

CASE NO. 05-2708

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IN THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PONTIAC SCHOOL DISTRICT, et al.,

Plaintiffs-Appellants,

v.

SECRETARY OF THE UNITED STATES  
DEPARTMENT OF EDUCATION,

Defendant-Appellee.

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On Appeal from the United States District Court  
For the Eastern District of Michigan  
(Honorable Judge Friedman)

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AMICUS BRIEF OF THE AMERICAN ASSOCIATION OF SCHOOL  
ADMINISTRATORS IN SUPPORT OF REVERSAL

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## **Interest of Amicus Curiae**

This brief amicus curiae is submitted on behalf of the American Association of School Administrators (“AASA”), a nationwide organization that represents over 13,000 public school administrators. The AASA and its members, who include public school superintendents throughout the country, are strongly committed to ensuring that our public schools provide children with the best education possible. Amici file this brief to provide the Court with the relevant context and everyday consequences of the federal government’s decision not to abide by its commitment to fully fund the No Child Left Behind Act (“NCLB”) and instead to require states and school districts to fill the ever-widening gap between the funds the federal government promised to states and school districts to implement the NCLB and the funds the federal government actually has delivered for that purpose.

All parties to this appeal have consented to the filing of this brief.

## **Argument**

The issue before this Court is the meaning of Section 9527(a) of the NCLB, 20 U.S.C. § 7907(a). Amici agree with appellants that the Section imposes a broad prohibition against requiring states or school districts to spend their own funds for NCLB compliance, including compliance with requirements that are imposed by

the NCLB itself. Amici do not write, however, to reiterate the basic principles of statutory interpretation that compel that conclusion. Rather Amici write to respond to an argument made by the defendant Secretary of Education (“Secretary”) in the district court (and noted with apparent approval in the decision of that court), and that Amici anticipate the Secretary may make in this Court as well.

Under the heading “Plaintiffs’ Interpretation [of Section 9527(a)] Is Inconsistent With the Purpose of the NCLB” in Defendant’s Memorandum in Support of its Motion to Dismiss, R. 7, pg. 30 (“Def. Mem.”), the Secretary argued that Section 9527(a) could not possibly mean what appellants say it means, because if states and school districts were obligated to comply with the mandates of the NCLB only to the extent that they received sufficient federal funds to do so, this could prevent full implementation of the NCLB, and in turn could undermine the statutory purpose of “improving the academic achievement of all students . . . .” 20 U.S.C. § 6310(4).

Amici disagree. As appellants explained in their complaint, in the NCLB Congress imposed extensive and costly new mandates on states and school districts in exchange for significant new federal funding to carry out those mandates. See R.1, Compl. ¶¶ 22-23. At the same time, Congress recognized that the primary responsibility for setting educational policy and for establishing educational programs and priorities resides with states and school districts. In this context, it

was eminently reasonable for Congress to conclude that the ability of states and school districts to pursue educational programs and priorities that they believe will best further the education of their students should not be dependent on whether Congress carries through with its commitment to fully fund the new NCLB mandates. That is to say, Congress did not expect states and school districts to divert their resources to NCLB compliance, thereby cutting back on their own educational programs and priorities, every time that a gap developed between the funds required to comply with the NCLB and the funds provided by the federal government for that purpose. As we demonstrate below, appellants' construction of Section 9527(a) – pursuant to which states and school districts cannot be required “to spend any funds or incur any costs not paid for under this Act” – reflects a balanced approach to the implementation of the NCLB, under which state and school district educational programs and priorities are not held hostage to the vagaries of the Congressional appropriations process.

**I. The Federal Government's Failure to Fully Fund the NCLB, Combined with the Secretary's Insistence that States and School Districts Fill the Funding Gap with their Own Resources, Has Had Significant Negative Consequences on the Ability of States and School Districts to Sustain and Maintain Their Educational Programs and Priorities**

**A. The Extent of the Federal NCLB Funding Shortfall**

To enable states and school districts to comply with the extensive and costly new mandates imposed upon them by the NCLB, Congress included in the NCLB

specific funding authorization levels for the NCLB’s various programs that were substantially higher than for the prior versions of the Elementary and Secondary Education Act (“ESEA”), of which the NCLB is the latest reenactment.

Specifically, to provide states and school districts with the funds necessary to comply with Title I of the NCLB (which is the NCLB Title that imposes the most significant mandates on states and school districts), Congress authorized the appropriation of \$116.25 billion dollars over the course of the first six years of the program, from fiscal year (“FY”) 2002 through FY 2007, with the authorized amounts steadily increasing from \$13.5 billion in FY 2002 to \$25 billion in FY 2007, to correspond to the increasing number and cost of the NCLB mandates during that period. 20 U.S.C. § 6302(a)(1) –(6).<sup>1</sup>

In the six years since the NCLB was enacted, however, Congress has appropriated (for FY 2002-2006) and the President has proposed (for FY 2007),

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<sup>1</sup> Many of the NCLB mandates were backloaded, to take full effect only in the out years of the program. For example, when the NCLB was first enacted, school districts were required to annually administer six standardized tests – math and reading/language arts tests to students in each of three different grade ranges (3-5, 6-9, and 10-12). 20 U.S.C. § 6311(b)(3)(C). But the NCLB now requires school districts to annually administer fourteen standardized tests – math and reading/language arts tests to students in every grade from 3-8 and, once more, to students while they are in grade range 10-12. *Id.* In the 2007-08 school year, the testing requirements will expand once more with the addition of mandatory testing in science for students in each of three different grade ranges (3-5, 6-9, and 10-12). *Id.*

an aggregate total of only \$72.547 billion for those purposes, leaving states and school districts with a funding gap of at least \$43.703 billion to fill.<sup>2</sup> Moreover, the amount of the funding gap has steadily grown from fiscal year to fiscal year, as the NCLB mandates have become increasingly more extensive and expensive.<sup>3</sup> Indeed, in the current school year, more than two-thirds of school districts in the country are receiving less in NCLB Title I funds than they previously did.<sup>4</sup> Over the next few years, the situation is expected to deteriorate further: twenty-eight states and nearly two-thirds of school districts nationwide are receiving less Title I monies for FY 06 than they received during FY 05, and forty-one states are slated

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<sup>2</sup> As we explain *infra* at 6-8, there is a growing body of evidence that even appropriations at the authorized levels would be insufficient to fully fund the NCLB mandates.

<sup>3</sup> The amounts authorized and appropriated for NCLB Title I for each fiscal year from 2002 through 2006 are set forth below, with the resulting shortfall for each year noted as well. For FY 2007, the chart shows the amount that President Bush has requested for Title I NCLB funding in his budget proposal and calculates the resulting shortfall in Title I funding on the assumption that Congress will appropriate the amount that the President has requested.

	FY 02	FY 03	FY 04	FY 05	FY 06	FY 07	Total
Authorization	13,500	16,000	18,500	20,500	22,750	25,000	116,250
Appropriation	10,350	11,689	12,342	12,740	12,713	12,713*	72,547
Shortfall	3,150	4,311	6,158	7,760	10,037	12,287	43,703

\* President's proposed funding level.

<sup>4</sup> Center on Education Policy, [Title I Funds – Who's Gaining and Who's Losing School Year 2005-06 Update](http://www.cepdc.org/pubs/TitleI_Funds_6July2005/Title_I_Funds_6July2005.pdf), pg. 1 (July 2005) (available at [http://www.cepdc.org/pubs/TitleI\\_Funds\\_6July2005/Title\\_I\\_Funds\\_6July2005.pdf](http://www.cepdc.org/pubs/TitleI_Funds_6July2005/Title_I_Funds_6July2005.pdf)).

to receive less Title I monies under the President's proposed budget for FY 07 than they did in prior years. This deterioration reflects the reality that instead of increasing appropriations for NCLB compliance each year as promised when the NCLB was enacted, Congress actually cut NCLB funding in FY 06 and is currently considering flatlining NCLB funding for FY 07 at the same level as FY 06.<sup>5</sup>

The fact that federal funds provided to states and school districts to comply with the NCLB are declining at the same time that the NCLB mandates are becoming more extensive and expensive indicates, in and of itself, that the funds provided by the federal government for NCLB compliance are insufficient. And, a mounting body of empirical evidence confirms that that is the case. Since the NCLB was enacted, no fewer than fifteen studies have been completed of whether states are receiving sufficient funding under the NCLB to comply with the new administrative mandates of the Act, and all but three of those studies have found that the funding provided by the federal government falls significantly below the amount needed to comply even with just the state-level administrative

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<sup>5</sup> See Center on Education Policy, From the Capital to the Classroom Year 4 of the NCLB, pg. 14 (March 28, 2006) ("CEP Year 4") (available at <http://www.cep-dc.org/nclb/Year4/Press/>).

requirements of the NCLB.<sup>6</sup> Bearing in mind that the state level administrative compliance costs are only a small part of the total NCLB administrative compliance costs, because the vast majority of those costs fall on school districts not states,<sup>7</sup> and that NCLB compliance costs are by no means confined to

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<sup>6</sup> See William J. Mathis, The Cost of Implementing the Federal No Child Left Behind Act: Different Assumptions, Different Answers, Vol. 80(2) Peabody Journal of Education pgs. 90-119 at pg. 99 (2005) (summarizing results of thirteen different state level studies of NCLB administrative costs and noting just three in which federal appropriations were found to be sufficient to cover state level administrative costs – an early Minnesota study finding that state had just enough funds to cover those administrative costs and two early business group studies finding federal funding to be sufficient). Since the Mathis article was published, two more state level studies have been completed. A New Mexico study documented state level administrative compliance costs that exceeded by “\$26 million . . . what New Mexico received in federal funding . . . for the 2004-05 school year.” New Mexico Public Education Department, PED Releases New Mexico Cost Study; \$26 Million Gap in Federal Funding for NCLB in '04-'05, pg. 1 (“NM PED Release”) (May 24, 2005) (available at <http://www.ped.state.nm.us/press/2005/may/05.24.05.html>). A Virginia study found that the state level NCLB administrative compliance costs will be covered by available federal funding only if that funding increases by 3% annually – which it is not projected to do. See CEP Year 4, pg. 17. See also supra at 5.

<sup>7</sup> For example, a recent study of both state and school district NCLB administrative compliance costs in New Mexico found that fully 89% of such costs fell on school districts rather than the state. Augenblick, Palaich & Associates, Inc., The Cost of Fulfilling the Approved Procedural Requirements of the No Child Left Behind Act in New Mexico, pg. 23 (May 2005) (“Augenblick New Mexico Study”) (available at [www.cep-dc.org/pubs/Forum14July2005/PalaichPaper.pdf](http://www.cep-dc.org/pubs/Forum14July2005/PalaichPaper.pdf)).

Studies of school district NCLB administrative compliance costs also uniformly have found the NCLB mandates to be substantially underfunded. The Connecticut Department of Education has reported that the district-level administrative compliance costs through FY 08 in three different school districts far outstrip available federal funding – by \$10.1 million for New Haven, an urban district; by

administrative costs, but also include the very considerable costs of complying with the NCLB mandate of bringing students up to federally mandated levels of proficiency by the 2013-14 school year, it is clear that current federal funding covers but a fraction of what it has and will cost states and school districts to comply with the new NCLB mandates.<sup>8</sup>

## **B. The Educational Consequences of the Federal NCLB Funding Shortfall**

1. Under the Secretary's construction of Section 9527(a) – namely, that states and school districts must fully comply with all of the NCLB mandates no matter how inadequate the federal funds they receive to pay for such compliance may be – the consequence of the shortfall in federal NCLB funding

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\$8.7 million for Hamden, a suburban district; and by \$3.8 million for Killingly, a rural district. CEP Year 4, pg. 16. Similarly, the New Mexico Public Education Department reported that the costs of NCLB administrative compliance for four different school districts (as found in the Augenblick New Mexico Study) also exceeded available federal funding – by as much as \$11.5 million for the Albuquerque Public Schools and \$4 million for the Gallup Public Schools. NM PED Release, pg. 2. In light of these findings, it is not surprising that a recent nationwide survey found a full 80% of school districts reporting that “they had costs for NCLB that were not covered by federal funds, such as costs for administering assessments, managing data, and providing professional development to help teachers meet the law’s requirements.” CEP Year 4, pgs. 1, 19.

<sup>8</sup> Mathis, for example, has estimated that to comply with both the NCLB administrative mandates and the proficiency mandates would require \$144.5 billion in federal funds annually – over 11 times more than the federal government is now providing for Title I. See Mathis, supra pg. 114.

necessarily has been to force states and school districts to divert resources from existing state and school district educational programs and priorities that they believe would be more helpful to their students, and that they would have continued to pursue but for the need to comply with the unfunded NCLB mandates.

In the initial years of the NCLB's implementation, this was most evident in regard to testing. Many states and school districts modified or abandoned their pre-existing testing regimes – which often were fuller and more comprehensive than the testing program mandated by the NCLB – because they lacked the resources necessary to maintain two separate testing regimes and/or could not sustain the pre-existing testing regimes on the scale mandated by the NCLB, see infra n. 28, given the minimal federal funding provided.<sup>9</sup> Other states and school

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<sup>9</sup> See Education Sector Reports, Margins of Error: The Education Testing Industry in the No Child Left Behind Era, pg. 17 (Mar. 2006) (“Margins of Error”) (available at [http://www.educationsector.org/usr\\_doc/Margins\\_of\\_Error.pdf](http://www.educationsector.org/usr_doc/Margins_of_Error.pdf)) (reporting that to comply with the NCLB both Mississippi and Kansas eliminated non-multiple choice questions from their state tests in 2005-06 and that many states which had “use[d] . . . testing to drive improvements in other subject areas,” such as social studies, found it necessary to “cut[ ] back” in order to divert resources to the testing required by the NCLB – such that today, only 19 states test students in social studies, whereas 27 states were doing so prior to the NCLB's enactment). See also Office of the Minnesota Legislative Auditor, Evaluation Report - No Child Left Behind, pg. 65 (March 2004) (available at <http://www.auditor.leg.state.mn.us/Ped/2004/pe0404.html>) (reporting that over 90% of Minnesota school districts had been administering other standardized tests when the NCLB was enacted, that 64% of superintendents either had dropped or

districts shelved plans for improving their pre-existing testing regimes.

Connecticut, for example, chose not to expand and strengthen its testing of students in grades 4, 6, 8 and 10 because of the need to devote its funds to developing and administering the standardized tests in grades 3, 5 and 7 that the NCLB mandates, but for which the federal government has not fully paid.<sup>10</sup>

Illinois reportedly abandoned plans to develop assessments for students on all of the Illinois learning standards, finding it necessary to proceed solely with the NCLB mandated tests rather than with the richer assessments in writing, social studies, arts, health and physical development that had been under consideration.<sup>11</sup>

And, Maryland stopped testing students in writing, science, and social studies,

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would drop “at least some of their non-NCLB tests as a direct result of the NCLB,” and that the majority of those districts did not believe the NCLB tests would provide teachers with the information needed regarding the “specific academic needs of individual students”); Margaret E. Goertz, Implementing the No Child Left Behind Act: Challenges for the States, Vol. 80(2) Peabody Journal of Education pgs. 73-89 at pg. 75 (reporting that states have found the “needed funds [to comply with NCLB testing mandates] by eliminating tests in science (at least temporarily), social studies, and other subjects not covered by the NCLB.”).

<sup>10</sup> See Connecticut State Department of Education, Cost of Implementing the Federal No Child Left Behind Act in Connecticut – State-Level Costs Part I, pg. 2 (March 2, 2005) (“Connecticut Study of State Costs”) (available at [http://www.state.ct.us/sde/NCLB\\_Study\\_2\\_28\\_05.pdf](http://www.state.ct.us/sde/NCLB_Study_2_28_05.pdf)).

<sup>11</sup> Public Education Network, Open to the Public – Speaking Out on “No Child Left Behind”, pg. 23 (2004) (“PEN Report”) (available at [www.publiceducation.org/portals/nclb/hearings/national/Open\\_to\\_the\\_Public.asp](http://www.publiceducation.org/portals/nclb/hearings/national/Open_to_the_Public.asp)) (reporting testimony at one of the nine different hearings the Public Education Network held on the NCLB in 2004).

limiting its assessments solely to the reading and math tests currently required by the NCLB.<sup>12</sup>

The cutbacks in testing subjects not covered by the NCLB inevitably have resulted in cutbacks in instruction in those subjects – illustrating the truth of the adage that what you get in education is what you assess. Throughout the country, elimination of tests in non-NCLB subjects has resulted in the elimination or reduction of classes in such subjects, including social studies, music, physical education, art and others. A recent nationwide survey of school districts found that to comply with the NCLB mandates, 71% of districts had reduced hours of instruction in elementary school on non-NCLB subjects, “systematically trimming courses like social studies, science and art” from the curriculum, and significant percentages of school districts reported similar reductions in their middle and high schools.<sup>13</sup>

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<sup>12</sup> See Council for Basic Education, Academic Atrophy – The condition of the Liberal Arts in America’s Public Schools, pg. 21 (March 2004) (“Academic Atrophy Report”) (available at <http://www.esc.org.html/Document.asp?chouseid=5058>).

<sup>13</sup> Sam Dillon, Schools Cut Back Subjects to Push Reading & Math – Responding to the NCLB Thousands Narrow the Curriculum, N.Y. Times, Mar. 26, 2006, A1 (reporting on results of nationwide school district survey reported in CEP Year 4). See also CEP Year 4, pgs. vii, 10, 89, 95-99 (reporting at page 10 that “[s]everal survey and case study participants cited negative effects of NCLB . . . on curriculum . . . includ[ing] a loss of time for subjects like music and social [studies] and creative classroom activities; excessive time required for testing;

These cutbacks obviously do not reflect a changed judgment by state and school districts that there is no educational value to a well-rounded curriculum. Instead they reflect the fact that, given the Secretary's position as to the meaning of Section 9527(a), public education administrators have had no choice but to comply with the unfunded NCLB mandates by diverting funding from critical state and school district educational programs and priorities – despite the reality that an educational system that is reduced to preparing students only to take a single set of tests serves no one, least of all the students most in need of assistance. In the students' own words, such a system, placing “extreme emphasis on preparing for a single test,” “skew[s] the curriculum and use of time inside schools,” “creating cynicism among students” and “further alienating them.”<sup>14</sup>

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diminished attention to the highest achieving students; and a narrowing of curriculum content and skills”). See also Academic Atrophy Report, pgs. 16-17 (reporting that 25% of principals in the four states surveyed reported decreases in instructional time for the arts, that 36% of principals in schools with a high percentage of minority students reported such decreases, that 23% of principals in such schools reported decreases in instructional time for foreign languages, and that even higher percentages of all the principals surveyed anticipated greater cutbacks in all of these areas in the future).

<sup>14</sup> Public Education Network, Open to the Public – Students Speak Out on “No Child Left Behind” pg. 3 (2004) (“PEN Students Speak Report”) (available at <http://www.publiceducation.org/pdf/nclb/StudentVoices.pdf>) (summarizing testimony by students at 9 different state hearings on the NCLB sponsored by PEN).

Enrichment programs outside the scope of the NCLB mandates also have suffered due to the need to divert funds to NCLB compliance, with programs for gifted students, such as advanced placement classes, taking a particularly heavy hit. “At almost every [one of nine different public] hearing[s] [held by the Public Education Network in 2004], parents or advocates testified about the loss of enrichment or other supports for gifted children.”<sup>15</sup> Student services also have been compromised: many school districts have been forced to devote the time of non-instructional specialists, such as guidance counselors, librarians, and social workers, to administering the NCLB mandated tests and/or have had to reduce the number of such specialists in order to muster the resources necessary to attempt to comply with the unfunded NCLB mandates.<sup>16</sup> Extracurricular activities likewise have been cut as a result of the NCLB’s unfunded mandates.<sup>17</sup>

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<sup>15</sup> PEN Report, pg. 24. See also id., pg. 4; PEN Students Speak Report, pg. 8; Daniel Golden, Initiative to Leave No Child Behind Leaves Out Gifted – Educators Divert Resources from Classes for Smartest to Focus on Basic Literacy, Wall Street Journal, Dec. 29, 2003, A1 (reporting that funding for gifted programs has been significantly cut in Illinois, California and Connecticut, and that “[o]fficials and advocates for the gifted in all of these places cite the [NCLB] as causing or at least contributing to the cutbacks”).

<sup>16</sup> See, e.g., NEA, Stories from the Field – Cuts Leave More and More Public School Children Behind (Dec. 2003/ Jan. 2004) (available at <http://www.nea.org/esea/storiesfromthefield.html>) (reporting that in the 2003-04 school year the Yonkers School District in New York planned to cut 41 guidance counselors, 28 librarians and 30 social workers, on top of eliminating all athletic, visual arts, vocal and instrumental programs, in order to generate additional funds

In sum, the Secretary's insistence that states and school districts fully comply with the NCLB mandates no matter how far short federal funding falls from covering the costs of doing so, has forced states and school districts to divert funds away from other educational programs and priorities that, in their professional judgment, are essential to a sound educational system.<sup>18</sup>

2. The effect of this development has not simply been to frustrate one type of education reform (i.e., state and local initiatives to improve education) in order to achieve another type of education reform (i.e., the NCLB regime). The

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for NCLB test preparation, and reporting similar cutbacks in school districts throughout the country); WEAC, Wisconsin Stories – How the ESEA is Endangering Wisconsin's Great Schools, pgs. 17, 21 (statements by school language pathologists and school counselor regarding the damage done to their regular direct student assistance work due to the time they must devote to administering NCLB mandated tests).

<sup>17</sup> Connecticut Voices for Children, Early Changes, Enduring Challenges: Connecticut Educators Speak Out About the Impact of the No Child Left Behind Act, pgs. 38-39 (Oct. 2004)(“Connecticut Educators Survey”)(available at <http://www.ctkidslink.org/publications/educ04nclb10.pdf>) (reporting that a “majority of principals (60%) reported that the [NCLB] has diverted funds from extracurricular activities such as music, drama, athletics and clubs.”).

<sup>18</sup> See, e.g., Connecticut State Department of Education, Cost of Implementing the Federal No Child Left Behind Act in Connecticut – Local-Level Costs Part II, pg. 15 (April 6, 2005) (available at [www.schoolfunding.info/policy/CostingOut/ct%20nclb%20cost%20study-%20local.pdf](http://www.schoolfunding.info/policy/CostingOut/ct%20nclb%20cost%20study-%20local.pdf)) (reporting that the unfunded NCLB mandates have placed “a substantial drain on local resources that could otherwise be directed to programs which local districts have determined are most helpful to their students,” and have required the state to expend funds on fulfilling unfunded NCLB mandates where those funds “would be much better spent on programs (such as preschool for disadvantaged 3- and 4-year-olds) that have been proven to improve student achievement”).

shortfall in federal NCLB funding has been so great that, even with the diversion of their own funds, many states and school districts still have been unable to properly comply with all of the mandates of the NCLB. As a result, it often has been the case that the diversion of state and school district funds has not simply failed to produce anything of consequence in terms of education reform, but actually has served to undermine the public education system. To illustrate this point, we detail below the consequences of the Secretary's insistence that states and school districts comply with the unfunded NCLB school improvement and testing mandates.

**a. The NCLB School Improvement Mandates**

In the 2005-06 school year, 22,873 schools – more than a quarter of the public schools in the country – failed to make adequate yearly progress (“AYP”) in raising student achievement on the NCLB mandated tests to NCLB required levels. Almost half of those schools had failed to make AYP for at least two years, which means that they were subject to the NCLB school improvement mandates.<sup>19</sup> Those mandates require, among other things, that schools develop and implement a school improvement plan. If the school does not make AYP after the plan has been in operation for two years, corrective action must be taken against the school,

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<sup>19</sup> NEA, Data on Schools Not Making AYP (Jan. 2006) (available at <http://www.nea.org/esea/images/AYP-State-Lists-2005-Jan4A.pdf>).

followed in another two years' time by complete restructuring if the school continues to fail to make AYP. See 20 U.S.C. § 6316.

But Congress has never appropriated any funds to pay for the school improvement activities that such schools (and their school districts) are required to undertake in an effort to raise student achievement to the mandated levels.<sup>20</sup> Instead, Congress has sought to fund the NCLB school improvement mandates by providing that states are to set aside for this purpose 4% of their Title I, Part A funds. However, the statute stipulates that the 4% set-aside must give way to the extent that it would result in a reduction of the total Title I, Part A funding that any school district receives as compared to the previous year. In reality, therefore, the 4% set-aside can only be applied to the portion of the state's Title I, Part A funding that is allocated to school districts whose funding is increasing. For most school districts, however, NCLB funding is declining, and many states therefore are not permitted to set aside 4% of their Title I, Part A funds.<sup>21</sup> In the current school year, ten states were unable to set aside the full 4% – with two states (Oregon and New Mexico) unable to set aside more than .1% of those funds for school improvement

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<sup>20</sup> See Center on Education Policy, A Shell Game: Federal Funds to Improve Schools, pg. 2 (Feb. 2006) (“Shell Game”) (available at <http://www.cep-dc.org/titlei/TitleISchoolImpFundJan2006.pdf>). See also CEP Year 4, pgs. 14-15.

<sup>21</sup> Shell Game, pgs. 2-3.

activities.<sup>22</sup> As a consequence, New Mexico now has only about \$130,000 and Oregon has only about \$169,000 to devote to the school improvement activities that must be undertaken in order to ensure that the schools in their states that have failed to make AYP for two years in a row make the necessary improvement in the future. Given that there are 95 such schools in New Mexico (leaving the state with just \$1,368 per school for improvement activities) and 44 such schools in Oregon (leaving the state with just \$3,834 per school for improvement activities),<sup>23</sup> it could hardly be more apparent that the available federal funds do not even provide a foothold for beginning the type of comprehensive school reform strategies necessary to raise student test performance to the NCLB mandated levels.<sup>24</sup>

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<sup>22</sup> Id., pgs. 4-5. Similarly inadequate levels of funding have been reported by other states. See, e.g., Connecticut Study of State Costs, pg. iv (reporting that in FY 05 Connecticut had just \$218,000 in federal funds for school improvement activities, or \$2,344 for each of its 93 schools that have failed to make AYP for two or more years).

<sup>23</sup> Shell Game, pg. 6. See also Data on Schools Not Making AYP, supra n. 19.

<sup>24</sup> Of course, the costs of implementing such comprehensive reform strategies vary significantly depending on the size of the school involved and the reasons for the failure to make AYP. But it is apparent that implementing meaningful school reform runs into the millions not thousands of dollars, particularly for those schools that are trying to reach students who come to school already significantly behind their classmates due to poverty, lack of English language skills, and/or lack of parental support. For example, the Reading School District in Pennsylvania, which ranks in the 98th percentile of school districts in Pennsylvania in terms of students at or below the poverty line, the 99th percentile in terms of the percentage of students who speak English as a second language, the 99th percentile for students from single parent households, and the 100th percentile for student

And the situation is only expected to worsen. Due to the cutbacks in NCLB funding for FY 06 (which will impact activities at the state and school district level in the 2006-07 school year), it is “possible that no states will have sufficient [Title I] funds to meet the [4%] mandatory reservation,”<sup>25</sup> and far more schools are expected to be graded as failing to make AYP due to the expansion of NCLB testing from six to fourteen tests, see supra n. 1, and due to the ratcheting up of NCLB proficiency requirements.<sup>26</sup>

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mobility, has estimated that it will cost \$5 million per school to implement the type of comprehensive school reforms (such as increasing the length of the school day and year and reducing class sizes) that would be required to ensure that its seven schools that have failed to make AYP for at least two years now make AYP. Melissa Jamula, Reading School District’s Legal Appeal of No Child Left Behind – The Challenges of an Urban School System, pgs. 1-3 (July 14, 2005) (available at <http://www.cep-dc.org/pubs/Forum14July2005/JamulaPaper.pdf>). Yet currently the Reading School District is able to provide each of those schools with only \$49,370 in federal NCLB funds, and the school district as a whole only receives \$10.3 million in federal NCLB funds – almost \$25 million less than the funds that would be required to actually improve student achievement in that district’s seven schools that have failed to make AYP. Id., pg. 4.

<sup>25</sup> Shell Game, pg. 3.

<sup>26</sup> The NCLB requires that states and school districts raise student test performance levels in regular increments over the next several years to the NCLB-required 100% proficiency level by the 2013-14 school year, with the first rise in proficiency levels to occur within two years of the NCLB’s enactment (that is to say, by the current school year), and the remaining rises to occur at least once every three years. See 20 U.S.C. § 6311(b)( 2)(E-H). These increases in the mandated proficiency levels will inevitably tend to increase the number of schools identified as needing improvement. Illustrating the point, when California raised its proficiency requirements this past year, the result was a 49% increase in the number of schools identified for restructuring – the last step in the NCLB-

The paucity of federal funding for the school improvement activities that were supposed to be the heart of the NCLB fatally undermines the promise of the program. Instead of providing underperforming schools – particularly the neediest schools – with critically needed assistance, the dramatic underfunding of the NCLB has resulted in the creation of a system for publicly labeling those schools as failures without providing any of the means necessary to cure the underlying academic and economic problems in those schools.<sup>27</sup>

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mandated school improvement activities. Center on Education Policy, Wrestling the Devil in the Details: An Early Look at Restructuring in California, pg. 2 (Feb. 2006) (available at <http://www.cep-dc.org/improvingpublicschools/WrestlingDetails.pdf>).

<sup>27</sup> As one prominent commentator has explained, “It’s as if you were to take the temperature of everybody in a hospital waiting room, and then take away the medicine from those with the highest temperatures and threaten to hit them.” Alain Jehlen, The Fix, NEA Today pg. 26 (April 1, 2004) (available at [http://www.nea.org/nea\\_today/0404/cover.html](http://www.nea.org/nea_today/0404/cover.html)) (quoting Gary Orfield, Co-Director of the Harvard Civil Rights Project, which has issued a series of reports critical of the NCLB’s implementation and its disproportionately negative effect on our neediest students). In fact, given the level of funding the federal government has seen fit to provide for school improvement activities, it is not too much to say that the federal government appears to have decided that it will simply provide the funding for the thermometers used to take the schools’ temperatures, leaving states and school districts to provide the resources to do whatever it may take to raise or lower the temperature not to mention attending to the myriad of needs that go beyond simply raising or lowering the temperature.

Putting the point in less colorful but equally powerful terms, the United States Commission on Civil Rights has warned that “[w]hile NCLB’s attempt to focus on, gather information about, and address the achievement gaps for minority and disadvantaged groups is laudable, NCLB alone does not equip schools to remedy those longstanding deficiencies. . . . [the NCLB] must not ignore the

The virtual absence of federal funding for NCLB-mandated school improvement activities is so severe that states and school districts cannot possibly be expected to come up with sufficient funds on their own to carry out those activities. Thus, at the existing levels of federal funding, the NCLB school improvement mandates and, with them, the NCLB as a whole, serve to undermine rather than improve the quality of public education. To force states and school districts to divert their resources to such a counterproductive exercise, at the expense of funding state and school district programs and priorities, to which they would prefer to devote their funds and which have a realistic prospect of success, could not have been what Congress had in mind when it enacted the NCLB.

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probability that millions of disadvantaged students and students of color will not be adequately instructed, will not be promoted, will not graduate, and may be further stigmatized due to the unintended consequences of the very system instituted to help them.” U.S. Commission on Civil Rights, Closing the Achievement Gap: The Impact of Standards-Based Education Reform on Student Performance, pg. 6 (July 2, 2004 Draft Report). See also LaRuth Hackney Gray, Charles H. Thompson Lecture-Colloquium Presentation: No Child Left Behind: Opportunities and Threats, Journal of Negro Education, pg. 3 (Mar. 22, 2005) (available at [http://www.findarticles.com/p/articles/mi\\_qa3626/is\\_200504/ai\\_n14900773](http://www.findarticles.com/p/articles/mi_qa3626/is_200504/ai_n14900773) (arguing that “[i]f the starting points are dramatically different and the finish line is the same, then equity is an empty slogan unless differentiated opportunities, supports, and resources are brought to bear on behalf of students and schools that face a longer or harder race”).

## **b. The NCLB Testing Mandates**

Given the central role that testing plays in the architecture of the NCLB, it is critically important that states and school districts have sufficient funds to develop and administer meaningful student assessments that measure not just students' test-taking skills or their ability to complete a multiple choice test, but students' ability to engage in higher order thinking and expression. After all, if the NCLB-mandated tests do not provide an accurate picture of students' academic performance, then the entire system of school improvement ushered in by the NCLB is a house of cards, built around assessments that say little about students' actual academic abilities.

Unfortunately, there is growing evidence that the NCLB testing regime is unsound due to the inadequate funds the federal government has provided for the development and implementation of the required assessments – an inadequacy that again, is so pronounced that states and school districts cannot realistically be expected to fill the gap.<sup>28</sup> According to one recent report, “lack of time, money, and skilled staff have led a substantial number of states to introduce tests that many testing experts say are not fully aligned with state standards – tests that don’t test

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<sup>28</sup> The massive number of new assessments mandated by the NCLB bears note. In the current school year alone, states will be administering some 11.4 million new tests to students as a result of the NCLB’s mandates. Margins of Error, pg. 5.

what states expect their students to know.”<sup>29</sup> Moreover, due to the “demand that [the NCLB tests] be constructed quickly and cheaply,” “many of the tests that states are introducing under the NCLB contain many questions that require students to merely recall and restate facts rather than do more demanding tasks like applying or evaluating information, largely because it’s easier and cheaper to test the simpler tasks.”<sup>30</sup> In fact, “15 states serving 42 percent of the nation’s students are using NCLB reading and math tests in 2005-06 that have no open-ended questions” at all.<sup>31</sup> The inevitable consequence of treating such crude assessments as the measure of the merit of a school under the NCLB is to encourage schools and teachers to focus their efforts on drilling students in “the lowest-level skills within reading and math.”<sup>32</sup>

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<sup>29</sup> Id., pg. 14.

<sup>30</sup> Id., pg. 15.

<sup>31</sup> Id., pg. 17.

<sup>32</sup> Id. See also Joan Herman, Making Accountability Work to Improve Student Learning, National Center for Research on Evaluation, Standards, and Student Testing (Mar. 2005) (available at <http://www.cresst.org>) (reporting at pages 4-5 that teachers “tend to model the pedagogical approach reflected in the test . . . rely[ing] heavily on multiple-choice worksheets in their classroom instruction” when the state or district test is made up of multiple-choice questions, and arguing at page 12 that “[t]he multiple choice and short answer type items that tend to predominate in large scale accountability tests can only go so far in tapping the complex thinking, communication and problem solving skills that students will need for further success. Other types of performance measures – essays, applied projects, portfolios, demonstrations, etc. - are needed to guide students’ progress.”).

Such a pedagogical approach benefits no one. As one junior high school student eloquently protested at the PEN hearings:

Please stop teaching me strategies to pass the test. Teach me how to solve the equation. Teach me the formulas. Teach me how you came to the conclusion that is the right answer. I can pass the test. Teach me what I need to know so that I can understand what I'm doing.<sup>33</sup>

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What we have set forth above are the predictable – indeed, inevitable – consequences of the massive shortfall in federal NCLB funding, coupled with the incorrect construction of Section 9527(a) urged by the Secretary and adopted by the district court. This Court should reject that incorrect construction, and adopt instead the construction of Section 9527(a) urged by appellants – namely, that the Section imposes a broad prohibition against requiring states and school districts to spend their own funds for NCLB compliance, including compliance with requirements that are imposed by the NCLB itself. This would acknowledge the political compromise that informs the NCLB, and would enable states and school

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<sup>33</sup> PEN Hearings, pg. 22. Teachers echoed such frustrations. See id., pg. 33 (reporting a teacher from Brookline, Massachusetts testifying that she was “appalled at what the high-stakes testing demands are doing to children in classrooms” and a teacher educator’s testimony that her student teachers were “panic[king] about their career choices” because all they saw happening in the schools where they taught “was drill and more drill.”).

districts to use their own funds to pay for their crucial educational programs and priorities while, at the same time, ensuring that states and school districts will be required to comply with the new NCLB mandates if Congress simply does what it says it would do – i.e., fully fund the Act. In that event, states and school districts – and, most importantly, the public school students that they serve – would realize the full benefits of the education reforms envisioned by the NCLB.<sup>34</sup>

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<sup>34</sup> We pause to make one final point. As all of the foregoing has made clear, complying with the NCLB is a multi-year endeavor, which requires states and school districts to invest significant resources to develop the capacity and administrative and technological infrastructure required to carry out the NCLB's mandates. See, e.g., Connecticut Study of State Costs, pgs. 9, 11, 21 (showing that Connecticut has had to expend \$40.1 million through FY 06 just to develop the NCLB required tests and the administrative structure and data management systems necessary to implement the NCLB). For that reason, it is no answer at all for the Secretary to contend that states and school districts should simply opt out of the NCLB if they now believe that their costs are too great. States and school districts opted into the NCLB on the understanding that the Act would be implemented in a manner that respected the limitations imposed by Section 9527(a), and their understanding, based on the literal terms of Section 9527(a), is entitled to protection by this Court.

## CONCLUSION

For the foregoing reasons, amici respectfully ask this Court to reverse the decision below, and allow appellants to proceed with their claims.

Respectfully submitted,

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## **CERTIFICATE OF TYPE VOLUME COMPLIANCE**

I hereby certify that this brief complies with the type volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7). The brief was prepared in a proportionately spaced 14 point font. According to the word count function of Microsoft Word, the brief contains 6,957 words.

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Gene C. Lange

## CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Amicus Brief for AASA in Support of Plaintiffs-Appellants will be served this 31<sup>st</sup> day of March of 2006 by overnight and electronic mail on the following lead counsel for defendant-appellee Spellings:

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