

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN**

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SCHOOL DISTRICT OF THE CITY OF)
PONTIAC, et al.,)
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Plaintiffs,)
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v.)
)
MARGARET SPELLINGS, in her official)
capacity as Secretary of the United States)
Department of Education,)
)
Defendant,)
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Case No. 2:05-CV-71535
Hon. Bernard A. Friedman
Judge Presiding

**DEFENDANT’S MOTION TO DISMISS PURSUANT TO
FED. R. CIV. P. 12(b)(1) AND 12(b)(6)**

For the reasons set forth in the attached memorandum, defendant Margaret Spellings, in her official capacity as Secretary of the United States Department of Education, hereby moves to dismiss this action with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Respectfully submitted,

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

ISSUES PRESENTED

1. Whether plaintiffs the National Education Association and its affiliates have standing to assert the alleged right of states and school districts throughout the country, and whether they otherwise have clearly alleged facts demonstrating their standing to advance their claims in this action.
2. Whether the plaintiff school districts have clearly alleged facts demonstrating their standing to advance their claims in this action.
3. Whether 20 U.S.C. § 7907(a) overrides the conditions prescribed by Congress for receipt of federal educational assistance under the Elementary and Secondary Education Act of 1965, as amended by the No Child Behind Act of 2001, where a recipient would have to spend any non-federal funds to meet those conditions.

CITATION OF CONTROLLING AUTHORITY

20 U.S.C. § 7907(a) and other provisions of the No Child Left Behind Act, 20 U.S.C. § 6301, *et seq.*

TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001)

Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378, 384-85 (1992)

Renne v. Geary, 501 U.S. 312, 316 (1991)

Singleton v. Wulff, 428 U.S. 106, 114 (1976)

Greater Cincinnati Coalition for the Homeless v. City of Cincinnati, 56 F.3d 710, 716 (6th Cir. 1995)

Coyne v. American Tobacco Co., 183 F.3d 488, 494-95 (6th Cir. 1999)

Clonlara, Inc. v. Runkel, 722 F. Supp. 1442, 1452 (E.D. Mi. 1989)

INTRODUCTION

The No Child Left Behind Act of 2001 (“NCLB”) is based on a simple principle. States and local school districts that receive federal financial assistance must comply with the conditions that come with that assistance, and must either demonstrate annual progress in obtaining improved educational achievement or implement certain remedial measures toward that end. The “centerpiece” of the law, in Congress’ words, is “academic accountability.”

In this lawsuit, plaintiffs seek the federal financial assistance without the accountability, relying exclusively on 20 U.S.C. § 7907(a) of the NCLB. That section prohibits “federal officers or employees” from adding “mandates” to the conditions that Congress requires states to satisfy in exchange for federal financial assistance. Plaintiffs, however, assert that recipients may evade the conditions of assistance themselves if they would have to spend any state or local funds to comply with those conditions. They seek an order requiring the federal government to continue providing funds to states and school districts regardless of whether they have satisfied or intend to satisfy the conditions for which they receive those funds.

Plaintiffs’ lawsuit has no merit and should be dismissed. The text, structure, purpose, and legislative history of the NCLB each foreclose plaintiffs’ interpretation of section 7907. Plaintiffs ignore the fundamental distinction between a condition of assistance imposed by Congress and an “unfunded mandate” imposed by “federal officers or employees.” Because the conditions imposed by Congress and accepted by states and school districts in exchange for federal financial assistance are not “unfunded mandates,” section 7907(a) – which plaintiffs repeatedly refer to as “the unfunded mandates provision” – does not override or limit those requirements.

The error of plaintiffs' position becomes even more patent when section 7907 is read in conjunction with the remainder of the statute. As demonstrated in section II(B), *infra*, numerous other provisions in the NCLB preclude plaintiffs' view that they need not comply with the NCLB's requirements if such compliance would require the expenditure of state or local funds. Plaintiffs' attempt to create an inadequate funding excuse for the failure to meet unambiguous NCLB requirements would also thwart the law's primary purpose, which is to hold states and school districts that accept federal funds accountable for achieving improved educational results. The remedy for those entities that do not wish to abide by NCLB requirements is to decline further funding and/or to advocate for increased funding. It is not to force the federal government to keep paying them money when they do not fulfill the statutory conditions.

Plaintiffs' claims are also not justiciable. The National Education Association and its affiliates fail to meet any of the requirements for standing and, by resting their claims entirely upon the alleged rights of states and school districts, violate the well-established prohibition on asserting the rights of third parties. While presenting a closer question, the school district plaintiffs lack standing because their assertion of injury is conclusory and based upon misstatements about NCLB requirements. With many references to the alleged problems of school districts and states that are not parties to this case and virtually no references to their own purported injuries, plaintiffs' complaint is equivalent to a policy position paper, rather than a serious attempt to meet the requirements of Article III.

STATUTORY BACKGROUND AND FUNDING

“[F]ederal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy.” *Bennett v. Kentucky Dep't. of Education*, 470 U.S. 656, 670 (1985). As a condition of receiving funds under Title I

of the Elementary and Secondary Education Act of 1965 (“ESEA”), a state “freely [gives] its assurances that it [will] abide by the conditions of Title I.” *Bell v. New Jersey*, 461 U.S. 773, 790 (1983). “If the conditions [are] valid, the State ha[s] no sovereign right to retain funds without complying with those conditions.” *Id.* at 791.

The No Child Left Behind Act. The NCLB is a comprehensive education reform package enacted on January 8, 2002, that amended the ESEA, codified at 20 U.S.C. § 6301 *et seq.* The purpose of the NCLB is to improve the education of elementary and secondary school students by, *inter alia*, “granting unprecedented new flexibility to local school districts” while at the same time “demanding results in public education through strict accountability measures.” H.R. Rep. 107-63(I), at 265 (2001), available at 2001 WL 518421. The “centerpiece” of the NCLB “is academic accountability.” *Id.* at 281. The NCLB “holds States, [LEAs], and schools accountable for ensuring that all students, including disadvantaged students, meet high academic standards.” *Id.*

The most relevant provisions of the NCLB to this lawsuit are found in Title I, Part A of the ESEA. In exchange for providing billions of dollars in assistance each year, Congress requires states and school districts to carry out the provisions that Congress has enacted – *i.e.*, the conditions of assistance. To receive a grant under Title I, Part A, a state must submit a plan developed by the state educational agency (“SEA”). 20 U.S.C. § 6311(a). Each state plan consists of three primary elements. *First*, each must demonstrate that the state “has adopted challenging academic content standards and challenging student academic achievement standards that will be used by the state, its local educational agencies [“LEAs”], and its schools to carry out” the requirements of Part A. 20 U.S.C. § 6311(b)(1)(A). While the standards must satisfy certain general criteria, *see* 20 U.S.C. § 6311(b)(1)(D), each state is afforded the flexibility to

design its own standards and need not submit the standards to the Secretary for approval. 20 U.S.C. § 6311(b)(1)(A).

Second, each state plan must show that “the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress” 20 U.S.C. § 6311(b)(2)(A). The definition of the term “adequate yearly progress” (“AYP”) is also largely subject to state discretion, but must be, *inter alia*, a statistically reliable way of measuring student progress based on academic assessments developed by the state. 20 U.S.C. § 6311(b)(2)(C)(ii), (iv).

In addition, the state’s definition must include “separate measurable annual objectives for continuous and substantial improvement” for all public elementary and secondary school students and certain subgroups of students. 20 U.S.C. § 6311(b)(2)(C)(v). The annual objectives must include a single minimum percentage of students who are required to meet or exceed the proficient level on the assessments developed by the State that applies to each group of students described in subparagraph (C)(v). 20 U.S.C. § 6311(b)(2)(G)(iii). A school or district will be considered to have made AYP only if each of the groups meets the objectives set by the state. 20 U.S.C. § 6311(b)(2)(I). In the alternative, for any group that does not meet the annual objective, a school or district can make AYP if the percentage of students in the group measuring below proficient on the state assessments decreased by at least 10 percent from the preceding school year and the students in that group made progress on one or more other academic indicators set forth in section 6311(b)(2)(C)(vi) or (vii). 20 U.S.C. § 6311(b)(2)(I)(i). This alternative is also known as the “safe harbor” provision.

Third, each state plan must show that the state “has implemented a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and [by the 2007-08 school year,] science” 20 U.S.C. § 6311(b)(3)(A). The state may choose the assessments that it uses to measure proficiency, but the assessments must be aligned with the state’s academic standards, must be used to measure all children, and must be “consistent with relevant, nationally recognized professional and technical standards.” 20 U.S.C. § 6311(b)(3)(C)(i)-(iii).

To receive a subgrant from the state, an LEA must have on file a plan approved by the SEA. 20 U.S.C. § 6312(a)(1). The plan must explain, *inter alia*, the LEA’s plans for meeting various NCLB requirements, and must “provide assurances that” the LEA will meet NCLB requirements. 20 U.S.C. § 6312(b)(1)(A)-(Q), (c)(1)(A)-(O).

In general, under section 6316, schools and LEAs that do not make AYP are eligible to receive additional financial and technical assistance, and if they continue to fail to improve, they are subject to required corrective measures designed to raise their academic achievement. 20 U.S.C. § 6316; H.R. Rep. 107-63(I), at 282. Section 6316 applies only to LEAs, and schools under the jurisdiction of LEAs, that receive Title I, Part A funds. 20 U.S.C. §§ 6311(b)(2)(A)(ii), 6316(a)(1).

Funding for the NCLB. To help states and local school districts comply with these conditions of assistance, Congress has increased the federal contribution to education spending to unprecedented levels. Since the year prior to enactment of the NCLB, for example, appropriations for Title I grants have increased by 45 percent, from \$8.76 billion in 2001 to

\$12.74 billion for 2005. 114 Stat. 2764-65; 115 Stat. 180; 118 Stat. 3142-43, 3348; Compl. ¶ 25.¹

If anything, however, this comparison significantly understates the amount of additional funding available to satisfy Title I requirements. The NCLB also provides substantial additional funds for states to develop and administer the assessments used to measure student progress. 20 U.S.C. § 7301-7301b. From 2002 to 2005, Congress has appropriated over \$1.5 billion for grants to aid states in developing and administering assessments. 115 Stat. 2202-03 (2002 - \$387 million), 117 Stat. 328 (2003 - \$387 million), 118 Stat. 257 (2004 - \$391.6 million), 118 Stat. 3144 (2005 - \$400 million); H.R. Conf. Rep. 107-342, at 125 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1690, 1753.² Congress has also appropriated an additional \$11+ billion in funds for states and LEAs to use in improving teacher quality and for professional development activities.³

The NCLB also “dramatically enhances flexibility for local school districts, giving them the freedom to transfer up to 50 percent of the federal education dollars that they receive among an assortment of [Elementary and Secondary Education Act] programs as long as they demonstrate results.” H.R. Rep. 107-63(I) at 265; 20 U.S.C. § 7305b(a)-(b). In addition to funds

¹ Grants to LEAs in the year prior to NCLB consisted of basic grants under section 6333 and concentration grants under section 6334. Grants to LEAs under the NCLB consist of basic grants, concentration grants, and new targeted grants and education finance incentive grants that did not exist prior to the NCLB. *See* 20 U.S.C. §§ 6333-6335, 6337.

² Under the predecessor to the NCLB, states were required to have developed and implemented many of the assessments required under the NCLB. *See* P.L. 103-382 § 1111(b)(3), 108 Stat. 3518 (2004).

³ 115 Stat. 2202-03 (2002) (H.R. Rep. 107-324, at 121 (2001)); 117 Stat. 327, 550 (2003) (H.R. Rep. 108-10, at 1125 (2003)); 118 Stat. 257, 457 (2004) (H.R. Rep. 108-401, at 811 (2003)); 118 Stat. 3143, 3348 (2005) (H.R. Rep. 108-792, at 1211 (2004)).

for improving teacher and principal quality, 20 U.S.C. § 6613, discussed in the previous paragraph, those programs include state and local technology grants, 20 U.S.C. § 6762; safe and drug-free school grants, 20 U.S.C. § 7112; and grants for innovative programs, 20 U.S.C. § 7211. Appropriations for these programs in 2005 alone amounted to over \$1.1 billion. 118 Stat. 3143-45, 3348 (2005); H.R. Rep. 108-636, at 167 (2004), available at 2004 WL 2112612; H.R. Conf. Rep. 108-792, at 1211 (2004), available at 2004 WL 2968603. Plaintiffs' exclusive focus on the amount of basic Title I funding available thus misses a large amount of additional funding that Congress has made available for meeting NCLB goals and requirements.

Even with this significant increase in funding, however, Congress was well aware that the "Federal Government provides only a small fraction of overall funding for elementary and secondary education in the United States." S. Rep. 107-7, at 3 (2001), available at 2001 WL 327700. States and local school districts may use Title I funds only to supplement funds from non-federal sources, 20 U.S.C. § 6321(b)(1), and a local educational agency may only receive Title I funds if "the local educational agency has maintained the agency's fiscal effort" with state and local funds. 20 U.S.C. § 6321(a). *See infra* at 24-26. Congress thus expected that the bulk of the financial contribution for educating children would continue to come from states and local school districts.

STANDARD OF REVIEW

With respect to a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), a "plaintiff bears the burden of demonstrating standing and must plead its components with specificity." *Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999). Courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citation and internal quotation marks omitted). Although courts must

“accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party,” *Coyne*, 183 F.3d at 492 (citation omitted), it “is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court’s remedial powers.” *Renne*, 501 U.S. at 316 (citation and internal quotation marks omitted).

In ruling on a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), the Court must “construe the complaint in the light most favorable to the plaintiff and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle him to relief.” *Gregory v. Shelby County, Tennessee*, 220 F.3d 433, 446 (6th Cir. 2000). “To avoid dismissal under Rule 12(b)(6), a complaint must contain either direct or inferential allegations with respect to all of the material elements of the claim.” *Wittstock, III v. Van Sile, Inc.*, 330 F.3d 899, 902 (6th Cir. 2003). The Court must accept the plaintiff’s factual allegations as true but “need not accept as true legal conclusions or unwarranted factual inferences.” *Gregory*, 220 F.3d at 446.

ARGUMENT

I. PLAINTIFFS’ CLAIMS ARE NOT JUSTICIABLE AND SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(b)(1)

There are two sets of plaintiffs in this case: (1) the National Education Association and several of its affiliates (“the NEA plaintiffs”) and (2) one school district from Michigan, one school district from Texas, and six single-school districts from Vermont together with the supervisory union that oversees them (“the school district plaintiffs”). Both sets lack standing.

The “irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is

(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.

Second, there must be a causal connection between the injury and the conduct complained

of Third, it must be likely, as opposed to merely ‘speculative,’ that the injury will be

redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)

(internal citation and quotation marks omitted). In addition to these constitutional requirements,

“a plaintiff must ‘assert his own legal rights and interests, and cannot rest his claim to relief on

the legal rights or interests of third parties.” *Coyne v. American Tobacco Co.*, 183 F.3d at 494

(quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

A. The NEA Plaintiffs Lack Standing

1. The NEA Plaintiffs Lack Standing Because They Are Asserting the Purported Rights of Third Parties

The NEA plaintiffs lack standing because they are “rest[ing their] claim to relief on the legal rights or interests of third parties” – specifically, the purported right of school districts and states not to spend their own funds on NCLB requirements. None of the exceptions to the general rule prohibiting third-party standing applies in this case. *First*, there is no relationship where the third party’s enjoyment of a right “is inextricably bound up with the activity the litigant wishes to pursue” *Singleton v. Wulff*, 428 U.S. 106, 114 (1976); *see Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1452 (E.D. Mi. 1989) (home school services did not have a “close and confidential” relationship enabling them to assert the constitutional rights of the parents of their students). A state or school district’s “enjoyment” of its alleged rights does not depend in any way on the ability of the NEA plaintiffs to assert its claims.⁴

⁴ If anything, the interests of the NEA plaintiffs and states and school districts appear to be adverse much of the time. Compl. ¶¶ 8-10 (referencing collective bargaining between the NEA plaintiffs
(continued...))

Second, “[e]ven where the relationship is close,” a litigant generally lacks third-party standing where there is no “genuine obstacle” to the rights-holder’s prosecution of the claim. *Singleton*, 428 U.S. at 116; *see also Warth*, 422 U.S. at 510 (denying standing because the plaintiffs failed to establish that “their prosecution of the suit is necessary to insure protection of the rights asserted”); *Clonlara, Inc.*, 722 F. Supp. at 1452 (plaintiff lacked standing because the third-party parents could assert their own rights). School districts and states are fully capable of protecting their own alleged rights should they choose to do so. Indeed, various school districts have joined this litigation. The NEA plaintiffs have no basis for asserting the rights of any, let alone all, of the country’s states and school districts, and their claims must therefore be dismissed.

2. *The NEA Plaintiffs Lack Standing Because They Have Failed to Allege an Injury in Fact That Is Fairly Traceable to the Challenged Conduct or Redressable by the Relief That They Seek*

The NEA plaintiffs also fail to satisfy the basic constitutional requirements for standing. They assert that they “have been harmed by the diversion of funds from educational programs and priorities they support and by the fact that the diversion has made obtaining and maintaining funding for non-NCLB programs and priorities (through collective bargaining and otherwise) more difficult.” Compl. ¶¶ 8-10. They further assert that they and their members “have been harmed by the stigma that has resulted from” schools and school districts “improperly being labeled as failing schools and school districts because they have not been provided with the necessary funds to make AYP.” *Id.* Neither allegation is sufficient to establish Article III jurisdiction.

⁴(...continued)
and schools or school districts).

Beginning with the first assertion, it is well-established that an adverse effect on programs that a litigant “supports” is not a concrete injury.⁵ Plaintiffs have not even identified the non-NCLB programs from which funds have allegedly been diverted, let alone provided even the barest explanation of how the alleged diversion of funds from non-NCLB programs has concretely or adversely affected the NEA plaintiffs or their members. Plaintiffs have “the burden of affirmatively demonstrating that jurisdiction is proper,” *Clonlara*, 722 F. Supp. at 1450, and must plead the components of standing “with specificity.”⁶ *Coyne*, 183 F.3d at 494. Plaintiffs’ conclusory allegations of harm fail to satisfy their burden and are insufficient to establish an injury in fact.

Even if plaintiffs’ allegations of harm were sufficient, they have not alleged anything more than a speculative causal link between the alleged harm and the challenged conduct. If “a defendant’s conduct does not conflict directly with an organization’s stated goals, it is entirely speculative whether the defendant’s conduct is impeding the organization’s activities.” *Nat’l*

⁵ See *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710, 716 (6th Cir. 1995); *Diamond v. Charles*, 476 U.S. 54, 62 (1986); *Simon v. Eastern Ky. Welfare Rts. Org.*, 426 U.S. 26, 40 (1976); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

⁶ Because jurisdictional allegations implicate the Court’s power to hear the case, various other courts have recognized that plaintiffs must plead standing with a greater level of specificity than would be necessary to sustain a complaint against a Rule 12(b)(6) motion. *United States v. AVX Corp.*, 962 F.2d 108, 115 (1st Cir. 1992) (“where standing is at issue, heightened specificity is obligatory at the pleading stage”); *Smith v. Meese*, 821 F.2d 1484, 1495 (11th Cir. 1987) (“The components of standing must be pleaded with a fair degree of specificity.”) (citation and internal quotation marks omitted); *Medrano v. MCDR, Inc.*, No. 04-2425-BP, 2005 WL 946856, *3 (W.D. Tenn. Mar. 31, 2005) (quoting the foregoing language from *AVX Corp.* and the language that follows from *Catalyst*); *Catalyst & Chemical Services, Inc. v. Global Ground Support*, 350 F. Supp. 2d 1, 7 (D.D.C. 2004) (in evaluating a Rule 12(b)(1) motion, “the plaintiff’s allegations” in the complaint “require ‘closer scrutiny’ than they would under the Rule 12(b)(6) motion to dismiss standard”) (quoting *Bates v. Rumsfeld*, 271 F. Supp. 2d 54, 59-60 (D.D.C. 2002)) (additional citations omitted); *Grand Lodge of the Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13-14 (D.D.C. 2001) (factual allegations merit “closer scrutiny” when resolving a 12(b)(1) motion).

Treasury Employees Union v. United States, 101 F.3d 1423, 1430 (D.C. Cir. 1996). Further, “where government action is challenged, if the government’s conduct does not directly conflict with the organization’s mission, the alleged injury to the organization likely will be one that is shared by a large class of citizens and thus insufficient to establish injury in fact.” *Id.*

No such conflict exists here. To the contrary, the complaint alleges that the NCLB’s teacher qualification requirements may require New Hampshire to spend *increased* funds on teacher salaries. *See* Compl. ¶ 85. *See also* Clare Kittredge, *Portsmouth Raises Teacher Salaries*, Boston Globe, July 24, 2003 (quoting the president of the NEA’s New Hampshire affiliate, a plaintiff in this case, as calling it “just disheartening” that New Hampshire ranks last in the country in teacher salaries after factoring in the cost of living).⁷ Absolving states and LEAs of their responsibility for meeting the teacher qualification requirements would obviously eliminate the alleged resulting incentive to raise teacher salaries. While plaintiffs’ allegations of fact must be accepted as true at this stage, a court is under no obligation to accept the speculative conclusions that they would draw from such facts. *NTEU*, 101 F.3d at 1430.⁸

⁷ *See also* Rebecca Carroll, *60% Say Teachers are Underpaid, Survey Finds Support for Voucher Program Wanes*, Lexington Herald-Leader, August 21, 2003 (quoting the president of the NEA as saying, “Teacher compensation is not what we would like for it to be” and that a poll advocating increased teacher pay “supported the opinion held for years by his group”). Other NCLB requirements that directly benefit educators include: the requirement that States annually increase the percentage of teachers “receiving high-quality professional development,” 20 U.S.C. § 6319(a)(2)(B), that LEAs and states provide technical assistance to aid schools and school districts in need of improvement, 20 U.S.C. §§ 6316(b)(4), 6316(c)(9), and that LEAs identified for improvement reserve 10 percent of Title I funds for professional development, 20 U.S.C. § 6316(c)(7)(A)(iii).

⁸ *See Coyne*, 183 F.3d at 495 (“Significantly, the Supreme Court has recognized that ‘a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant’s acts [is] generally said to stand at too remote a distance to recover’”) (quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-69 (1992) (brackets in original)); *American Federation of Government Employees v. Clinton*, 180 F.3d 727, 731 (6th Cir. 1999) (effect of challenged action on employment prospects was speculative and therefore insufficient to establish standing).

As for plaintiffs' perfunctory allegations of "stigma" to the NEA plaintiffs allegedly resulting from schools that employ members of the plaintiffs "being labeled as failing," various courts have held that generalized allegations of stigma cannot establish an injury in fact absent allegations of a direct injury, such as the denial of equal treatment or some other concrete harm resulting from the alleged stigma.⁹ Such allegations are particularly inadequate in this case where the alleged stigma results from the truth: *i.e.*, the failure of school districts to make progress in increasing proficiency in consecutive years. Public awareness of a fact about a matter of public concern is not a "legally cognizable" injury that can provide a basis for standing. *See* H. Rep. 107-63(I), at 276 (2001) ("The intent of the No Child Left Behind Act of 2001 is to ensure that information on academic performance of Title I schools is made available to parents and the public at large.").

It is also entirely speculative for plaintiffs to assert that low student proficiency is the result of inadequate federal funding, or that the public will blame the NEA plaintiffs and their members for low proficiency. Regardless, the relief that plaintiffs seek will not result in increased funding, and low student proficiency is not "fairly traceable" to requiring states, LEAs, and schools to comply with NCLB requirements, which, of course, is what plaintiffs challenge. To the contrary, students will have the same academic skills the day after this Court's ruling as

⁹ *See Allen v. Wright*, 468 U.S. 737, 755 (1984) (no standing to challenge tax exemption granted to discriminatory private school based solely on its allegedly stigmatizing effect); *Alamo v. Clay*, 137 F.3d 1366, 1370 (D.C. Cir. 1998) (assertions of stigma are insufficient to establish an injury in fact where the plaintiffs fail to allege "any detrimental consequences" that would result from the stigma, and "[p]urely speculative or conclusory assertions of the consequences of the alleged stigma do not satisfy the Supreme Court's requirement for specific, concrete facts demonstrating a particularized injury"); *Scodari v. Alexander*, 69 F.R.D. 652, 657 (E.D.N.Y. 1976) (the purported stigma "is caused, if it exists, by independent reactions of associates of plaintiffs to decisions of plaintiffs' superiors. And indeed, those reactions are hardly inevitable, especially considering plaintiffs' opposition to those decisions and plaintiffs' lack of control over them.").

they had the day before the ruling. Moreover, plaintiffs' claims concerning inadequate federal funding will be just as convincing or unconvincing the day after a ruling as they will be the day before a ruling. All that will change in the best-case scenario for plaintiffs is that schools and LEAs would no longer be obligated to implement NCLB remedial measures designed to improve achievement, or to comply with other NCLB requirements.

The NEA plaintiffs' alleged injuries are also not redressable for various other reasons. Any declaratory judgment obtained by the NEA plaintiffs would not bind the Secretary in subsequent litigation with any school district or state and therefore would not redress plaintiffs' alleged injury.¹⁰ Moreover, because the question of whether adequate funding has been provided to states and local governments is one that is exceedingly complex and indeterminate, *see infra* at 31, the injunctive relief that plaintiffs have requested is not nearly specific enough to satisfy the requirements of Fed. R. Civ. P. 65(d). It is also pure speculation to say that school districts or states would spend any extra funds on programs that the plaintiffs' "support," even if extra funds became available.¹¹ In sum, the NEA plaintiffs' lawsuit amounts to no more than the use of a federal forum to proclaim an advocacy group's belief that states and school districts should be receiving more federal funds. Such advocacy is not an appropriate use of the federal courts under basic principles of standing.

¹⁰ *United States v. Mendoza*, 464 U.S. 154, 162 (1984) (nonmutual offensive collateral estoppel may not be asserted against the United States); *see also Hercules Carriers, Inc. v. Florida Dep't. of Transportation*, 768 F.2d 1558, 1579 (11th Cir. 1985); *United States v. AMC Entertainment, Inc.*, 232 F. Supp. 2d 1092, 1117 (C.D. Cal. 2002); *Reich v. D.C. Wiring, Inc.*, 940 F. Supp. 105, 106-07 (D.N.J. 1996) (all applying *Mendoza* to non-mutual defensive collateral estoppel).

¹¹ *Coyne*, 183 F.3d at 496 (reimbursement to state treasury would not redress alleged injury to taxpayers because it would be the state's decision as to how to use the additional funds); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. at 42-43 (denial of hospital care to indigent patients was not "fairly traceable" to the granting of a tax exemption to hospitals that provided only emergency room service because it was not clear that elimination of the exemption would result in greater services).

B. The School District Plaintiffs' Claims Are Not Justiciable

The claims of the school district plaintiffs are also not justiciable. Like the NEA plaintiffs, their claims violate the prohibition against asserting the rights of third parties by seeking relief on behalf of every state and school district in the country. Even limited to themselves, however, their claims are not justiciable because their allegations are far too conclusory to establish an injury in fact. Plaintiffs' general boilerplate statements, Compl. ¶¶ 4-7, do not explain which requirements they will be unable to satisfy, or why they cannot satisfy those requirements with the federal funds provided. Rather than address the specific situations of the school district plaintiffs, plaintiffs primarily point to reports addressing other school districts and states from around the country. *See* Compl. ¶¶ 42-44, 52-53, 63-64, 67, 85, 88.

Further, to the extent that plaintiffs make any specific allegation concerning the financial situation of any of the plaintiff school districts, it is that certain school districts cannot make AYP without spending state or local funds. Compl. ¶ 65. This allegation cannot support standing for two reasons. As an initial matter, plaintiffs overstate the level of proficiency they will have to meet next year to avoid remedial requirements by ignoring the federal "safe harbor" provision.¹² 20 U.S.C. § 6311(b)(2)(C); *see supra* at 4. Plaintiffs' AYP allegations thus rest on a misstatement about the Act's requirements and therefore cannot support standing.

¹² The complaint incorrectly asserts that because only 41% and 16% of high school students in the Pontiac school district scored proficient on the 2003-04 language arts and mathematics tests, respectively, 52% and 44% of those students will have to be proficient next year for the school district to make AYP. Compl. ¶ 62. In fact, under the "safe harbor" provision, *see supra* at 4, Pontiac would only need to reach 45.1% and 17.6% proficiency on the language arts and mathematics assessments, respectively, to make AYP and avoid the NCLB's required remedial measures. Plaintiffs make the same error in discussing Texas' proficiency levels, Compl. ¶ 68, and never mention section 6311(b)(2)(C) in their complaint.

Moreover, even if plaintiffs had accurately described the AYP requirements, such allegations would be insufficient to establish standing. Plaintiffs' implicit assumption is that school districts or schools cannot be required, as a condition of receiving federal funds, to spend *any* non-federal funds on making AYP – *i.e.*, on increasing the proficiency of children in reading/language arts and arithmetic, which is the fundamental mission of public school districts. Because this assertion is patently meritless, *see infra* at 24-26, any allegation of injury that potentially relies on such an assumption cannot possibly provide a basis for standing.

Plaintiffs also include an extended discussion of testing requirements in their complaint, Compl. ¶¶ 33-45, even though under the Act, it is the states – none of which are parties to this lawsuit – that are responsible for developing and ensuring the administration of required assessments, and for ensuring that the results of the tests are available to LEAs before the beginning of the next school year. 20 U.S.C. §§ 6311(b)(3), 6316(a)(2). Moreover, the funds paid by the federal government to help states to develop and administer assessments are not “passed through states to school districts,” Compl. ¶ 27, but rather come from a different pool of money than the Title I authorizations that the plaintiffs reference throughout their complaint. *See, e.g.*, Compl. ¶¶ 21-26; *see* 20 U.S.C. § 7301b(a)(2). It is thus unsurprising that the section of plaintiffs' complaint discussing assessments almost exclusively addresses state, not local, costs.¹³

¹³ The only allusion to a plaintiff in this section is the statement that the Otter Valley school district “still must comply with the NCLB testing mandates,” even though it does not receive Title I funds, Compl. ¶ 45. Any responsibility Otter Valley has for testing, however, results from the fact that it is a political sub-unit of a state that has chosen to accept Title I funds and the accompanying conditions. As discussed in the text, these conditions include the state's responsibility for developing and administering tests to all public school students in the state, for which Vermont has received funds under the NCLB. Because it is Vermont's decision as to how to fund these responsibilities, the alleged injury is thus not “fairly traceable” to the requirements of the NCLB but is rather the result of the independent

(continued...)

Thus, in addition to failing more generally to plead the components of standing “with specificity” as Article III requires, *Coyne v. American Tobacco Co.*, 183 F.3d at 494, the plaintiffs make inaccurate statements that cannot be separated from their bare allegations of injury.¹⁴ When plaintiffs claim generally that they have to spend their own funds on NCLB activities, it is impossible to determine whether they are referring to: (1) non-federal funds spent to meet an AYP target that they are not required to meet, (2) non-federal funds spent on meeting basic school functions such as teaching children to read and learn math, or (3) non-federal funds spent on testing responsibilities that the state has imposed. Indeed, virtually every reference that the complaint makes to any of the plaintiff school districts in the complaint relates to the school districts having to spend non-NCLB funds in one of those three areas. Compl. ¶¶ 45, 61-62, 65, 68, 77. Under these circumstances, the school district plaintiffs have failed “clearly to allege facts demonstrating that” they are “proper part[ies] to invoke judicial resolution of the dispute and the exercise of the court’s remedial powers.” *Renne*, 501 U.S. at 316.

¹³(...continued)
action of a third party not before the Court.

¹⁴ As stated *supra*, a key component of the NCLB was permitting states and school districts to use funds reserved for other programs to meet Title I requirements. *See supra* at 6-7. States and school districts may use several billion dollars under other NCLB programs to meet Title I requirements. *See id.* The complaint, however, fails at any point to mention the enhanced flexibility afforded by the NCLB. Absent an allegation that they have taken advantage of the various funding opportunities afforded by the NCLB, the school districts cannot claim that they have been required to spend non-NCLB funds to meet NCLB requirements.

II. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(b)(6)

A. The Plain Language of Section 7907(a) Precludes Plaintiffs' Claim

The full subsection relied on by plaintiffs provides that:

Nothing in [the NCLB] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under [the NCLB].¹⁵

20 U.S.C. § 7907(a). This section prohibits federal officials from using the provisions of the NCLB to intrude upon fundamental and long-respected elements of state sovereignty: *i.e.*, state and local control over curriculum and state and local control over their budgeting and appropriations process. Section 7907(a) is thus a general provision designed to protect against expansive construction of ambiguous provisions in the ESEA, or the addition of requirements not in the statute, by the federal officials charged with implementing those provisions. Nothing in section 7907, however, excuses state and local entities from complying with the conditions for receipt of federal assistance that Congress imposed in the NCLB, nor does it relieve states and local governments of paying to improve the educational performance of their students.

Plaintiffs' misinterpretation of the provision begins with their misunderstanding of the term "mandate," as well as their disregard of other language in section 7907. By common understanding, to "mandate" is to command. The requirements of the NCLB, however, apply only to those entities who apply for and accept federal funding. They are "conditions of assistance," and not "mandates." Federal officials have thus not "mandated" that states and local school districts spend non-federal funds on federal requirements when states and school districts

¹⁵ Plaintiffs assert two causes of action, Compl. ¶¶ 92-97, but both rely on 20 U.S.C. § 7907(a).

accept those requirements in exchange for federal assistance. Nothing in section 7907 requires the Secretary to continue to fund states and local school districts that do not comply with the conditions of assistance that Congress established.

There is no doubt that Congress shared this common understanding of the term “mandate.” In the Committee Reports for the NCLB, both the Senate and the House reported the Congressional Budget Office’s (“CBO”) conclusion that the NCLB contains no intergovernmental mandates “as defined in the Unfunded Mandates Reform Act” because “[a]ny costs incurred by state, local, or tribal governments would result from complying with conditions of aid” (emphasis added). *See* H.R. Rep. 107-63(I), at 406; S. Rep. 107-7, at 57 (relying on the same CBO conclusion).¹⁶ The Unfunded Mandates Reform Act of 1995 (“UMRA”) itself excludes from the definition of the term “Federal intergovernmental mandate” “any provision in legislation, statute, or regulation that” is either “a condition of Federal assistance; or a duty arising from participation in a voluntary Federal program” other than an entitlement program such as Medicaid. 2 U.S.C. § 658(5)(A)(i)(I)-(II).¹⁷ Because the requirements at issue are conditions of assistance, they are not “unfunded mandates.” Because they are not “unfunded mandates,” they are not prohibited by what plaintiffs repeatedly refer to as “the ‘Unfunded Mandates Provision’” in section 7907(a). Compl. ¶¶ 1, 14-16.

In challenging the conditions of assistance imposed by Congress, moreover, plaintiffs also disregard the introductory words of section 7907 (“Nothing in this chapter shall be construed

¹⁶ *See also* H.R. Rep. 107-63(I) at 392 (stating that the NCLB was not an unfunded mandate because the Act only “authorizes programs of the Elementary and Secondary Education Act and provides States and school districts with increased flexibility”).

¹⁷ As discussed in the next subsection, the language at issue was first enacted as part of the Goals 2000 education legislation in 1994, just prior to enactment of the UMRA.

to authorize an officer or employee of the federal government . . .”). These words mean what they say. Section 7907(a) limits the authority of “officers or employees of the federal government.” It does not, as plaintiffs claim, limit the conditions of assistance that *Congress* imposed and that states and LEAs agreed to accept in exchange for receiving federal funding. Instead, it prohibits federal officials from adding certain requirements that Congress did *not* impose and that states and LEAs did *not* agree to accept in exchange for federal funding.¹⁸

Under plaintiffs’ interpretation of section 7907, the words “to authorize an officer or employee of the federal government” would be superfluous. Such an attempt to read words out of a statute would be unavailing under almost any circumstances. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citing the “cardinal principle of statutory construction that a statute ought, upon the whole, to be construed” in a way that would avoid rendering any provision “superfluous, void, or insignificant”) (citation and internal quotation marks omitted). It is particularly so where Congress used the introductory phrase “Nothing in this chapter shall be construed to mandate,” but without the words “to authorize an officer or employee of the federal government,” just three subsections later. *See* 20 U.S.C. § 7907(d). Congress’ use of the words in one subsection but not in another emphasizes that Congress’ inclusion of these words was deliberate and refutes plaintiffs’ attempt to deprive them of significance.

Finally, if a state or LEA determines that it must spend state money to comply with federal requirements, the federal government has not mandated that the state “spend any funds or incur any costs not paid for” under the ESEA any more than it has “mandated an LEA’s

¹⁸ As discussed in the next subsection, the concern when the provision was first enacted as part of the Goals 2000 legislation was that the federal government would impose various requirements that were not in the original legislation, in order to secure compliance with standards that the states would later develop under that statute.

curriculum” if the LEA independently concludes that it must change its curriculum to meet AYP requirements. Instead, the federal government has left the state the discretion to determine how it will satisfy the conditions that it agreed to accept in exchange for federal assistance.

B. The Legislative History of Section 7907(a) Precludes Plaintiffs’ Claim

There was no substantive discussion in the legislative history of section 7907(a) when Congress was considering the NCLB. This lack of discussion alone is a telling sign that Congress did not understand section 7907 to give states and school districts an excuse for failure to satisfy the NCLB’s conditions of assistance. *See also* section II(D), *infra* (discussing Congress’ emphasis on holding states and school districts accountable for improving the academic achievement of students).

The part of section 7907(a) on which plaintiffs rely first appeared as section 318 of the Goals 2000 education legislation, which was enacted in 1994. P.L. 103-227, 108 Stat. 125, 186 (1994). While congressional discussions that took place seven years prior to the NCLB are less relevant, the reasons why that provision was added to the 1994 legislation further confirm defendant’s understanding. In general, Goals 2000 set national goals for education improvement and provided funds to state governments to aid them in developing state standards for improving education. *Id.* at 130-133, 157-187. Congress included the language at issue in Goals 2000 against the backdrop of: (1) a general concern about unfunded mandates that culminated in the Unfunded Mandates Reform Act of 1995, discussed *supra* at 19, and (2) a specific concern that federal officials would use requirements that states develop voluntary standards as an occasion to require states to satisfy the standards that they developed, by imposing mandates that were not in the Act.

As Representative Goodling in 1993 explained in proposing a provision similar to section 7907, “there were some contradictory provisions in [Goals 2000] relating to how prescriptive the Federal Government will be in requiring States to enforce [the States’] standards.” 139 Cong. Rec. H7740-03, 7769 (daily ed. October 13, 1993) (statement of Rep. Goodling). Representative Goodling explained that he viewed this language to be merely “a clarifying amendment” that “there was no intention to create such an unfunded mandate on States.” *Id.* The 420-0 vote to approve the amendment further established its non-controversial nature. *Id.*

In 1994, Senator Gregg was similarly concerned that federal officials might use their authority under Goals 2000 to add requirements to those imposed by Congress. To ensure that “funds provided under” the legislation could not “be utilized by the Federal Government to contribute to an unfunded Federal mandate,” Senator Gregg proposed an amendment stating 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). Later that day, Senator Gregg combined the three subsections of his amendment with a prohibition on mandating state curricula into a single paragraph that corresponded more closely with the language of the House amendment; the modified amendment became the language that was used in Goals 2000, the Improving America’s Schools Act of 1994 (“IASA”), and the NCLB. *Id.* at S626. The origins of this provision thus confirm that Congress was concerned about officials requiring states to meet requirements that Congress did not impose, particularly ones affecting local control of

education.¹⁹ The provision did not reflect concern about requiring states to meet the conditions of assistance that Congress did impose.

C. Numerous Other Provisions of the NCLB Preclude Plaintiffs' Interpretation

Numerous other provisions of the NCLB foreclose plaintiffs' interpretation. *See Regions Hospital v. Shalala*, 522 U.S. 448, 460 n.5 (1998) ("stress[ing]" that in interpreting a particular provision a court should "look to the provisions of the whole law"). These provisions fall into various categories.

1. *The Conditions of Assistance Challenged by Plaintiffs and the Required Assurance Provisions Foreclose Plaintiffs' Interpretation*

Throughout the NCLB, Congress provided that states or school districts that receive federal assistance "shall" comply with the various conditions that plaintiffs challenge.²⁰ This language is unambiguous, appears throughout the statute, and is in no way contingent upon the amount of federal funding available at a particular time. *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (the "mandatory 'shall' [] normally creates an obligation impervious to judicial discretion" and the requirement that statutes be read "as a

¹⁹ Congress was concerned, for example, that the statute not be used to impose per-pupil spending requirements, class size requirements, federal teacher certification, curricular control, or national building standards. 140 Cong. Rec. S611 (daily ed. Feb. 2, 1994) (statement of Sen. Kassebaum). *See also id.* at S607, S627 (statements of Sen. Kennedy), S626 (statement of Sen. Gregg).

²⁰ For example, the statute requires that "[e]ach local educational agency receiving funds under this part *shall*" use the State assessments to evaluate schools' educational progress. 20 U.S.C. § 6316(a)(1) (emphasis added). For LEAs with schools identified for improvement, 20 U.S.C. § 6316(b)(5)(A)-(B) provides that LEAs "*shall* continue to provide all students enrolled in the school the option to transfer to another public school served by the local educational agency in accordance with" section 6316(b)(1)(E) and (F) and "*shall* make supplemental educational services available consistent with" section 6316(e)(1). For each school subject to corrective action, the LEA "*shall* . . . identify the school for corrective action and take at least one of" six actions prescribed by the statute. 20 U.S.C. § 6316(b)(7)(C)(iv) (emphasis added). These requirements only apply to those LEAs that elect to take Title I funds. 20 U.S.C. § 6316(a)(1).

whole” requires “giv[ing] effect to this plain command”). As such, it directly contradicts plaintiffs’ attempt to qualify each one of these provisions with an amorphous full federal funding requirement. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378, 384-85 (1992) (holding that “it is a commonplace of statutory construction that the specific governs the general” and that a specific statutory preemption provision trumped a general savings clause that began “[n]othing in this chapter shall . . .”); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 348 (1998) (more specific provisions of a treaty governed the terms of a general savings clause). One would expect, moreover, that there would be references to section 7907(a) elsewhere in the statute if it had the sweeping effect that plaintiffs claim it to have. There are none.

In addition, Congress required states and school districts, prior to receiving any funds under the NCLB, to provide assurances that they will meet the NCLB’s requirements, including the requirements discussed in plaintiffs’ complaint. Both states and LEAs must assure that “each program will be administered in accordance with all applicable statutes, regulations, program plans, and applications.” 20 U.S.C. §§ 7844(a)(1), 7846(a)(1). In addition, states and LEAs must assure that they will implement specific NCLB requirements that plaintiffs now challenge. 20 U.S.C. §§ 6311(c); 6312(c). For example, an LEA may receive a subgrant under Title I only if it submits a plan that “provide[s] assurances that” the LEA “will fulfill such agency’s school improvement responsibilities under section 6316,” including implementing corrective action and restructuring remedies. 20 U.S.C. § 6312(c)(1)(D). As this language demonstrates, the required assurance is absolute; an LEA may not satisfy the requirement by stating that it will meet the conditions, but only if it does not have to spend local funds to do so.

The required assurance provisions further demonstrate that states and LEAs may not rely on an “inadequate funding” excuse to evade NCLB requirements. Congress would not have required states to provide an unqualified assurance that it would satisfy the statutory requirements unless Congress believed that the requirements themselves were unqualified. Put another way, the plaintiff school districts could never have received any funds under the statute if they said three years ago what they are currently saying in their complaint. The NCLB requirements are conditions of assistance, not options that states and LEAs may disregard based on the amount of their federal grant.

2. *Provisions that Specifically Require the Spending of State and Local Funds as a Condition of Receiving Federal Funds Foreclose Plaintiffs’ Interpretation*

Other provisions in the statute expressly require the use of state and local funds as a condition of receiving federal assistance, and provide that federal funds are only meant to supplement state efforts. Section 6321(b)(1), for example, provides that:

A State educational agency or local educational agency shall use Federal funds received under [Title I, Part A] only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part [*i.e.*, Title I, Part A], and not to supplant such funds.

See also 20 U.S.C. § 6321(a) (an LEA may receive Title I, Part A funds “only if the State educational agency involved finds that the local educational agency has maintained the agency’s fiscal effort in accordance with” 20 U.S.C. § 7901); 20 U.S.C. §§ 6613(f), 6623(b) (funds received by states and LEAs for improving teacher quality under Title II of the ESEA “shall be used to supplement, and not supplant, non-Federal funds that would otherwise be used for” such

activities).²¹ *See also* 20 U.S.C. § 6314(a)(2)(B) (providing that schools participating in a “schoolwide program” “shall use funds available to carry out this section only to supplement the amount of funds that would, in the absence of funds under this part, be made available from non-Federal sources for the school . . .”). Such provisions appear throughout the NCLB.

Various other provisions in the NCLB, moreover, require state grant applicants to match the federal grant amount with state and local funds as a condition of receiving federal funds for a particular program. *See, e.g.*, 20 U.S.C. § 6381a(c)(5) (requiring states to match the amount of the federal grant for Even Start family literacy programs). By requiring states to spend state funds to obtain federal funds, such provisions provide another refutation of plaintiffs’ view that states or LEAs may not be required to spend state or local funds to receive federal funds. Thus, far from absolving states and LEAs of federal conditions of assistance if they would have to use state or local funds to comply, Congress in many instances specifically *required* states and LEAs to use state and local funds. These provisions confirm the untenableness of plaintiffs’ position.

Even without these provisions, it would be nonsensical to assert, for example, that LEAs do not have to meet AYP if doing so would require the expenditure of non-federal funds. *See* Compl. ¶¶ 55-70 (addressing AYP requirements). Plaintiffs lament that “every state that has made” an estimate of the cost of making AYP “has correctly concluded that it will cost far more than the federal government is now providing states to comply with the NCLB’s AYP mandates.” Compl. ¶ 70. Plaintiffs forget that making AYP is synonymous with helping

²¹ Section 6337(b)(1)(A)(ii), moreover, separately provides that the size of a state’s federal education finance incentive grant increases in proportion to the state’s educational contribution. All other things being equal, states that spend more receive more from the federal government. This provision also contradicts plaintiffs’ view that the Secretary may not condition assistance on the State spending its own funds.

children to become proficient in reading/language arts and mathematics – *i.e.*, the core functions of education. Even if what plaintiffs assert to be the federal share of education funding doubled, the state and local share would still be well over 80 percent. *See* Compl. ¶ 26. *See also* S. Rep. 107-7 at 3 (the “Federal Government provides only a small fraction of overall funding for elementary and secondary education in the United States.”). No reasonable person could believe that Congress intended federal funds to cover the entire cost of teaching children these subjects, yet plaintiffs’ asserted interpretation of section 7907 would dictate this precise result. Similarly, plaintiffs complain about the NCLB teacher-qualification requirements, but again could not seriously contend that Congress provided that the federal government would pay the full cost of ensuring that teachers are highly qualified. Compl. ¶¶ 81-86.

3. *Provisions That Specifically Require States and School Districts to Meet Particular Requirements Even Where Federal Funding Falls Below a Particular Level Foreclose Plaintiffs’ Interpretation*

Other provisions of the NCLB require states to meet particular requirements regardless of the level of federal funding. For example, while plaintiffs complain about the costs of developing and administering NCLB assessments, Compl. ¶¶ 40-45, section 6311(b)(3)(D) provides:

A State may defer the commencement, or suspend the administration, but not cease the development, of the assessments described in this paragraph, that were not required prior to January 8, 2002, for 1 year for each year for which the amount appropriated for grants under section 7301b(a)(2) of [the NCLB] is less than [amounts prescribed in section 6311(b)(3)(D)(i)-(iv)].

This provision precludes plaintiffs’ interpretation of section 7907(a) in several different ways. As an initial matter, the annual appropriation for testing never fell below the amounts set forth in the section. *See supra* at 6. Under these circumstances, the statute unambiguously requires the states both to develop and administer the tests as set forth in 20 U.S.C. § 6311(b)(3), regardless

of whether the amounts were “enough” to pay the full costs of developing and administering the tests. This section, moreover, provides that states may “not cease the development of the assessments,” even if funding falls below the specified levels, and further provides that states may only defer or suspend administration for a limited period regardless of the amount of funding available. Congress thus specifically required states to meet the testing requirements regardless of available funds.

More generally, this provision demonstrates that when Congress intended to connect a requirement to available federal funding, it did so explicitly. *See also, e.g.*, 20 U.S.C. § 6311(c)(2) (requiring states to participate in biennial state assessments under the National Assessment of Educational Progress “if the Secretary pays the costs of administering such assessments”) (emphasis added). Its failure to do so with respect to most of the requirements that are the subject of plaintiffs’ complaint demonstrates that it did not intend to limit those requirements in the same way. *See Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2754 n.9 (2004) (request that the Court read a phrase appearing in one section of a statute into another section “runs afoul of the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meaning were intended”) (citation and internal quotation marks omitted). Plaintiffs’ interpretation would also render such limitations superfluous in violation of the “cardinal principle of statutory construction” that a statute ought to be construed to avoid rendering any provision superfluous. *TRW, Inc. v. Andrews*, 534 U.S. at 31.

4. *Various Other Provisions of the NCLB Foreclose Plaintiffs’ Interpretation*

Other provisions of the NCLB demonstrate that plaintiffs’ interpretation of section 7907(a) is incorrect. Plaintiffs, for example, rely heavily in their complaint on the fact that the

level of funds appropriated under Title I, Part A of the NCLB falls short of the levels authorized; however, they point to nothing in the statute providing that states and school districts would not have to comply with federal requirements if the amount appropriated fell short of these authorized amounts. Compl. ¶¶ 21-31. Instead, Congress specifically contemplated that Title I appropriated amounts might be less than the amount authorized and so provided for ratable reductions in those amounts with no suggestion that such reductions would detract from the obligation of states and school districts to comply with the conditions of assistance. 20 U.S.C. § 6332(b)(1), (d)(1). Moreover, as discussed in the previous section, Congress unambiguously required states to develop and administer tests so long as funding for testing exceeded a particular amount – an amount that was less than the amount of testing funding that Congress authorized. *Compare* 20 U.S.C. § 6311(b)(3)(D) with § 7301b.

Further, beyond the fact that plaintiffs' position would thwart the entire purpose of the NCLB, *see* section II(D), *infra*, the interaction between plaintiffs' interpretation of section 7907 and other provisions of the Act would produce absurd results that Congress could not have intended. *See Clinton v. New York*, 524 U.S. 417, 429 (1998) (rejecting a proposed interpretation that would have produced such a result). For example, under section 6311(g)(1)-(2), the Secretary may withhold the administrative funds of any State that fails to meet the requirements of section 6311, and *must* withhold the administrative funds of any State that fails to meet deadlines imposed under the IASA. Such a state would obviously have to use non-federal funds to satisfy the administrative costs of complying with the NCLB, but, under plaintiffs' view, could not be expected to use state funds to pay such administrative costs. Plaintiffs' initial failure to meet deadlines in the IASA or section 6311 would thus have the perverse effect of freeing the state of all NCLB obligations.

D. Plaintiffs' Interpretation Is Inconsistent With the Purpose of the NCLB

The NCLB's purpose and its legislative history further demonstrate the error of plaintiffs' position. *See Regions Hospital v. Shalala*, 522 U.S. at 460 n.5 (1998) ("stress[ing]" that in interpreting a particular provision, a court should look to "the provisions of the whole law, and to its object and policy") (citation and internal quotation marks omitted). According to the NCLB "Statement of Purpose," Congress' central strategy for ensuring that all students had the opportunity to obtain a high-quality education was to "measur[e] progress against common expectations for student academic achievement" and "hold[] schools, local educational agencies, and States accountable for improving the academic achievement of all students" 20 U.S.C. § 6301(1), (4). The NCLB "provid[es] greater decisionmaking authority and flexibility to schools and teachers in exchange for greater responsibility for student performance." 20 U.S.C. § 6301(7). *See also* 20 U.S.C. § 6601(1)-(2). The legislative history of the NCLB reinforces this emphasis on accountability. For example, the House Committee Report for the NCLB provides that the "centerpiece" of the NCLB "is academic accountability," and that the NCLB "holds States, [LEAs], and schools accountable for ensuring that all students, including disadvantaged students, meet high academic standards." H.R. Rep. 107-63(I) at 281.²²

²² In addition, the Senate Committee Report stated that the NCLB "will demand greater accountability for student performance, focus Federal support on a few key priorities, provide more flexibility, and require real consequences and wider choices when schools fail our children." S. Rep. 107-7 at 2. President Bush's remarks on signing the bill explain that the NCLB "contains some very important principles that will help guide our public school system for the next decades" and that the "[f]irst principle is accountability." Statement By President George W. Bush Upon Signing H.R. 1 [*i.e.*, the NCLB], 2002 U.S.C.C.A.N. 1614, 1616 (2002). In the 2004 reauthorization of the Individuals with Disabilities Education Act, Congress again emphasized the central importance of accountability to the NCLB, noting that the reauthorization "carefully aligns the IDEA with the accountability system established under NCLB to ensure that there is one unified system of accountability for States, local educational agencies, and schools." S. Rep. 108-185, at 17-18 (2003), available at 2003 WL 22536141.

At the same time, nothing in the legislative history suggests that Congress believed that states and school districts could accept federal funds while refusing, whatever the reason, to comply with the conditions of assistance. Rather, as indicated *supra* at 19, both the House and Senate Committee Reports provide that the NCLB is not an “unfunded mandate” because any “costs incurred by state, local, or tribal governments would result from complying with conditions of aid.” The Senate Report, moreover, emphasized that “the Federal Government must insist that, *whatever the level of its investment in education*, it must receive the highest return possible in the currency of well-educated children” S. Rep. 107-7 at 4 (emphasis added).

This history makes clear that plaintiffs’ interpretation could not possibly be correct. Congress did not carefully construct this edifice of accountability while, at the same time, providing the wrecking ball for its destruction. Under plaintiffs’ interpretation, states and school districts could always excuse a failure to comply with a condition of assistance by asserting that they had not been provided with sufficient funds to do the job. Plaintiffs’ interpretation is inconceivable because it is the opposite of accountability.

Any attempt by plaintiffs to limit the ambit of their claim to situations where states and school districts have spent their money wisely or efficiently would, in addition to reading still more words into the statute, continue to conflict with the legislative history and purpose of the Act. Each time the Secretary wished to enforce a requirement against a non-complying recipient, the recipient could claim it had not received sufficient funding, and the Secretary would have to factor in the costs of an expensive, complicated, and ultimately uncertain proceeding addressing whether “enough” funding had been provided.

Such a limitation would also transfer state and local discretion and flexibility as to the best way to educate their students to administrative law judges and federal courts and thereby allow federal evaluation of state educational standards and methods in through the back door. That back door, moreover, leads into fora that are, to put it mildly, ill-suited for resolving immensely complicated and inherently policy-oriented disputes over education funding that have engaged educational policy experts for decades.

CONCLUSION

For the foregoing reasons, this action must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

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CERTIFICATION OF SERVICE

I hereby certify that on June 29, 2005, I electronically filed the foregoing documents with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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I further certify that I have mailed by U.S. mail the documents to the following non-ECF participants:

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