUE PROCESS AND FUNDAMENTAL FAIRNESS.

In her motion to dismiss, the Secretary contends that before an Article III judge can provide declaratory relief as to the meaning of the Unfunded Mandates Provision of the NCLB Act:

- (1) the State must violate the NCLB Act and its plan assurances, even though the State has been and remains in complete compliance with the Act and its assurances and is not subject to any anticipated enforcement action;
- (2) the Secretary then must decide to bring an enforcement action on whether the State has violated the NCLB Act and its plan assurances, because the State cannot initiate an administrative action;
- (3) the Secretary, and not an independent commission, must make the final decision as to whether the State has violated the NCLB Act and its assurances, and would not be obligated to -- and probably would not -- even address the State's statutory and constitutional claims; and
- (4) after it loses at the administrative level, the State would then be able to raise its purely legal issues in its appeal in the U.S. Court of Appeals.

See DOE br. 14-19; DOE reply br. 2-7; DOE 3/30/06 br. 24-30. In essence, the State must risk prevailing on its legal claims against the Secretary, but nonetheless losing on the merits of the administrative enforcement action, in order to obtain judicial relief from the Secretary's violations of the NCLB Act.

Under the Secretary's proposed judicial review scheme, the State must violate the Act and so be willing: to forfeit its administrative fees for the years during which the

process is pending; to have its entire federal educational funding withheld until a “final” administrative decision is made (\$387 million per year total -- \$184 million per year for NCLB); and, if the State “loses” the administrative enforcement action, to risk losing all federal educational funding for the years the administrative process was pending. See DOE br. 14-19; DOE reply br. 2-7; DOE 3/30/06 br. 24-30.²

Given that the purpose of the administrative process would be to determine whether the State had violated the Act and/or its assurances, and the Secretary is demanding that the State violate the Act and its assurances before it can obtain any judicial relief, the State would face the very real possibility of prevailing on the legal merits of the meaning of the Unfunded Mandates Provision, and yet losing the administrative process, thereby risking literally hundreds of millions of federal education dollars. The Secretary’s proposed judicial review scheme would require substantial harm to be risked and/or suffered by the State both before and after judicial review.³

Almost one hundred years ago, the U.S. Supreme Court rejected efforts to erect similar roadblocks to obtaining a judicial adjudication of a good faith dispute between

² If limited to 1% of the State’s NCLB federal funding, the administrative fees would be \$1.8 million a year. See Amended Complaint ¶ 62. For the administrative fee penalty, the Secretary contends that there is no pre-deprivation review process at all and that the amount of penalties is entirely within her sole, unreviewable, discretion. See, e.g., 1/31/06 oral arg. tr. at 7-8. The Secretary also contends that she has unreviewable discretion to withhold all, some or none of a State’s federal educational funding for a violation of the Act. See, e.g., 1/31/06 oral arg. tr. at 10-13.

³ The proposed harm is all the more egregious because it would be imposed upon the most disadvantaged school children in the State. Even the temporary suspension of Title I funding pending final administrative decision would be devastating. For example, “temporarily” eliminating all third grade art and music classes because federal funding is being temporarily withheld means that those third graders will never have third grade art and music. Reinstating the funds after six or ten months cannot remedy the harm. The students will move on, and the experienced teachers temporarily fired will seek other jobs, and may not be available when the funds are reinstated.

parties. In Ex parte Young, the federal courts properly exercised federal jurisdiction over the issue of whether railway rates prescribed by state statute were so low as to be confiscatory. 209 U.S. 123 (1908). The state statute in question required that before judicial review of the rates could be obtained, the railroad had to refuse to institute the rates, and respond to a contempt proceeding. If the railroad was mistaken in its position, its agents and employees faced jail time and the company a fine of \$5,000 per ticket sold. 209 U.S. at 145.

The Court in Ex parte Young held that such a judicial review scheme was unconstitutional, for the “necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity.” 209 U.S. at 146. Where a “remedy is so onerous and impracticable as to substantially give none at all the law is invalid, although what is termed a remedy is in fact given.” 209 U.S. at 147. “It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.” Id. To make judicial review available “only upon the condition that if unsuccessful [the plaintiff] must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question.” 209 U.S. at 148. Where the practical effect of coercive penalties for noncompliance was to foreclose all access to the courts, the Court held that the district court had jurisdiction to hear the plaintiffs’ claims. Ex parte Young, 209 U.S. 123, 147-148 (1908).

The Supreme Court subsequently reaffirmed that when “the penalties, which may possibly be imposed, if [a plaintiff] pursues this course without success, are such as might well deter even the boldest and most confident,” then “a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate.” Oklahoma Operating Co. v. Love, 252 U.S. 331, 336-337 (1920) (emphasis added). In Oklahoma Operating Co., the only judicial review of an order fixing postal rates under Oklahoma state law was provided by contempt proceedings. 252 U.S. at 336. In a factual scenario remarkably similar to the judicial review scheme advocated by the Secretary here, a party would be required to violate the postal rate order in order to provoke a contempt complaint, and in response to a contempt show cause, the complainant could attempt to show that the “order violated was invalid, unjust or unreasonable.” Id. If the petitioner lost before the Commission, only then was judicial review available. Id. The contempt penalties were severe -- \$500 per day in 1918 dollars. Id.

Even though access to the courts was ultimately provided under the scheme at issue, the Court nonetheless held the scheme unconstitutional and permitted the matter to be heard by the district court. Specifically, the Oklahoma Operating Co. Court held that the contempt penalties that would apply for “boldly” violating the order if a party lost were so punitive and onerous, that “obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates.” 252 U.S. at 337.

Consistent with the constitutional limits established by the Ex parte Young and Oklahoma Operating Co. decisions, the Second Circuit has affirmed the “right to contest the validity of a legislative or administrative order affecting [a party’s] affairs without necessarily having to face ruinous penalties if the suit is lost.” Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115, 1119 (2d Cir. 1975), *cert. denied*, 426 U.S. 911 (1975). “The constitutional requirement is satisfied by a statutory scheme which provides an opportunity for testing the validity of statutes or administrative orders without incurring the prospect of debilitating or confiscatory penalties.” Id. In this same vein, the Second Circuit has held that a forfeiture provision in a state statute that required teachers to risk their retirement benefits if they challenged their termination and lost, but allowed them to maintain their benefits if they accepted the termination, unconstitutionally chilled the exercise of the teachers’ due process rights to a predissmissal hearing. Winston v. City of New York, 759 F.2d 242, 244 (2d Cir. 1985).

The Second Circuit recently affirmed these fundamental fairness and due process principles in terms directly applicable to this case:

Any legislative scheme that denies subjects an opportunity to seek judicial review of administrative orders except by refusing to comply, and so put themselves in immediate jeopardy of possible penalties “so heavy as to prohibit resort to that remedy,” runs afoul of the due process requirements of the Fifth and Fourteenth Amendments. This is so even if “in the proceedings for contempt the validity of the original order may be assailed.”

Schulz v. Internal Revenue Service, 413 F.3d 297, 303 (2d Cir. 2005), *citing Oklahoma Operating Co.*, 252 U.S. at 333, 335. In Schultz, the Second Circuit rejected the Internal Revenue Service’s contention that in response to a tax subpoena, a taxpayer lacked the ability to obtain judicial review of the subpoena “except by refusing to comply,” and facing heavy penalties. Id. If there is a significant deprivation prior to

judicial review, or if the penalty for losing after judicial review is too onerous, the party may bring the claim to the district court.⁴

Other courts of appeals have similarly recognized these constitutional constraints on administrative actions. In Rhode Island Dept. of Environ. Management v. United States, 304 F.3d 31 (1st Cir. 2002), the Rhode Island Department of Environmental Management (RI DEM) brought suit in federal district court to enjoin administrative proceedings by the Department of Labor (DOL) regarding state employees purportedly terminated for their environmental whistle-blowing activities. Accepting the RI DEM's sovereign immunity defense, the federal district court enjoined the administrative proceedings. Affirming the district court's decision, the First Circuit rejected the jurisdictional challenges, holding that the "state's right to relief is premised on a claim that federal officials are violating a clear right that is constitutional in nature." 304 F.3d at 43. "Given that the state's asserted immunity is constitutional in scope ... we are bound by a strong presumption in favor of providing the state some vehicle for vindicating its rights." 304 F.3d at 41. "Absent immediate judicial review," the state would be deprived "of a meaningful and adequate means of vindicating its rights." 304

⁴ During the telephonic oral argument the Court directed the parties' attention to Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986). In Wagner Seed, lightning struck the company's warehouse, resulting in a toxic chemical spill to the surrounding groundwater. The EPA ordered the company to clean up the spill, and the company filed suit to enjoin the EPA clean-up order, asserting an "act of God" defense. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) clearly precluded pre-enforcement review of EPA's remedial actions. 800 F.2d at 315. In response to the company's due process claims, the Second Circuit held that "it is plain that there is no constitutional violation if the imposition of penalties is subject to judicial discretion." 800 F.2d at 315-16. Denying the company's challenge, the Court relied upon CERCLA's statutory scheme whereby penalties could only be collected after a judicial hearing, and a good faith defense existed in an action for fines. Here, no enforcement order has been (or is likely to be) issued, and serious harm is inflicted before judicial review is available.

F.3d at 43 (internal citations omitted). Even though the statutory scheme provided a mechanism for direct appellate review to the U.S. Court of Appeals, the First Circuit held that the district court had jurisdiction, rejecting a Thunder Basin “exclusive procedure” argument. 304 F.3d at 38, 43-45.

The due process limitations recognized in Ex parte Young and Oklahoma Operating Co. similarly tempered the U.S. Supreme Court’s holding in Thunder Basin v. Reich, 510 U.S. 200 (1994). In the majority opinion, the Court determined that the Ex parte Young due process issue was not presented “because neither compliance with, nor continued violation of, the statute will subject petitioner to a serious prehearing deprivation.” 510 U.S. at 216. Specifically, the majority determined that posting the designations and permitting the miners’ representative to have access to the property simply did not pose Ex parte Young concerns. 510 U.S. at 216-17. Moreover, although the Mine Act’s “civil penalties unquestionably may become onerous if the petitioner chooses not to comply,” there was no temporary penalty assessment. 510 U.S. at 217.

Concurring in part and in the judgment, Justices Scalia and Thomas expressly parted company with the majority on the due process implications of the Thunder Basin holding. The concurrence interpreted the majority’s decision as applying a “*de minimis*” harm standard. 510 U.S. at 220 (concurrence). Rejecting the *de minimis* harm argument, the concurrence nonetheless contended that Ex parte Young due process concerns were not implicated because the Thunder Basin plaintiff “had the option of complying and *then* bringing a judicial challenge.” 510 U.S. at 221 (emphasis in original). Thus the concurrence would have decided the due process challenge “on the

simple grounds that the company can obtain judicial review if it complies with the agency's request, and can obtain presanction judicial review if it does not." Id.⁵

Both before and after judicial review, the State's harm is not *de minimis*. The State faces a pre-judicial review deprivation of both a \$1.8 million unreviewable administrative penalty, and an at least temporary loss of up to \$387 million. If forced to violate the Act in order to obtain judicial relief for the Secretary's violations, the State also faces the unacceptable risk of winning its legal points, and nonetheless losing the administrative process and losing its federal educational funding. Given this scenario, the Secretary's proposed mandatory judicial review scheme would effectively preclude any judicial review.

The Ex parte Young line of cases stands for the simple proposition that constitutional due process and fundamental fairness jurisprudence prevents the State from being forced into a Hobson's choice in order to obtain judicial relief from the Secretary's erroneous interpretation of the statute.⁶ The State cannot be required to

⁵ In her March 30, 2006 brief (at 29 n.14), the Secretary mistakenly suggested that a property interest was necessary to invoke the constitutional constraints in the Thunder Basin analysis. Ex parte Young, Thunder Basin and their progeny do not even discuss, much less apply, a property right analysis to their due process considerations. See, e.g., Brown & Williamson (consent decree terms); Schultz (response to tax subpoena); Thunder Basin (designated employee representative). Rather, the courts addressed systemic barring of access to the courthouse. If there was serious harm or risk of harm, either pre- or post-judicial review, before access to the courts was permitted, constitutional due process was violated. Here the relationship between the state and federal government is in the nature of a contract, and the State asserts that its federal contract partner is violating the terms of that contract. See Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981). Although the State submits that a property right analysis is unnecessary, its quasi-contractual rights provide it sufficient interest to maintain its defense to the Secretary's efforts to require an illusory route to judicial review.

⁶ Even though the State is not technically provided the due process protections of the Fifth Amendment, see South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1969), the

risk losing \$387 million dollars in order to obtain a judicial interpretation of the meaning of the Unfunded Mandates Provision. Further, the State cannot be required to risk losing up to \$387 million, even temporarily, until the Secretary reaches a “final” administrative decision. Such a loss, even temporarily, would have a catastrophic effect upon those least able to afford it -- the State’s neediest schools and students. No rational, responsible state or local official or agency could risk losing that level of funding, either temporarily or permanently.

Equally important, the State should not be forced to violate statutory provisions in order to adjudicate the Secretary’s violations of the letter and spirit of the Act. The Secretary’s proposed judicial review scheme violates the well-established constitutional limits established in Ex parte Young and Oklahoma Operating Co. As aptly highlighted by the concurrence in Thunder Basin, a party should have the option of complying with the Act, accepting any harm that results from that compliance, and then obtaining judicial review. See Thunder Basin, 510 U.S. at 221 (concurrence). The Secretary’s vigorous efforts to preclude any judicial review of her actions by requiring the State to risk all of its federal funding to obtain judicial relief from her misinterpretation of the statute must be rejected as in direct violation of the constitutional limits inherent in the Thunder Basin analysis.

State is entitled to the “basic principle of justice” and fundamental fairness when protecting its interests through judicial proceedings. See City of New York v. New York, N.H. & H. RR, 344 U.S. 293 (1953); United States v. Cardinal Mine Supply, Inc., 916 F.2d 1087 (6th Cir. 1990); In re Scott Cable Communications, Inc., 259 B.R. 536, 543-44 (D. Conn. 2001). The State is unaware of any authority that would apply a due process limitation on the Thunder Basin analysis for private litigants and eliminate any consideration of fundamental fairness for governmental litigants, especially, when the real parties at risk are the State’s neediest school children. Put another way, the constitutional constraints of the Thunder Basin analysis should apply uniformly, regardless of the nature of the litigants.

II. THE SECRETARY'S APA PLAN AMENDMENT SUGGESTION REVEALS THE FUNDAMENTAL FLAW IN HER THUNDER BASIN ARGUMENT.

Throughout her motion to dismiss filings, the Secretary contended that the State had to violate the NCLB Act and its plan assurances, suffer an enforcement proceeding brought against it under the General Education Provisions Act (GEPA), and then have the administrative decision appealed to the U.S. Court of Appeals, before any Court would have jurisdiction to rule upon the meaning of the Unfunded Mandates Provision of the NCLB Act. See, e.g., DOE br. 14-19; DOE reply br. 2-7. Indeed, the Secretary repeatedly argued that a GEPA enforcement action was the sole means for the State to obtain a judicial interpretation of the Unfunded Mandates Provision. *Id.*

In support of her Thunder Basin jurisdictional challenge, the Secretary now suggests in her post-oral argument brief that the State could have pursued a plan amendment, and her denial of such a plan amendment would entitle the State to an administrative hearing and routine Administrative Procedures Act (APA) review before the U.S. District Court, pursuant to 20 U.S.C. §6311(e)(1)(E). See DOE 3/30/06 br. 28. Although Sec. 6311(E)(1)(e) plainly provides that a hearing is necessary before a state's plan can be denied, it is by no means plain that a hearing is required before proposed plan amendments can be denied by the Secretary. If the statutory process in fact applies to plan amendments, it has been honored in the breach. The Secretary has denied dozens, if not hundreds, of state plan amendments across the nation, but as far as the State can ascertain, no hearings have been provided.⁷

⁷ The Council of Chief State School Officers (CCSSO) published reports in 2003, 2004 and 2005 regarding amendments to state plans that have been approved and denied by the Secretary. The reports can be found at www.ccsso.org. Only the Secretary would have knowledge regarding whether any hearings on denied plan amendments have

Specifically, the Secretary has denied a number of Connecticut's plan amendments without the benefit of a hearing, including its proposed plan amendments regarding its English language learner and special education assessments. In its May 27, 2005 correspondence, Connecticut reiterated its waiver requests and sought to amend its plan. See Amended Complaint ¶144. In addition to renewing its waiver requests regarding the timing of assessments for English language learner (ELL) students and the form of assessments for up to 2% of special education students, the State also requested amendments to its state plan on the exact same two issues. Id. On June 20, 2005, the Secretary (through her deputy) denied Connecticut's proposed plan amendments regarding the timing of ELL student assessments and the form of assessments for up to 2% of special education students. See Amended Complaint ¶147. At no time either before or after the issuance of the June 20, 2005 denial was the State provided or offered a hearing.⁸

Section 6311(e)(1)(E) also completely undermines the Secretary's arguments against Administrative Procedures Act (APA) review and her reliance on Thunder Basin. The NCLB Act clearly contemplates U.S. District Court review of the Secretary's actions. The NCLB Act's administrative process for the denial of plans lacks all of the

been provided to any State. Certainly none have been provided to Connecticut and the plaintiffs are unaware of any being provided to any other state.

⁸ Until the issue was raised in the post-oral argument briefing and argument, the State viewed the substantive issues as embodied in its waiver requests. The State's May 27, 2005 request and the Secretary's June 20, 2005 denial are referenced in both the original and amended complaints, but the details of the plan amendment requests were not discussed. See Complaint ¶¶ 78, 81; Amended Complaint ¶¶ 144, 147. If the Secretary concedes that the §6311(e)(1)(E) process applies to plan amendments, the State will respectfully request permission to amend its complaint to include an APA claim that the Secretary's denial of the State's proposed plan amendments without the benefit of the statutorily-mandated hearing was arbitrary, capricious and contrary to law.

“channeling” characteristics that persuaded the Thunder Basin Court to find that the district court lacked jurisdiction to hear the Thunder Basin plaintiffs’ claims. Moreover, there is no indication, statutory or otherwise, that the sole means of obtaining a judicial determination on the legal meaning of a statutory provision of the NCLB Act requires that the issue be presented in a plan amendment, with subsequent pursuit of the procedures set forth in Sec. 6311(e)(1)(E), before an Article III judge can provide declaratory relief on the meaning of a statutory provision.

Given that the State’s plan amendments on ELL and special education testing were denied on June 20, 2005, no judicial resources are saved by requiring the State to pursue a plan amendment on alternate grade testing. The State is being harmed right now, because it is currently being required to spend state funds on NCLB mandates, in direct violation of the Unfunded Mandates Provision. The Secretary’s legal interpretation of the Unfunded Mandates Provision is well-known and directly contrary to the State’s view. See Am. Complaint ¶¶ 5-7; DOE br. 29-41; DOE reply br. 9-13. Pursuing a plan amendment on the alternate grade testing would simply unduly delay the inevitable district court adjudication of the State’s claims.

Finally, the State is not required to pursue a futile act. The Second Circuit has recognized that "where resort to the agency would plainly be unavailing in light of its manifest opposition or because it has already evinced its 'special competence' in a manner hostile to petitioner, courts need not bow to the primary jurisdiction of the administrative body." Bd. of Educ. of the City of New York v. Harris, 622 F.2d 599, 607 (2d Cir. 1979). Pursuing a futile plan amendment process (especially when it was already unsuccessfully pursued on two of the three pending substantive issues) benefits

no one and will only result in placing the parties back where they are today -- with their differences in statutory interpretation presented to the U.S. District Court.

III. THE NCLB ACT PROVIDES AMPLE STANDARDS FOR THE COURT TO APPLY TO THE STATE'S APA CLAIMS.

Under the Administrative Procedures Act, courts have jurisdiction to review administrative agency actions except “to the extent that--(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a). Because the NCLB Act clearly does not preclude judicial review, the Secretary seeks to shield her decisions under the narrow exemption set forth in 5 USC § 701(a)(2). See DOE br. 51-55; DOE reply br. 18-19. In particular, the Secretary contends that there are no meaningful standards for the Court to evaluate her decisions, and thus judicial review is inappropriate. *Id.*

The Secretary's contention is contradicted by the Second Circuit's reasoning in Riverkeeper, Inc. v. Collins, 359 F.3d 156 (2004). In Riverkeeper, an advocacy group appealed the Nuclear Regulatory Commission's (NRC) refusal to adopt certain security measures that the group deemed necessary to protect two New York nuclear power plants from possible air terrorist attack. The group claimed that the court had jurisdiction to review the NRC's decision because the decision constituted an abdication of the NRC's statutory duties. Significantly, the court did not dismiss the group's abdication argument as invalid, as the Secretary would have this Court do, but rather carefully analyzed the NRC's enabling statute's policy mandates and found in them “meaningful standards” with which to evaluate the NRC's action. 359 F.3d at 167-168. Specifically, the Court found the statute's mandate to “provide adequate protection to the health and safety of the public” and to “protect health or to minimize danger to life or

property,” provided standards sufficient for the Court to determine whether the NRC had implicitly abdicated its statutory responsibilities. Id. Although the court ultimately concluded that there had been no abdication, it only reached this conclusion after carefully evaluating the NRC’s conduct in light of the statutory standards derived from the statute’s policy mandates.

Adhering to the reasoning in Riverkeeper, other district courts have recently found sufficient standards in the overall purposes of the pertinent Acts with which to evaluate administrative decisions. For example, in George Campbell Painting Corp. v. Chao, 2006 U.S. Dist. LEXIS 3318 (D. Conn., January 23, 2006, Hall, J.), a highway contractor argued in part that the Secretary of Labor’s adverse wage determination was incorrect and in violation of the Secretary’s constitutional, statutory and regulatory responsibility to give contractors “fair warning.” 2006 U.S. Dist. LEXIS 3318 at *8. The pertinent labor statute expressly precluded any judicial review of the Secretary’s wage determinations. Id. at *12-13. Nonetheless, the court held that the practices and procedures followed by the Secretary in her interpretation of the Act were subject to the judicial review provisions of the APA. Id. at *14. Rejecting a 5 U.S.C. § 701(a)(2) challenge, the Court held that there were sufficient standards in the overall statutory structure and provisions of the Act for the Court to apply to the Secretary’s actions and thus APA review was proper.

In a similar vein, a first-time homeowner who was swindled by a mortgage insurance broker sued the U.S. Department of Housing and Urban Development (HUD) for “rubber-stamping” his mortgage insurance application when HUD had knowledge of the broker’s predatory practices. M&T Mortgage Corp. v. White, 2006 U.S. Dist. LEXIS

1903 (E.D.N.Y., January 9, 2006). HUD moved to dismiss, contending that the homeowner's mortgage application was "committed to agency discretion by law," there was "no law to apply," and thus HUD's actions were exempt from APA review under 5 U.S.C. § 701(a)(2). *Id.* at *22. Denying the motion to dismiss, the M&T Mortgage Court held that HUD's statutory obligation to "affirmatively further" fair housing in its mortgage insurance application programs provided a sufficient standard for the court to evaluate HUD's actions. *Id.* at *25-*29.

In this case, there are more than sufficient statutory standards for the Court to apply in the State's APA appeal. The overall purpose of the NCLB Act is

to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at minimum, proficiency on challenging State academic achievement standards and state academic assessments.

20 U.S.C. § 6301. To the extent the Secretary is administering the NCLB Act and acting on the State's requests in a manner that:

- Rewards lowering the quality of state academic assessments and punishes higher-quality, challenging state academic assessments, the NCLB Act provides the Court with standards to apply (20 U.S.C. §§ 6301(1), 6301(9), 6311(b)(3)(C)(vi), 6311(b)(3)(C)(vii), 6311(b)(3)(C)(iii));
- Insists upon state academic assessments that lack scientific research support and are contrary to nationally recognized professional and technical standards, the NCLB Act provides the Court with standards to apply (20 U.S.C. §§ 6301(9), 6311(b)(3)(C)(iii), 6311(b)(3)(C)(iv));

- Undermines state control over the content of curriculum and assessments, the NCLB Act provides the Court with standards to apply (20 U.S.C. §§ 6311(b)(3)(C)(i), 6311(b)(6), 6575, 6849, 7371, 7906(b));
- Rebukes a state for applying a third indicator (writing) that is clearly enumerated in the statute, the NCLB Act provides the Court with standards to apply (20 U.S.C. § 6311(b)(2)(C)(vii));
- Fails to provide “reasonable accommodations” in the assessments of ELL and special education students, the NCLB Act provides the Court with standards to apply (20 U.S.C. §§6311(b)(3)(C)(ix)(II), 6311(b)(3)(C)(ix)(III), 6311(b)(3)(C)(iii), 6301(9)); and
- Fails to consider whether her decisions will require the State to “spend any funds or incur any costs not paid for under the Act,” the NCLB Act provides the Court with standards to apply (20 U.S.C. § 7907(a)).

Moreover, insofar as the Secretary declined to give any consideration whatsoever to the State’s waiver requests, she violated her statutory duty to consider all waiver requests of all statutory and regulatory requirements of the Act. See 20 U.S.C. § 7861.

The NCLB Act is replete with statutory standards for the Court to apply in this case, and thus the Secretary’s efforts to preclude APA review under the narrow exemption provided by 5 U.S.C. § 701(a)(2) must fail.

CONCLUSION

In her concerted efforts to preclude an Article III judge from opining upon the purely legal inquiry regarding the meaning of the Unfunded Mandates Provision of the NCLB Act, the Secretary proffers an ever-shifting landscape of purported barriers and hurdles. The Secretary's proposed path to judicial review is illusory and is in fact designed to ensure that as a practical matter no judicial review is sought or obtained. As such, it violates basic principles of justice and must be rejected.

For the reasons set forth above, and in the State's briefing and oral argument in this matter, the State respectfully requests that the Court deny the Secretary's Motion to Dismiss, and to permit this case to proceed accordingly.

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CERTIFICATION OF SERVICE

I hereby certify that on May 19, 2006, a true and accurate copy of the foregoing State's Supplemental Brief on Matters Raised During April 28, 2006 Oral Argument Issues was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system and by first-class mail, postage-paid to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing, including the proposed intervenors Olf and Bally Veldhuis, P.O. Box 607, New Canaan, CT 06840. Parties access this filing through the court's CM/ECF System. Pursuant to the Court's standing order, a courtesy copy was also provided to chambers by overnight mail.

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