

**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>	:	JUNE 6, 2006

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE  
TO FILE SECOND AMENDED COMPLAINT**

Pursuant to Federal Rules of Civil Procedure 15(a) and 15(d), the plaintiffs State of Connecticut and General Assemble of the State of Connecticut (the "State") hereby move for leave to file their Second Amended Complaint.

The Second Amended Complaint is necessary to address new arguments by the Secretary, raised for the first time in her post-oral argument briefs, that the denial of plan amendments would afford a state the opportunity for a hearing, and any denial would be subject to Administrative Procedures Act (APA) review. The Second Amended Complaint adds allegations regarding the denial of the State's plan amendments without the opportunity for a hearing, updates the current status of state law and facts, and clarifies certain factual allegations.

In her March 30, 2006 post-oral argument brief in support of her Motion to Dismiss, the Secretary contended that "the State could obtain an administrative hearing and then judicial review under the APA" if the Secretary disapproved an amended plan,

citing 20 U.S.C. §6311(e)(1)(E). During oral argument on April 28, 2006, the Secretary suggested that §6311(e)(1)(E) applied to plan amendments, not just plans. In her brief filed May 19, 2006, the Secretary confirmed her interpretation of §6311(e)(1), namely that a plan amendment would be subject to the statutory structure for the approval and disapproval of plans, as set forth in §6311(e)(1). Secretary's May 19, 2006 br. 17-18. Moreover, she confirmed that the denial of a plan amendment would be subject to an APA appeal. Id.

20 U.S.C. §6311(e)(1)(E) provides that the Secretary cannot decline to approve a State's plan before ---

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

Once she has provided the opportunity for revisions, technical assistance and a hearing, the Secretary has

the authority to disapprove a State plan for not meeting the requirements of this part, but shall not have the authority to require a State, as condition of approval of the State plan, to include in, or delete from, such plan one or more specific elements of the State's academic content standards or to use specific academic assessment instruments or items.

20 U.S.C. §6311(e)(1)(F). Section 6311(e)(1)(F) limits the Secretary's ability to require specific assessment elements or to deny a State's use of certain elements in its standards or assessments.

As set forth in the State's May 19, 2006 brief, because the Secretary had never complied with the procedural steps set forth in §6311(e)(1)(E) when she denied prior plan amendments submitted by the State, the State was unaware that the Secretary

interpreted §6311(e)(1)(E) as applying to plan amendments as well as plans. Indeed, the State is unaware of a hearing ever being provided prior to the denial of plan amendments of any state.

Upon review of the State's submission to the Secretary on May 27, 2005, and the Secretary's (through her designee) response on June 20, 2005, the State confirmed that it had indeed requested plan amendments as well as waivers for its assessments of English language learners and special education students. Although the State had previously referenced both its May 27, 2005 submission and the Secretary's June 20, 2005 response in its complaint, it had assumed that the issues of ELL and special education assessments were encompassed by its waiver requests, and had not specifically raised the denial of its proposed plan amendments. Because the Secretary now contends that a denial of a plan amendment would permit APA review whereas the denial of a waiver request on the exact same issue, contained in the same communications, would not, the State seeks to add its claims regarding the denial of its proposed plan amendments.

### **PROPOSED AMENDMENTS**

In its Second Amended Complaint, the State amends its claims as follows:

(1) to add a Fourth Count and the factual allegations related thereto for an appeal under the APA for the lack of required statutory procedures and the denial of the State plan amendments to test ELL students after three years in U.S. schools, and to have the option of testing up to 2% of special education students at instructional level

rather than grade level (changes reflected in 2d Amended Complaint ¶¶ 148, 151-52, 154, 162, 166, 174, 178, Fourth Count and relief requested);

(2) to bring up-to-date discrete allegations in the complaint (changes reflected in 2d Amended Complaint ¶¶ 16, 17, 28, 38, 40); and

(3) to clarify that the Secretary's waiver denial was based solely upon the initial 2 ½ page letter, and to clarify that contrary to the proposed intervenor's assertion, the State only sought (and seeks) the option of testing up to 2% of the special education population at instructional level rather than grade level, and never sought to use the option for 100% of the population (changes reflected in 2d Amended Complaint ¶¶ 105(c), 106, 122, 123, 147, 150).

As reflected on the accompanying red-lined version of the pages changed in the Second Amended Complaint, of the 179 (plus subparts) allegations in the complaint, the proposed amendments are comprised of six new paragraphs, modifications to 13 paragraphs, one new count and corresponding changes to the prayer for relief.

### **ARGUMENT**

Leave to amend a complaint shall be freely given when justice so requires, Fed. R. Civ. P. 15(a), and "should not be denied unless there is evidence of undue delay, bad faith, undue prejudice to the non-movant or futility." Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001). See Foman v. Davis, 371 U.S. 178, 182 (1962); Dougherty v. N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 87-88 (2d Cir. 2002).

"Where, as here, a Rule 15(a) motion for leave to amend is filed in response to a dispositive motion under Rule 12(b) or 12(c) based solely on the pleadings, the motion

for leave to amend will be granted unless the amendment would be ‘futile.’” E\*Trade Financial Corp. v. Deutsche Bank AG, 420 F. Supp. 2d 273, 283 (S.D.N.Y. 2006). See also Ricciuti v. N.Y.C. Transit Authority, 941 F.2d 119, 123-24 (2d Cir. 1991) (“As a matter of procedure, when a complaint is dismissed pursuant to Rule 12(b)(6) and the plaintiff requests permission to file an amended complaint, that request should ordinarily be granted.”) “To avoid the proposed amendment,” the nonmoving party bears the burden of demonstrating “undue delay, bad faith, futility of the amendment, [or] resulting prejudice.” E\*Trade Financial Corp., 420 F. Supp. 2d at 282 (internal citation omitted).

Fed. R. Civ. Pro. 15(d) provides in relevant part that “upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.” In general, when the events sought to be added relate to the prior pleading, leave is freely granted, absent undue delay, bad faith, dilatory motive or prejudice to the non-movant. Quarantino v. Tiffany & Co., 71 F.3d 58, 66 (2d Cir 1995); 3 MOORE'S FEDERAL PRACTICE § 15.30 (Matthew Bender 3d ed). See also Weeks v. New York State, 273 F.3d 76, 88 (2d Cir. 2001); Flaherty v. Lang, 199 F.2d 607, 614 n. 3 (2d Cir. 1999). The burden of showing bad faith or dilatory motives rests on the party opposing leave to supplement. Cohen v. Reed, 868 F. Supp. 489, 497 (E.D.N.Y. 1994).

Given that no discovery has been conducted to date, and indeed, the administrative record has not yet been submitted or certified, there is no undue delay or prejudice to the Secretary from these proposed changes. The changes to update the

complaint and clarify allegations are minor and ministerial. The only substantive change -- the inclusion of an APA appeal from the denial of plan amendments -- is the result of the Secretary's interpretation disclosed for the first time in post-oral argument briefing that a hearing is required before a plan amendment may be denied, and that an APA appeal may be taken from the denial of plan amendments. Therefore, the Secretary's interests are not unduly prejudiced by permitting the State to file a Second Amended Complaint to pursue such a judicial avenue.

The new Fourth Count is the result of the Secretary's argument in her March 30, and May 19, 2006 post-oral argument briefs. The State respectfully requests leave to file its Second Amended Complaint.

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

RICHARD BLUMENTHAL  
ATTORNEY GENERAL

BY: /s/ Richard Blumenthal  
Richard Blumenthal  
Attorney General  
Federal Bar No. ct05924  
55 Elm Street, P.O. Box 120  
Hartford, CT 06141-0120  
Tel: (860) 808-5020  
Fax: (860) 808-5347  
[Attorney.General@po.state.ct.us](mailto:Attorney.General@po.state.ct.us)

BY: /s/ Clare E. Kindall  
Clare E. Kindall, AAG  
Federal Bar No. ct13688  
55 Elm Street, P.O. Box 120  
Hartford, CT 06141-0120  
Tel: (860) 808-5020  
Fax: (860) 808-5347  
[Clare.Kindall@po.state.ct.us](mailto:Clare.Kindall@po.state.ct.us)

**CERTIFICATION**

I hereby certify that on June 6, 2006, a true and accurate copy of the foregoing Plaintiffs' Motion to File Second Amended Complaint was filed electronically and served by mail on anyone unable to accept electronic filing, including Olf and Bally Veldhuis, 160 Mill Road, New Canaan, CT 06840. 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 motion was provided to chambers by overnight mail.

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