

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

| | | |
|----------------------------------|---|-------------------------------|
| STATE OF CONNECTICUT and the |) | |
| GENERAL ASSEMBLY OF THE STATE OF |) | |
| CONNECTICUT, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | Civil No. 3:05-cv-01330 (MRK) |
| |) | |
| MARGARET SPELLINGS, SECRETARY |) | |
| OF THE DEPARTMENT OF EDUCATION, |) | |
| |) | |
| Defendant. |) | January 13, 2006 |

**REPLY IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS PURSUANT TO
FED. R. CIV. P. 12(b)(1) & 12(b)(6)**

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. The Court Lacks Jurisdiction Over the State’s Pre-Enforcement Challenge 2

 A. Thunder Basin Controls the Outcome of this Case 2

 B. The State’s Claims Are Not Ripe 7

II. The Alleged Expenses Are Not Attributable to NCLB’s Conditions of Assistance 8

III. Plaintiffs’ Statutory and Constitutional Claims Fail on the Merits 9

 A. Section 7907(a) Would Not Excuse the State of Connecticut from
 Compliance with the NCLB’s Conditions of Assistance 9

 1. The State’s Interpretation of § 7907(a) Conflicts With Its
 Plain Language 9

 2. The State’s Interpretation of § 7907(a) Conflicts With
 Other Provisions of the NCLB 11

 3. The State’s Interpretation of § 7907(a) Would Undermine
 Congressional Intent 12

 B. The Secretary May Constitutionally Enforce the NCLB’s Conditions
 of Assistance 13

 1. The Federal Government May Enforce Unambiguous Conditions
 of Assistance Under the Spending Clause 13

 2. The Federal Government May Enforce Unambiguous Conditions
 of Assistance Under the Tenth Amendment 15

IV. The Secretary’s Denial of Waiver Requests Is Not Subject to Judicial Review 18

CONCLUSION 19

INTRODUCTION

The State's Opposition confirms that the Court lacks jurisdiction over the State's claims and that those claims fail as a matter of law. With respect to its central claim, the State has no answer to the Secretary's argument – and to the recent decision of Chief Judge Friedman of the Eastern District of Michigan dismissing an identical claim – that 20 U.S.C. § 7907(a) limits only the ability of “federal officials and employees” to impose unfunded mandates but does not limit the conditions of assistance that *Congress* imposed. Nor does the State have any effective answer to the Supreme Court's decision in Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994), which establishes that the Court lacks jurisdiction.

The State's Opposition also confirms that no disputes of fact preclude dismissal of the case. In arguing that this case is ripe for adjudication, the State admits that “the State's two primary claims are almost entirely legal in nature”; as the State acknowledges, its first claim (that 20 U.S.C. § 7907(a) releases a state from compliance with the NCLB's conditions of assistance if compliance would require the expenditure of state funds) presents a pure question of statutory construction, while its second claim (that the Constitution prohibits the Secretary's conduct) turns on analysis of the applicable case law. See Opp. at 21. With respect to the State's third claim (that the Secretary's denial of waiver requests was arbitrary and capricious), the State does not argue that factual development is required for the Court to rule on whether waivers are committed to agency discretion by law.¹ Accordingly, there is nothing to prevent this Court from rendering a decision in favor of the Secretary based on the relevant statutory provisions and case law.

¹ Furthermore, were the Court to determine that the agency's denial of the waivers is reviewable under the Administrative Procedure Act, such review would be limited to the administrative record. See Riverkeeper, Inc. v. EPA, 358 F.3d 174, 184 (2d Cir. 2004).

ARGUMENT

I. The Court Lacks Jurisdiction Over the State's Pre-Enforcement Challenge

A. Thunder Basin Controls the Outcome of this Case

In her motion to dismiss, the Secretary established that this case is controlled by Thunder Basin Coal Company, Inc. v. Reich. In Thunder Basin, the plaintiff alleged that a requirement imposed by the agency through a letter was unlawful on both statutory and constitutional grounds. The Court concluded that pre-enforcement review was barred because the governing statute (the Mine Act) contained a comprehensive review procedure that would apply if the plaintiff failed to comply with the requirement and the agency took enforcement action. Permitting the lawsuit, the Court held, would circumvent the statutory review scheme.

The State attempts to distinguish Thunder Basin by portraying the Mine Act as providing review for any grievance at any time, in contrast to the General Education Provisions Act ("GEPA"),² which provides for review only where the agency has taken enforcement action. See Opp. at 13-17. In fact, the statutory review provisions of the Mine Act, like those of GEPA, apply only where the agency has begun enforcement action against a mine operator through the issuance of a written citation or order. See 30 U.S.C. § 814-816. While such citations/orders may be issued whenever the Secretary of Labor "believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or *any mandatory health or safety standard, rule, order, or*

² The State also notes that the review provisions for violations of the NCLB are contained in GEPA rather than in the NCLB itself. See Opp. at 16. This fact is without significance. The NCLB amends a comprehensive and longstanding statutory framework, which framework is governed in large part by GEPA. The review provisions of GEPA apply to "recipient[s] of funds under any applicable program," 20 U.S.C. § 1234g(a); "applicable program" is defined as "any program for which the Secretary or the Department has administrative responsibility as provided by law or by delegation of authority pursuant to law." 20 U.S.C. § 1221(c)(1). GEPA's review provisions thus clearly apply.

regulation promulgated pursuant to this chapter” (30 U.S.C. § 814(a)) (emphasis added) – language relied upon heavily by the State – this is a point of similarity, not a point of distinction. Under GEPA, the Secretary may initiate enforcement action whenever the Secretary “has reason to believe that any recipient of funds under any applicable program is failing to comply substantially with *any requirement of law* applicable to such funds.” 20 U.S.C. § 1234c (emphasis added).

The State erroneously asserts that neither the NCLB nor GEPA contains any provision for review of a claim that the Secretary’s administration of the NCLB is unconstitutional and contrary to the statute. See Opp. at 16-17. In fact, the review provisions of GEPA *do* provide for review of such a claim; they simply require that it be raised at a particular time and in a particular context (*i.e.*, review of enforcement actions). Again, there is no distinction here between this case and Thunder Basin, in which the only review available to the plaintiff under the Mine Act was review of enforcement actions, see Thunder Basin, 510 U.S. at 208-09, and the Court held that the plaintiff both could and must bring its challenge to the lawfulness of the agency’s conduct in that context.

The State also asserts that “the review provided [by GEPA] is far less extensive than that of the Mine Act.” Opp. at 17. As set forth in the Secretary’s motion to dismiss, however, the review processes are nearly identical, with the sole exception that the second level of review in the Mine Act context is provided by an independent commission rather than the agency. See MTD at 16-17. Contrary to the State’s portrayal, the Court in Thunder Basin did not ascribe overriding significance to the existence of an independent commission. Rather, the Court, after noting that the independent commission “perhaps” had greater authority than an agency to review challenges to the constitutionality of statutes (an issue that does not even arise in the instant case), held that the plaintiff’s claims would fall under the Mine Act’s review provisions “even if” there were no independent commission, because “petitioner’s statutory and constitutional claims . . . can be

meaningfully addressed in the Court of Appeals.” Thunder Basin, 510 U.S. at 215.³ Courts of Appeals accordingly have found Thunder Basin to be controlling in cases where the review process did not include an independent commission. See Nat’l Taxpayers Union v. SSA, 376 F.3d 239 (4th Cir. 2004); Great Plains Coop v. Commodity Futures Trading Comm’n, 205 F.3d 353 (8th Cir. 2000); Massieu v. Reno, 91 F.3d 416 (3d Cir. 1996).

The State relies on cases that preceded Thunder Basin and are readily distinguishable. The State begins by citing Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) and other cases noting that convincing evidence of legislative intent is necessary to override the “strong presumption” that Congress intended judicial review of agency action. Opp. at 11. As the Court noted in Thunder Basin, Bowen has no application where the aggrieved party may obtain review in the Court of Appeals following enforcement proceedings. See Thunder Basin, 510 U.S. at 207 n.8 (“Because court of appeals review is available, this case does not implicate ‘the strong presumption that Congress did not mean to prohibit all judicial review.’”) (quoting Bowen, 476 U.S. at 672); see also Shalala v. Illinois Council on Long Term Care, 529 U.S. 1, 19 (2000) (noting “the distinction that this Court has often drawn between a total preclusion of review and postponement of review”).

The State next cites McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991), in which the Court held that a statute precluding district court review of the INS’s determinations on individual applications for special agricultural worker (“SAW”) status did not preclude review of the agency’s application processing procedures. See Opp. at 11-12. McNary is inapposite for the same two reasons that the Court found it to be inapposite in Thunder Basin. See 510 U.S. at 212-15.

³ The Court also noted that claims arising under the Mine Act “fall squarely within the Commission’s expertise.” See 510 U.S. at 214. This observation related to the Commission’s area of competence, not its independent nature, and would be equally applicable here.

First, McNary and similar cases involve “claims considered wholly collateral to a statute’s review provisions and outside the agency’s expertise.” Thunder Basin, 510 U.S. at 212. In McNary, the Court emphasized that the plaintiffs’ procedural challenge “[did] not seek review on the merits” of their individual SAW applications, and prevailing on their procedural claims would not “establish their entitlement to SAW status.” McNary, 498 U.S. at 495. By contrast, the issue of whether the State may be required to expend its own funds clearly would be central, not “collateral,” to the merits of any enforcement review proceedings under GEPA; indeed, the State alleges that this issue would be dispositive of any enforcement proceedings. See Complaint at 27, ¶ 4. Furthermore, because the State’s challenge turns on the interpretation and application of a statute that the Secretary is charged with administering, it implicates an area that is peculiarly within the agency’s expertise. See Perine v. William Norton & Co., Inc., 509 F.2d 114, 120 (2d Cir. 1974).

Second, the Court in McNary found that, “if not allowed to pursue their claims in the District Court, respondents would not as a practical matter be able to obtain meaningful judicial review.” McNary, 498 U.S. at 496. The Court based this conclusion on various factors, none of which is present in this case. See id. at 496-97. The State has provided no reason why the Court of Appeals cannot meaningfully review its claim if and when the State violates the challenged requirements and the agency takes steps to enforce them. Accord Board of Governors v. MCorp Financial, Inc., 502 U.S. 32, 43 (1991) (statute “expressly provides . . . a meaningful and adequate opportunity for judicial review of [a challenged] regulation” where, “[i]f and when the Board finds that [the plaintiff] has violated that regulation, [the plaintiff] will have, in the Court of Appeals, an unquestioned right to review of both the regulation and its application”).

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), see Opp. at 12-13, is even less apposite. The statute in that case contained a “savings clause” expressly permitting the use of

remedies (such as APA review) outside the review procedures provided. See Abbott Labs., 387 U.S. at 139-46. Here, GEPA contains no “savings clause” indicating that parties may opt out of the review procedures specified in the Act. See Thunder Basin, 510 U.S. at 212 (distinguishing Abbott Laboratories on the ground that the Mine Act contained no comparable “savings clause”).

Finally, the State relies on Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233 (1968) and Leedom v. Kyne, 358 U.S. 184 (1958). In Oestereich, a Selective Service Board inducted an individual into the military despite the fact that he was admittedly exempt from service. The government conceded that the induction was “blatantly lawless.” Oestereich, 393 U.S. at 238. Although section 10(b)(3) of the Military Selective Service Act provided that inductees could seek judicial review of their classification only through a post-induction writ of habeas corpus or in the context of criminal proceedings, the Court held that “[n]o one, we believe, suggests that § 10(b)(3) can sustain a literal reading” under the circumstances. Id. at 238. The Solicitor General agreed. See id. There is no comparison between Oestereich, in which the statute’s jurisdictional bar would have allowed the admittedly lawless act of an agency to deprive an individual of his physical liberty, and this case, in which a federal court has agreed with the Secretary that her interpretation *is* lawful, see School Dist. of the City of Pontiac v. Spellings, 2005 WL 3149545 (E.D. Mich. Nov. 23, 2005), and proceeding through the statutory review process will not result in any substantial pre-hearing deprivation. See Part I.B., infra.

In Kyne, the statute in question contained a provision for review of final orders, but the challenged agency action – which the government conceded was *ultra vires* – was not a final order. The Court found that the statute’s silence regarding review of agency actions other than final orders did not suggest that such review was unavailable, particularly given that such a reading would deprive the plaintiffs of any means to vindicate their statutory rights. See Kyne, 358 U.S. 187-91.

The case is easily distinguished on two grounds: (1) the bar to this Court's jurisdiction stems, not from mere statutory silence regarding whether review is available, but from the statutory specification of an applicable administrative and judicial review process; and (2) the State may pursue its alleged statutory rights through the review procedure Congress has provided. The Supreme Court has found Kyne to be inapplicable under analogous circumstances. See MCorp Financial, 502 U.S. at 43-44; see also Murphy ex rel. Estate of Payne v. United States, 340 F. Supp. 2d 160, 176-77 (D. Conn. 2004) (discussing distinction between MCorp and Kyne).

B. The State's Claims Are Not Ripe

The Secretary's Motion to Dismiss noted that, while the threshold issues in this case (those raised in the Motion to Dismiss) are entirely legal in nature, complex factual issues would be raised if the State were to prevail on these legal issues, and a reviewing court would benefit greatly by the existence of a well-developed administrative record. The State responds that *no* factual issues are raised, because "the State is not asking the Court to determine, as a factual matter, the amount of federal funding that would be necessary to meet the State's obligations under the NCLB Act." Opp. at 21. This statement is contradicted by the relief that the State seeks, namely, an order granting waivers from the NCLB's requirements. See Complaint at 28, ¶ 8. As discussed at Part IV, infra, waiver determinations are committed to the agency's discretion; but even if that were not the case, the Court could not order the agency to grant a waiver based on 20 U.S.C. § 7907(a) without first determining that denying the waiver would require the expenditure of state funds.

The State next argues that the Secretary's denials of the State's waiver requests constitute final action because they are "definitive statements of the agency's position" that "the State must comply with all requirements of the NCLB Act even if federal funding is inadequate to cover the State's costs of compliance." Opp. at 22. In fact, nothing in the Complaint suggests that the

Secretary *ever* made such a “definitive” statement in denying the waiver requests. Based on the information in the Complaint, it is equally likely that the Secretary believed that sufficient federal funding was available to meet the conditions in question. See Complaint ¶¶ 64, 76, 81.

With regard to the hardship of postponing review, the Secretary’s motion distinguished this case from Abbott Laboratories on the ground that GEPA requires the Secretary to stay the withholding of funds under 20 U.S.C. § 1234d pending completion of the administrative and judicial review proceedings. The State responds that “any possible stay of the Secretary’s action would only affect Title I spending and would not apply to any non-Title I federal funding.” Opp. at 24. This is incorrect. The GEPA withholding and review provisions, including the requirement of a stay pending review, apply to the withholding of funds under “any applicable program,” 20 U.S.C. § 1234c, defined as “any program for which the Secretary or the Department has administrative responsibility as provided by law or by delegation of authority pursuant to law.” 20 U.S.C. § 1221(c)(1). The sole applicable exception is funding for state administration of Title I programs, the withholding of which is governed by a special provision of the NCLB. See 20 U.S.C. § 6311(g)(2). The State has not argued that the withholding of some or all of this amount, which constitutes at most one percent of Connecticut’s Title I funding, see 20 U.S.C. § 6304(a), would constitute a severe enough hardship to justify bypassing the statutory review process.

II. The Alleged Expenses Are Not Attributable to NCLB’s Conditions of Assistance

The Secretary’s Motion to Dismiss observed that the activities which allegedly would require state expenditures are wholly optional under the NCLB. The significance of this is twofold: (1) the State lacks standing because its cited injuries are self-inflicted, and (2) the State cannot prevail on any claim that the federal government has “mandated” State expenditures. See MTD at 23-29.

The State responds with a vague assertion that a factual dispute exists regarding whether the

activities in question – written-response testing, foreign language assessments for ELL students, and modified-standard assessments for disabled students – are “voluntary” or required. See Opp. at 25-26. The State’s Complaint, however, does not bear out any such factual dispute. The Complaint makes clear that the Secretary *would* permit multiple-choice testing. See Complaint ¶ 73. Whether the NCLB itself requires written-response testing is a question of law, not fact, which is easily resolved in the negative by reference to the statute. See 20 U.S.C. §§ 6311(b)(3)(C), 6311(e)(1)(F). The State’s Complaint also makes clear that neither the NCLB nor the Secretary requires foreign language assessments for ELL students or modified-standard assessments for disabled students; indeed, with respect to the latter measure, the Complaint alleges that the State had to seek special permission to implement it. See Complaint ¶¶ 25, 62, 79-80; see also 70 Fed. Reg. 74624, 74635 (Dec. 15, 2005) (proposed rule) (providing that states “may” employ modified standards).⁴

III. Plaintiffs’ Statutory and Constitutional Claims Fail on the Merits

A. Section 7907(a) Would Not Excuse the State of Connecticut from Compliance with the NCLB’s Conditions of Assistance

1. The State’s Interpretation of § 7907(a) Conflicts With Its Plain Language

The Secretary’s Motion to Dismiss established that the State’s interpretation of 20 U.S.C. § 7907(a) is foreclosed by the provision’s plain language, which applies only to “mandates” imposed by “an officer or employee of the Federal Government,” not to conditions of assistance imposed by Congress. See MTD at 29-33.

⁴ In this and other sections of its brief, the State makes reference to Connecticut Public Act No. 03-168. See Opp at 5-6, 26, 35, 55. The purpose of these references is unclear. Even if the State were correct that states cannot be *required* to expend their own funds under 20 U.S.C. § 7907(a), the State has not claimed that § 7907(a) *forbids* states to expend their own funds, as Connecticut’s legislation purports to do. Connecticut’s statute therefore is in no way “parallel” to the NCLB (Opp. at 55) even by its own reading, and any problems posed by this state legislation are problems of the General Assembly’s own making.

Regarding the term “an officer or employee of the Federal Government,” the State’s response is that the requirements at issue were imposed by the Secretary, not by Congress. See Opp. at 33-34. As discussed above, the particular activities that allegedly would cause the State to expend its own funds were not imposed by the Secretary *or* Congress; they are wholly voluntary. With respect to other requirements discussed by the State in this section – the requirement that all ELL students be tested within their first year in a U.S. school system and the requirement that special education students be tested at grade level – the State has not alleged that these requirements would require the expenditure of state funds. Moreover, these conditions clearly are imposed by the Act, not devised by the Secretary. See 20 U.S.C. § 6311(b)(3)(C)(ix)(III); 20 U.S.C. § 6311(b)(3)(C)(i); 20 U.S.C. § 6311(b)(1)(B). The State’s suggestion that the Secretary’s authority to waive such requirements transforms them into the mandates of a federal official rather than conditions established by Congress is specious; the inclusion of the term “officer or employee of the Federal Government” would have been wholly unnecessary if Congress were referring to unwaived statutory conditions, rather than requirements imposed in the first instance by a federal official or employee.

The State’s response to the term “mandate” rests entirely on a misreading of the Secretary’s argument. Contrary to the State’s assertion, the Secretary has not argued that “the word ‘mandate’ in the NCLB Act, and more specifically in the Unfunded Mandates Provision, really means ‘condition of assistance.’” Opp. at 29. Quite the opposite: the Secretary’s position is that the word “mandate” does *not* mean “condition of assistance” – a point that the State wholeheartedly concedes (see Opp. at 30-32) – and therefore, assuming that Congress meant what it said, a provision barring unfunded “mandates” does not require Congress to fund conditions of assistance. It is the State that is attempting to substitute the term “condition of assistance” for the term “mandate” – not vice versa.

By the same token, the fact that several other sections of the statute forbid the federal

government from imposing “mandates” (see Opp. at 30) in no way suggests that the Act’s requirements *are* “mandates.” As the State observes, Congress used the term “mandate” only when explaining what the federal government *could not* require; Congress nowhere referred to the actual conditions of assistance – e.g., implementing yearly assessments – as “mandates.” Because these requirements are undeniably conditions of federal assistance, see MTD at 30-31, they could not violate § 7907(a) regardless of the source of funds used to comply with them.

2. The State’s Interpretation of § 7907(a) Conflicts With Other Provisions of the NCLB

As shown in the Secretary’s Motion to Dismiss, the State’s interpretation of § 7907(a) is inconsistent with several provisions of the Act that specify a minimum amount that states *must* spend on particular requirements.⁵ The State responds with the “commonplace of statutory construction that the specific governs the general.” Opp. at 36 (quoting Morales v. TWA, 504 U.S. 374, 384-85 (1992)). This principle, which applies once a court has found a conflict between provisions, see Edmond v. U.S., 520 U.S. 651, 657 (1997), entirely fails to address the Secretary’s point that statutes must be read, if at all possible, to avoid such conflict. The Secretary’s reading would avoid a conflict between statutory provisions; the State’s reading, as it implicitly concedes, would create one.

Moreover, the response that “the specific governs the general” cannot explain away 20 U.S.C. § 6311(b)(3)(D), a provision specific to the assessment requirement that establishes the level of federal funding below which states may be excused from some, but not all, assessment requirements. See MTD at 34-35. The State describes this provision as “a minimum funding

⁵ The State’s assertion that these minimum state funding provisions relate to “optional” programs (Opp. at 36) is meaningless; all of the programs under the Act are “optional.” The State need not apply for general Title I grants any more than it need apply for grants under those programs that contain minimum state funding requirements.

requirement” that “bind[s] future Congresses . . . to allot a threshold level of funds for the assessment piece of Title I.” Opp. at 37. This simply is not what the provision says. On its face, § 6311(b)(3)(D) addresses the obligations of the states, not the obligations of Congress, and it makes quite clear that the states are excused from assessment requirements only if funding falls below certain amounts. The State does not deny that federal funding has met or exceeded these amounts; therefore, the State cannot be excused from the assessment requirements based on a claim of inadequate federal funding.

3. The State’s Interpretation of § 7907(a) Would Undermine Congressional Intent

The Secretary’s Motion to Dismiss explained that, given the significant overlap between the requirements of the NCLB and the most basic functions of education, the State’s interpretation would create a loophole that would effectively negate the requirements of the Act (unless the federal government agreed to assume primary fiscal responsibility in the area of education). The Secretary pointed out that such a result would be contrary to Congressional intent. See MTD at 37-41.

The State does not address this point. Instead, the State attempts to demonstrate Congress’s intent by using snippets of the legislative histories of previous educational statutes. Opp. at 37-43. Because the plain language of § 7907(a) establishes that the provision applies to mandates imposed by federal officials and employees and not conditions of assistance established by Congress, it is inappropriate to rely on any legislative history to support a different interpretation, see Dep’t of Housing and Urban Devel. v. Rucker, 535 U.S. 125, 132 (2002), let alone the legislative history of a provision enacted by a prior Congress. See Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 508 (2d Cir. 2005) (“[P]rior legislative history is a hazardous basis for inferring the intent of a subsequent Congress . . .”).

In any event, the State’s selective presentation ignores key aspects of the legislative history that would support the interpretation of the Secretary. In particular, the “unfunded mandates” provision of the Goals 2000 legislation originated in an amendment proposed by Senator Gregg. Senator Gregg wished to ensure that “funds provided under” the legislation could not “be utilized by the Federal Government to contribute to an unfunded Federal mandate”; his amendment accordingly provided that “no provision of Federal law shall require a State, in order to receive funds under this Act, to comply with any federal requirement, *other than a requirement of this Act as in effect on the effective date of this Act.*” 140 Cong. Rec. S605-01, 622 (daily ed. February 22, 1994) (statement of Sen. Gregg) (emphasis added). Senator Gregg later combined this amendment with a prohibition on mandating state curricula that corresponded more closely with the language of the House amendment; the result was the “unfunded mandates” provision that appeared in Goals 2000 and subsequent legislation. See id. at S626. The origin of the provision thus refutes the State’s claim that “Congress was not concerned about the federal Department of Education ‘piling’ onto the requirements of its federal statutory enactments.” See Opp. at 38.

B. The Secretary May Constitutionally Enforce the NCLB’s Conditions of Assistance

1. The Federal Government May Enforce Unambiguous Conditions of Assistance Under the Spending Clause

The Secretary’s motion noted that the NCLB’s requirements are unambiguously stated conditions of assistance, and therefore do not run afoul of the Spending Clause. The State does not deny that the requirements in question are unambiguous on their face. Rather, the State claims that a different provision – 20 U.S.C. § 7907(a) – injects ambiguity into the conditions of assistance. The State’s position is valid only if 20 U.S.C. § 7907(a) plausibly could be read to release states from compliance, not only with the mandates of “officer[s] and employee[s] of the Federal Government”

as stated, but also with the conditions imposed by Congress itself. As the United States District Court for the Eastern District of Michigan recently held, section 7907(a) “cannot reasonably be interpreted” in that manner. See City of Pontiac, 2005 WL 3149545 at *5. Furthermore, even if 20 U.S.C. § 7907(a) could be read to create some ambiguity regarding when and whether the state must comply with the assessment requirements, any such ambiguity would be conclusively resolved by 20 U.S.C. § 6311(b)(3)(D), which specifies the exact amount of federal funding below which the State may be excused from some (but not all) of the assessment requirements. It is difficult to imagine a less ambiguous statement of the State’s obligations.

The State also relies heavily on Judge Luttig’s opinion in Commonwealth of Virginia v. Riley, 106 F.3d 559 (4th Cir. 1997). This opinion has no relevance here. In Riley, the Fourth Circuit found that a provision of the Individuals with Disabilities Education Act (“IDEA”) that conditioned the receipt of federal funds on states’ assuring disabled students “the right to a free appropriate public education” did not prohibit states from expelling disabled students for misconduct unrelated to their disabilities. The government conceded that the statutory provision in question only *implicitly* conditioned federal funding on the provision of educational services to students who had been expelled for misconduct (and Judge Luttig did not even find an “implicit” condition). See Riley, 106 F.3d at 562-63. There is nothing “implicit,” however, about the NCLB’s requirement to administer yearly assessments to all students. The requirement that the State seeks to avoid is precisely the requirement set forth in the statute, not a requirement that the Secretary has inferred therefrom.⁶

⁶ Having previously argued that its constitutional claim did not require further factual development, see Opp. at 21, the State here alleges that the Secretary “has improperly introduced selective evidential material” and that “this improper presentation of selective ‘facts’ underscores why the State is entitled to an evidentiary hearing.” Opp. at 51. The “evidential material” in question is an excerpt from the State’s own application for federal funding, (cont’d)

2. The Federal Government May Enforce Unambiguous Conditions of Assistance Under the Tenth Amendment

The Secretary's Motion to Dismiss observed that courts generally have declined to apply the "coercion" theory mentioned in dicta in two Supreme Court decisions. Put in plain terms, the State is arguing that, the greater the amount of funding that Congress provides, the less right Congress has to impose conditions that it believes are important to ensuring that the funds are well spent. No court has ever limited Congress's ability to impose conditions on federal funds based on the alleged coerciveness of those conditions, and the State offers no reason why this Court should be the first.

The State's reliance on three cases that allegedly reaffirmed the validity of the "coercion" theory, see Opp. at 47-48, is misplaced. In Riley (discussed supra), six judges assumed (without deciding) the validity of the coercion theory; however, seven judges either expressly declined to join in that part of the opinion or dissented. Accordingly, Riley provides no indication that the Fourth Circuit has embraced the "coercion" theory. Although the court in West Virginia v. United States Department of Health and Human Services (the second case cited by the State) erroneously read Riley to suggest the validity of the "coercion" theory in the Fourth Circuit, the West Virginia court itself expressly declined to rule on the theory's validity. See 289 F.3d 281, 291 (4th Cir. 2002).

Accordingly, only the Eighth Circuit appears to treat the "coercion" theory as valid, see Jim C. v. Atkins School Dist., 235 F.3d 1079, 1081-82 (8th Cir. 2000), and its application of that theory squarely supports the Secretary. The crux of that analysis is as follows:

To avoid the effect of Section 504 [which prohibits discrimination based on disability] on the Arkansas Department of Education, the State would be required to sacrifice federal funds only for that department. This requirement is comparable to the ordinary *quid pro quo* that the Supreme Court has repeatedly approved; the State is

which is discussed in the State's Complaint (¶ 29). The State does not dispute the veracity of the statements it made in that application, or identify any other factual dispute raised by the excerpt. In the absence of any factual dispute, the State's call for an evidentiary hearing is groundless.

offered federal funds for some activities, but, in return, it is required to meet certain federal requirements in carrying out those activities. In these cases, the Court has found no coercive interference with state sovereignty because the State could follow the “‘simple expedient’ of not yielding” Likewise here, the Arkansas Department of Education can avoid the requirements of section 504 simply by declining federal education funds. The sacrifice of all federal education funds, approximately \$250 million [per year] or 12 per cent. of the annual state education budget . . . would be politically painful, but we cannot say that it compels Arkansas’s choice.

Jim C., 235 F.3d at 1081-82 (internal citation omitted). In other words, withholding federal funding for education, when a state refuses to comply with a condition of that funding, is not “coercive.”

The Fourth Circuit’s “coercion” analysis in West Virginia – which it undertook despite declining to rule on the validity of the “coercion” theory – also supports the Secretary’s position. Although the court opined that withholding all Medicaid funding based on a relatively minor infraction would raise “serious Tenth Amendment questions,” it noted that the Medicaid Act in fact permitted the Secretary to withhold all *or part* of the State’s funding. Because a facial constitutional challenge may succeed only if the challenged provision “cannot operate constitutionally under any circumstance,” the court ruled that the mere *possibility* that the state could lose all Medicaid funding was insufficient to render the challenged “quid pro quo” unconstitutional. See West Virginia, 289 F.3d at 291-295. The same analysis would apply here, where the Secretary has taken no action to withhold all (or even part) of Connecticut’s educational funding⁷ and both the NCLB and GEPA allow for much less drastic penalties. See 20 U.S.C. §§ 1234c(a), 1234d(a), 6311(g)(2).

Nor would Judge Luttig’s “coercion” analysis in Riley provide a basis for ruling against the Secretary, even if it had been adopted by a majority of the *en banc* panel. Judge Luttig suggested

⁷ The State alleges that the Secretary threatened to cut off all of the State of Utah’s educational funding if it “opted out” of the NCLB’s requirements. See Complaint ¶ 35. But opting out of the program altogether is quite different from agreeing to participate in the program and failing to comply with certain provisions. Moreover, even if the situations were equivalent, the penalty imposed remains in the discretion of the Secretary.

that withholding \$60 million in program funding could be disproportionate to the point of coercion where the states “refused to fulfill their federal obligation in some insubstantial respect.” Riley, 106 F.3d at 50. There is nothing “insubstantial” about the obligation to implement yearly testing for all students. To the contrary, that requirement is at the heart of the NCLB’s effort to promote accountability in public education. See, e.g., H.R. Rep. No. 107-63(I), at 270-71 (2001); S. Rep. 107-7, at 149 (2001); 147 Cong. Rec. H2396-02, at H2527 (statement of Rep. Roukema); id. at H2528 (statement of Rep. McKeon).

Finally, mere pages after arguing that the question of whether the Secretary’s interpretation of 20 U.S.C. § 7907(a) constitutes coercion is “primarily legal” and does not require further factual development, see Opp. at 21, the State argues that “[w]hether the federal ‘inducements’ and conditions here have crossed the line into coercion is obviously a question of fact dependent upon the development of an appropriate evidentiary record.” Opp. at 47. The State was right the first time. For purposes of this motion, the Secretary does not contest the State’s description of the federal “inducements” and “conditions” at issue here: if a state opts not to accept the NCLB’s conditions for obtaining Title I funding, it may forfeit funding for educational programs that rely on the Title I formula.⁸ See Complaint at ¶ 35. The amount of federal funding that the State receives based on its Title I allotment is a matter of public record over which there is no factual dispute. The only remaining task for this Court is to apply the relevant case law to these circumstances.

⁸ The State’s Opposition erroneously suggests a distinction between “NCLB funds” and “Title I funds.” Opp. at 7. The NCLB amends the ESEA; the assessment requirements at issue are conditions of funding under Title I of the ESEA as amended by the NCLB. The Opposition also wrongly states that non-Title I programs that rely on the Title I formula would be “completely eliminated” if a state opted out of the Title I requirements. Id. While the amount of funding for these programs varies depending on the amount of Title I funding the state receives (in accordance with the applicable statutory formula), funding is not “eliminated” if the state receives no Title I funds; instead, as the State’s Complaint alleges, funding is “negatively affected.” Complaint at ¶ 35.

IV. The Secretary's Denial of Waiver Requests Is Not Subject to Judicial Review

The Secretary's Motion to Dismiss noted that there are no statutory or regulatory standards by which the Secretary's discretion in granting or denying a waiver may be judged. The State responds that 20 U.S.C. § 7907(a) itself provides such a standard. See Opp at 55. That argument fails because it relies on the false assumption that § 7907(a) pertains to conditions of assistance imposed by Congress as well as mandates imposed by officers and employees of the Federal Government. Because § 7907(a) does not apply to statutory requirements, it cannot guide an agency's discretion in determining whether statutory requirements should be waived.

The State also claims that "the Secretary, notwithstanding her statutory duty to do so, has proclaimed that she will not exercise *any* discretion with respect to a whole category of waiver requests," i.e., those seeking a waiver of the annual testing requirements. Opp. at 54. In fact, the State's Complaint does not allege that the Secretary has refused to exercise her discretion. Rather, it alleges that the Secretary has determined that she will not grant waivers from the requirement of annual testing (see Complaint ¶ 65) – a determination that is itself an exercise of the Secretary's discretion. That the Secretary has announced that she will apply this determination consistently with respect to all requesters hardly offends the law,⁹ and the State's wholly unsupported allegation that

⁹ Indeed, where the agency's discretion is unfettered by statute, one of the few ways in which courts have held that the agency still may act unlawfully is by acting *inconsistently* in similar cases. See, e.g., U.S. v. Ten Cartons, 888 F. Supp. 381, 418 (E.D.N.Y. 1995).

The cases cited by the State simply reaffirm the unremarkable (and inapposite) principle that the agency may not ignore standards that Congress *has* specified. Cases holding that an agency abuses its discretion when it "relie[s] on factors Congress did not intend it to consider or . . . fail[s] to consider relevant factors," Opp. at 54, have no application where Congress has not specified which factors the agency should or should not consider. Cases applying the "arbitrary and capricious" standard (Opp. at 54) are similarly irrelevant; where the law provides no other meaningful standards, the "arbitrary and capricious" standard cannot provide an independent basis for review. See Schneider v. Feinberg, 345 F.3d 135, 148-49 (2d Cir. 2003).

the Secretary made this determination without considering or balancing any factors whatsoever (Opp. at 56) need not be accepted as true since it is not alleged in the Complaint. Furthermore, contrary to the State's contention, Congress did not state an intent "that waivers on 'any' provision ought to be available." Opp. at 55. Rather, Congress stated that the Secretary "may" grant waivers for any provision not expressly excepted; Congress thus expressly left to the Secretary the decision of when waivers would be available and when they would not. See 20 U.S.C. § 7861.

CONCLUSION

For the reasons stated above and in the Secretary's Motion to Dismiss, the Secretary requests that the Court dismiss the State's claims with prejudice.

Respectfully submitted,

KENT D. TALBERT
Acting General Counsel
Office of the General Counsel
United States Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

PETER D. KEISLER
Assistant Attorney General

KEVIN J. O'CONNOR
United States Attorney

JOHN HUGHES
Assistant United States Attorney

SHEILA M. LIEBER
Deputy Branch Director

/s/ Elizabeth Goitein
ELIZABETH GOITEIN
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 7320
Washington, D.C. 20530
Federal Bar No. phv0649
Telephone: (202) 514-4470
Facsimile: (202) 616-8470
E-mail: elizabeth.goitein@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2006, a copy of the foregoing Reply in Support of Defendant's Motion to Dismiss 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 or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Elizabeth Goitein
ELIZABETH GOITEIN
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 7320
Washington, D.C. 20530
Federal Bar No. phv0649
Telephone: (202) 514-4470
Facsimile: (202) 616-8470
E-mail: elizabeth.goitein@usdoj.gov