

TABLE OF CONTENTS

INTRODUCTION1

BACKGROUND2

 I. Connecticut’s Persistent Achievement Gap2

 II. Closing The Gap: “No Child Left Behind” And The
 Elementary And Secondary Education Act.....3

 III. The Proposed Intervenors4

PROCEDURAL POSTURE6

ARGUMENT.....6

 I. Intervenors Are Entitled To Intervention As Of Right Under
 Federal Rule Of Civil Procedure 24(a)7

 A. Intervenors’ Application Is Timely7

 B. Intervenors Have A Significant And Vital Interest
 In This Litigation8

 1. Individual Intervenors Are The Intended
 Beneficiaries Of The Statute And Have A
 Significant Interest In Its Continued Enforcement10

 2. Individual Intervenors Have A Direct Interest In
 Their Education.....11

 C. There Is A Substantial Risk That Intervenors’ Interest Will
 Be Impaired By The Disposition Of This Case13

 1. The Risk Of Decreased Assessment13

 2. Additional Educational Benefits That Will Be Lost14

 D. Intervenors’ Interests Are Not Adequately Represented
 By The Present Parties To The Litigation.....15

 II. Alternatively, This Court Should Grant Permissive Intervention
 Under Rule 24(b)18

CONCLUSION.....20

INTRODUCTION

Movants, the Connecticut State Conference of the National Association for the Advancement of Colored People (the “Connecticut NAACP”) and three individual students enrolled in three of Connecticut’s lowest performing public schools (“Intervenors”), submit this Memorandum of Law in support of their Motion to Intervene as defendants in this action brought by the State of Connecticut and the General Assembly of the State of Connecticut (“State” or “Connecticut”) against Margaret Spellings, in her official capacity as the United States Secretary of Education (the “Secretary”). Intervenors seek intervention as of right pursuant to Federal Rule of Civil Procedure 24(a) or, in the alternative, with this Court’s permission under Federal Rule of Civil Procedure 24(b), for the purposes of ensuring Connecticut’s compliance with Title I of the Elementary and Secondary Education Act of 1965 (“ESEA”), as amended by the No Child Left Behind Act of 2001 (“NCLB” or “the Act”).

In brief, Intervenors seek to protect their interest in Connecticut’s full and complete compliance with the letter and spirit of NCLB. They seek to secure the enhanced educational opportunities and outcomes that Congress intended when it approved NCLB with overwhelming bipartisan support in 2001. These tangible benefits will be impaired if Connecticut succeeds in its campaign to avoid its responsibilities under the Act. Moreover, intervention is necessary to ensure that these children’s interests and the interests of other students are fully and adequately represented in this suit. As a result, Intervenors’ Motion must be granted to give voice to their unique concerns, and to articulate and fully protect their rights under the statute.

BACKGROUND

I. CONNECTICUT'S PERSISTENT ACHIEVEMENT GAP

Connecticut is failing its most disempowered children. The chasm that separates the State's affluent, mainly white schools from its poor and predominantly minority schools is vast. This discrepancy was noted by the Connecticut Supreme Court in the landmark decision *Sheff v. O'Neill*, 678 A.2d 1267, 1270 (Conn. 1996), where the court found that the Hartford, Connecticut public schools were racially and ethnically isolated, and that Hartford public school students had not been provided with a substantially equal or adequate education as required by the Connecticut state constitution. Although the court ordered the State to remedy the constitutional violations, minority and poor students in Hartford and other parts of Connecticut continue to receive a woefully inadequate education.

The educational inadequacies outlined nearly ten years ago by the Connecticut Supreme Court persist today, not only in the Hartford schools, but in public schools throughout the State. The State recently ranked dead last among states for its poor to non-poor achievement gap on the National Assessment of Educational Progress. *See* Quality Counts Report, attached as Exhibit A. In addition, these inadequacies and the immense gap in achievement are exemplified by the remarkably disparate test scores that Connecticut students receive on the Connecticut Mastery Test ("CMT"), the statewide proficiency exam. For example, while 88% of white fourth-grade students are considered proficient in math, only 56% of African-American students are proficient. *See* Summary of Student Achievement on the Connecticut Mastery Test 2004, available at www.cmtreports.com/iReport/Report.aspx. Similarly, while 76% of white fourth-grade students are proficient in English, only 41% of African-American students score as such. *Id.* These disparities persist through eighth grade and into high school. *Id.*; *see also* 2005

Connecticut Academic Performance Test Results, available at www.capreports.com/web2005/byGroup (displaying vast disparities in performance by race/ethnicity on the state high school assessments in mathematics, science, reading and writing).

II. CLOSING THE GAP: “NO CHILD LEFT BEHIND” AND THE ELEMENTARY AND SECONDARY EDUCATION ACT

Against this background, and in light of similar problems in other states, the No Child Left Behind Act was passed in 2001 as a comprehensive education reform package. NCLB was designed to supplement and amend ESEA, which provides financial assistance to high-poverty schools in order to close achievement gaps between different groups of students. The Act recognized the imperative national interest in “ensur[ing] that all children have a fair, equal and significant opportunity to obtain a high-quality education.” 20 U.S.C. § 6301. The touchstone of the Act is accountability. It requires Title I schools to show “adequate yearly progress” for students in historically-disadvantaged groups and, when progress is not made, the Act prescribes a set of remedies for schools and school districts. *See* 20 U.S.C. § 6316. While not a panacea, the Act helps guarantee adequate and equal educational opportunities, and facilitates the realization of Connecticut’s own constitutional obligation to provide an adequate education for *all* its public school students.

Pursuant to this mandate, the Act confers numerous substantial benefits on students and provides important educational resources. These benefits include:

- State-administered annual assessments in English and mathematics, with results provided to parents;
- Report cards on student test scores and other measures, with information reported by school, school district, and for the state as a whole;
- Over one dozen “right to know” provisions requiring school officials to keep parents informed on such matters as school improvement, English proficiency, and school safety;

- An effective state accountability and school improvement system to ensure that students attain the state’s “proficient” standards of achievement by 2014;
- Parental options to transfer children to a better school or to obtain tutoring when schools fail to make sufficient progress towards state proficiency standards; and
- Qualified teachers and, in some cases, paraprofessionals, who must meet rigorous requirements for subject-matter knowledge and state certification.

See, e.g., 20 U.S.C. §§ 6311(h)(1)(C), 6311(h)(2)(B), 6311(h)(2)(E), 6316. While Connecticut claims to support the laudable goals of NCLB, it seeks in the present suit to undermine those goals by vitiating the basic rights provided to students and parents by the statute. Respectfully, Connecticut’s action in bringing this lawsuit is analogous to a polluter claiming to support the Clean Water Act while petitioning for the ability to dump hazardous waste in to the Connecticut River.

III. THE PROPOSED INTERVENORS

The individual Intervenors are the intended beneficiaries of No Child Left Behind: children and the parents of children attending schools with a high percentage of low-income students. These are schools that receive Title I funding and are subject to the requirements of the Act the State seeks to evade. They include two elementary schools and one middle school that are among the lowest-achieving schools in Connecticut. Moreover, the entire school district of Hartford, where these schools are located, has failed to make “adequate yearly progress” and has been identified by the State as a “district in need of improvement” under Title I. These particular children were recognized by Congress as deserving explicit attention and academic acceleration by educators, and are the intended beneficiaries of the Title I funds. *See* 20 U.S.C. § 6301.

Intervenor Sonia Ruiz resides with her family at 128 Madison Avenue, Hartford, Connecticut 06106. Her mother’s name is Brandie Marie Gonzalez. Sonia is a Latino student at Parkville Community in Hartford, which has not made adequate yearly progress and is a “school in need of improvement” under Title I. She is 9-years-old and in third grade.

Intervenor Demont Murphy resides with his family at 30 Taylor Drive, Hartford, Connecticut 06120. His mother's name is Jacqueline D. Medina. Demont is a biracial (African-American and Hispanic) 7-year-old who attends Simpson-Waverly Elementary School in Hartford. He is currently in second grade. Although the state has reported that Simpson-Waverly recently made adequate yearly progress, its 2004 scores on the State's fourth-grade reading test, for example, were far below those of the State as a whole. The school's students also suffer from achievement gaps based on race and income compared to the rest of the State. For example, while 67% of Connecticut's fourth graders were "proficient" in reading in 2004, only 23.7% of Simpson-Waverly's students were proficient. While 41% of African-American fourth graders statewide were proficient in reading, only 25% of Simpson-Waverly's African-American students tested at this level. *See* Connecticut "State by District" and "State by School" Reports, available at <http://www.cmtreports.com>.

Intervenor Manaicha Gonzalez resides at 425 Hudson St., B-1 in Hartford, Connecticut. Manaicha's mother's name is Elizabeth Villanueva. Manaicha is 14-years-old, and is in the eighth grade at Quirk Middle School in Hartford, which has not made adequate yearly progress and is a "school in need of improvement" under Title I. Manaicha has been identified as disabled.

In addition, the Connecticut NAACP moves for intervention in this case. *See* Declaration of Scot X Esdaile, attached as Exhibit 2 to the Motion to Intervene. The Connecticut NAACP is a non-profit organization that seeks to ensure the political, social, educational and economic equality of rights of all persons, and to eliminate racial hatred and discrimination. The Connecticut NAACP's membership includes minority parents and their children who attend public schools in the State of Connecticut, including those schools receiving Title I funds. Such

members of the Connecticut NAACP are the exact persons for whom NCLB seeks enhanced educational opportunities.

PROCEDURAL POSTURE

On August 22, 2005, Connecticut brought suit against the Secretary seeking to evade the requirements of NCLB. Connecticut claims, *inter alia*, that the provisions of the Act constitute an unfunded mandate, in violation of § 9527(a) of the Act (codified as 20 U.S.C. § 7907(a)), as well as the Spending Clause and Tenth Amendment of the United States Constitution. *See* Complaint ¶¶ 37-46; 93-102. The State also challenges the Secretary's denial of certain waivers requested under the Act. *Id.* ¶¶ 103-06.

The Secretary filed a Motion to Dismiss this action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on December 2, 2005. On December 23, the State of Connecticut filed an Opposition to the Secretary's Motion to Dismiss. The Defendant's Reply was filed on January 13, and oral argument on the motion is scheduled for January 31, 2006.

ARGUMENT

Connecticut now proposes to continue its inadequate assessment system, to dilute the accountability of state and local education officers, and to abdicate its other responsibilities under the Act. Connecticut's attempt to evade the Act poses a serious threat to Intervenors' educational future. As a result, the interests of these children and their parents in this suit could not be greater. In addition to the threatened removal of specific benefits provided by the Act, the students have a right to education under the Connecticut Constitution that is implicated by this action. Moreover, while Intervenors join in the Secretary's Motion to Dismiss, they have unique interests and distinct arguments on certain issues concerning the requirements of the Act, which

the Secretary is not capable of fully representing. Consequently, this Court should grant Intervenor's motion for intervention by right.

Alternatively, this Court may and should exercise its discretion to permit intervention. Intervenor's entrance into this litigation will not prejudice or unduly delay the progress of this suit in any way. Furthermore, Intervenor will suffer irreparable harm if Connecticut is allowed to escape its obligations under NCLB. The interests are too great and the stakes of this suit too high to bar the involvement of Intervenor, who include the children of Connecticut whose education and future hinges on the outcome of this litigation.

I. INTERVENORS ARE ENTITLED TO INTERVENTION AS OF RIGHT UNDER FEDERAL RULE OF CIVIL PROCEDURE 24(a)

In order to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24, an applicant must establish that (1) the application to intervene is timely; (2) the applicant has a sufficient interest in the litigation; (3) this interest will be impaired by the disposition of the action; and (4) applicant's interest is not adequately protected and represented by the current parties. *See* Fed. R. Civ. P. 24(a); *see, e.g., Catanzano by Catanzano v. Wing*, 103 F.3d 223, 232 (2d Cir. 1996). While a moving party is required to make some showing as to each factor, the components of the rule are designed to be considered together. "A showing that a very strong interest exists may warrant intervention upon a lesser showing of impairment or inadequacy of representation. Similarly, where representation is clearly inadequate, a lesser interest may suffice." *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984). As set forth below, Intervenor satisfy each of these requirements and, as a result, are entitled to a voice in this litigation.

A. Intervenor's Application Is Timely

The question of whether an application to intervene is timely does not lend itself to a "precise definition." *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 198 (2d Cir. 2000). Instead, it depends on various factors including: (1) how long an applicant had notice of his interest in the action before making the motion; (2) whether the existing parties were prejudiced by the delay; (3) whether prejudice to movant will occur if the motion is denied; and (4) any other factors that speak to timeliness. *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994).

Here, the Intervenor's filed their motion for intervention on January 30, 2006, approximately five months after the State of Connecticut filed its Complaint. Intervenor's needed this reasonable period of time to research Connecticut's Complaint and the Secretary's Motion, before deciding that intervention was necessary. Briefing and oral argument on the Secretary's motion to dismiss is not scheduled for completion until January 31, 2005. More important, discovery in the case has been stayed pending the resolution of the Motion to Dismiss. Thus, this case is still in its infancy and the timing of the intervention will not in any way prejudice the rights of the other parties. As a result, Intervenor's satisfy the timeliness requirement of Rule 24(a).

B. Intervenor's Have A Significant And Vital Interest In This Litigation

Intervenor's have an interest in this litigation stemming both from their status as beneficiaries under the statute (and the accompanying educational benefits that are at risk) and as

a result of the important interest that children and their parents have in the fundamental right to education under state law.¹

Intervention should be granted as of right when the proposed intervenors have an interest that is “significantly protectable and direct as opposed to remote or contingent.” *United States v. New York*, 820 F.2d 554, 558 (2d Cir. 1987); *see also Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) (noting that the “interest” test was designed as a “practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process”). Courts take a pragmatic, flexible approach in determining what constitutes an interest sufficient to justify intervention, rather than following any rigid formula. *See, e.g., Hooker Chems. & Plastics Corp.*, 749 F.2d at 983. The interest need not be property-based or economic. *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 130 (2d Cir. 2001). Moreover, the interest exists independently of the merits of the intervenors’ claims. *Id.*

In addition to individual intervenors, an organization can also intervene to protect its own interests, *see, e.g., Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior*, 100 F.3d 837, 842 (10th Cir. 1996) (collecting cases of intervention by organizations), or the interests of its members when: (1) the organization’s members would otherwise have standing (2) the interests the organization seeks to protect are germane to its purpose and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *In re Holocaust Victim Assets Litig.*, 225 F.3d at 196; *see also Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2d Cir. 1968); *United States v. Bd. of Educ. of Chicago*, 1993 WL 408356, at *2 (N.D. Ill. Oct. 12, 1993).

¹ In the Second Circuit, intervention at the district court level does not require that the would-be intervenors demonstrate Article III standing. *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978); *accord Bente v. Kessler*, 1992 WL 266926, at *3 (E.D.N.Y. Sep. 30, 1992).

1. Individual Intervenors Are The Intended Beneficiaries Of The Statute And Have A Significant Interest In Its Continued Enforcement

The individual Intervenors here have a significant, direct, and legally protectable interest as a result of their status as beneficiaries of the challenged Act. Courts have consistently recognized that the beneficiaries of a statute or law have an interest sufficient in that law's continued vitality and enforcement to justify intervention. *See, e.g., Assoc. Gen. Contractors of Conn., Inc. v. New Haven*, 130 F.R.D. 4, 11 (D. Conn. 1990) (ruling minority contractors who benefited from ordinance "obviously" had interest in suit challenging ordinance); *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980) (granting intervention in suit challenging ratification of the ERA for organization whose members would benefit from the law); *cf. Natural Res. Def. Council, Inc. v. U.S.E.P.A.*, 99 F.R.D. 607, 609 (D.D.C. 1983) (granting intervention where lawsuit threatens to undo regulatory decision in party's favor).

In the closely analogous case of *Taft v. Pontarelli*, parents whose children attended religiously-affiliated schools sought leave to intervene in a suit challenging portions of the Education Consolidation and Improvement Act of 1981. 100 F.R.D. 19, 20 (D. R.I. 1983). Because the parties seeking intervention alleged that they "benefit[ed] from enhanced educational opportunities" under the challenged act, the court granted intervention. *Id.* at 20-21.

Similarly, the individual movants here are children and the parents of children who attend public schools in Connecticut. They are the targeted beneficiaries of the statute and enjoy enhanced educational opportunities as a result of NCLB's enactment. The Act seeks to accomplish its stated purpose of ensuring that students receive a "fair, equal and significant opportunity to obtain a high-quality education" by, *inter alia*, establishing "high-quality academic assessments [and] accountability systems ... so that students, teachers, parents, and administrators, can measure progress"; "meeting the educational needs of low-achieving children

in our Nation’s highest-poverty schools, limited English proficient children, migratory children, [and] children with disabilities”; closing “the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers”; and “affording parents substantial and meaningful opportunities to participate in the education of their children.” 20 U.S.C. § 6301. Under the explicit terms of the Act, therefore, the individual Intervenor – children who attend state public educational institutions, including students attending school in significantly disadvantaged districts, disabled students and minority students – are clearly the intended beneficiaries of the statute and enjoy enhanced educational opportunities as a result of its enactment.

2. Individual Intervenors Have A Direct Interest In Their Education

Federal courts have consistently recognized that parents have a strong interest in their children’s education. This interest derives, in part, from the Supreme Court’s recognition of the fundamental interest of parents in directing the education and upbringing of their children. *See Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925). Thus, courts have permitted parents of school-aged children to intervene in suits where these basic parental interests and the children’s educational future were at stake. *See, e.g., Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) (finding parents have sufficient interest in education of children to justify intervention); *see also Graves v. Walton County Bd. of Educ.*, 686 F.2d 1135, 1142 n.5 (5th Cir. 1982) (recognizing parental right and noting that intervention is freely allowed in suits concerning public schools); *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987); *Atkins v. State Bd. of Educ of N.C.*, 418 F.2d 874, 876 (4th Cir. 1969).

Moreover, parents and students have an even stronger case for intervention here given that Connecticut state law, unlike federal law, recognizes a constitutional right to education.

Article Eighth, § 1 of the Connecticut Constitution guarantees a free public education within the state and “substantially equal educational opportunit[ies] for all public schoolchildren.” *Sheff*, 678 A.2d at 1279-80; *see also Packer v. Bd. of Educ. of Town of Thomaston*, 717 A.2d 117, 127 (Conn. 1998); *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977). As a result, to the extent that this suit impacts the educational opportunities of Connecticut children and affects the resources available for their education, it may impair their constitutionally-guaranteed rights.

Indeed, Intervenors’ interest here is compelling. They are children who seek, through their parents, to intervene in this case to protect their interest in improved schooling. The schools these children currently attend are substandard and failing to provide an education that will enable the children to compete on a level playing field with other students in the state, the nation and the world. If conditions are not improved in these and other failing Connecticut schools, there is little prospect that these students and their peers will have a realistic opportunity to succeed in life. The Supreme Court has affirmed the significance of an adequate education and, relatedly, the importance of equal access to such an opportunity for all children:

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Plyler v. Doe, 457 U.S. 202, 221-23 (1982) (quoting *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954)). This recognition of the importance of education highlights the essential nature of Intervenors' interest in this suit.

C. There Is A Substantial Risk That Intervenors' Interest Will Be Impaired By The Disposition Of This Case

As stated above, NCLB is intended to “[c]los[e] the achievement gap between high and low-performing children, especially the achievement gaps between minority and non-minority students” and to “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education.” 20 U.S.C. § 6301. As part of this mission, the Act confers tangible, concrete benefits on the children of Connecticut and their parents, which may no longer be available should the State be excused from its obligations by this Court. For a child now attending Connecticut’s public schools, even one school-year of delay or noncompliance by the State can have far-reaching effects, particularly with respect to students who are currently achieving below the State’s grade-level standards. The longer these students are denied the benefits of the Act and the longer they are forced to wait for their schools to improve, the further behind they will fall. The relief sought in the State’s Complaint is far-reaching and, if granted, would deprive Intervenors of important educational benefits.

1. The Risk Of Decreased Assessment

The statutory measures the State explicitly seeks to evade include, *inter alia*, the obligation to develop and implement high-quality annual assessments to measure schools’ progress in meeting state standards. *See* 20 U.S.C. §§ 611(b)(3) and 6316. This includes the requirement to appropriately accommodate students with special needs in assessment and accountability systems. *See* 20 U.S.C. § 6311(b)(3)(C). If Connecticut is successful in this

litigation, one of the many unacceptable changes it proposes is to administer the statewide Title I assessments to 4th, 6th and 8th graders only, omitting the assessments now required at grades 3, 5 and 7. *See* Complaint ¶ 47. However, the Act’s annual testing requirement was designed to maximize accountability and facilitate intervention at an early age, to sustain progress at each succeeding grade level. Eliminating tests in certain grades would dilute the efficacy of assessments as a diagnostic tool for teachers and principals, and reduce accountability to students and parents. *See* 20 U.S.C. §§ 6311(b)(3)(C)(v), (vii), (xii).

2. Additional Educational Benefits That Will Be Lost

The State also seeks the more generalized relief of being allowed to avoid the expenditure of state funds to comply with NCLB. *See* Complaint at 27-28. This relief, if granted, will implicate other provisions of the law in which Intervenors also have a direct interest. These include, but are not limited to, provisions concerning public reporting of school and district data; the quality of teaching in high-poverty schools; the alignment of curriculum and instruction to state standards; the duty of states to ensure districts and schools have the capacity to comply with Title I requirements; parents’ rights to transfer to better schools and/or to obtain supplemental educational services; the provision of assistance and resources to low-performing schools; and, ultimately, the effective reconstitution of persistently low-performing schools.

The State has sought from this Court an order prohibiting the Secretary, prospectively, from enforcing the Act. It has also demanded that the Secretary be enjoined from denying certain waivers. Most sweepingly, the State has asked this Court to enjoin the Secretary from “taking *any* adverse action against the State of Connecticut because of a failure to comply with *any* mandate of the NCLB that is attributable to Connecticut’s refusal to expend its own funds to achieve such compliance.” Complaint at 27-28 (emphasis added). As a result, should

Connecticut prevail, students risk losing *all* of the benefits of NCLB – essential provisions designed by Congress to assist low-performing schools and provide better and equalized educational opportunities. The fundamental purpose of the No Child Left Behind Act is to provide meaningful tools for closing the achievement gap among schools and increase school accountability. As described above, Connecticut has the greatest achievement gap between poor and non-poor students across the 50 states. This is a gap that has persisted despite the State’s own assessment and accountability programs, and which NCLB provides real tools for remedying. The importance, therefore, of this suit and the involved interests of the children of Connecticut cannot be overstated.²

In sum, Intervenor has a constitutional right to education that will be affected by this case, as well as an interest in the tangible, real benefits in terms of educational opportunities provided by the Act. For the reasons set forth above, these interconnected interests face a substantial risk of impairment in the present litigation.

D. Intervenor’s Interests Are Not Adequately Represented By The Present Parties To The Litigation

Finally, this Court should grant intervention as of right because Intervenor’s interests are not already adequately represented. Proposed intervenors generally face only a “minimal” burden in demonstrating that representation by an existing party is not adequate. *Trbovich v.*

² The case for intervention is not impaired by any argument, merited or not, that Intervenor may not have the ability to bring their own claim. If anything, as Judge Posner has observed, “The strongest case for intervention is not where the aspirant for intervention could file an independent suit, but where the intervenor-aspirant has no claim against the defendant yet a legally protected interest that could be impaired by the suit.” *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 101 F.3d 503, 507 (7th Cir. 1996) (citing David L. Shapiro, “Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,” 81 Harv. L. Rev. 721, 726-27 (1968)); *see also Willis v. Firestone Bldg. Prods. Co.*, 231 F.R.D. 447, 449 (D. Conn. 2005) (emphasizing party need not have an independent cause of action to be able to intervene). Thus, in order to grant intervention, this Court need not reach the question of whether Intervenor would have their own cause of action.

United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972). If the intervenors have a strong interest in the subject matter of the litigation, this burden remains slight even if the intervenors seek to join the side of the government. *See Hooker Chems. & Plastics Corp.*, 749 F.2d at 983 (recognizing presumption of adequacy when government is a party but noting that “a showing that a very strong interest exists may warrant intervention upon a lesser showing of impairment or inadequacy of representation”). Courts have further held that even a heightened showing of inadequate representation is met when proposed intervenors adduce a distinct interest or point to an adverse governmental interest. *See, e.g., S. Dakota ex rel Barnett v. United States Dep’t of Interior*, 317 F.3d 783, 785 (8th Cir. 2003) (finding that proposed intervenor may rebut presumption that the government is adequately representing its interests by showing that its interests actually differ from or conflict with the government’s). Intervenors should prevail whether a minimal or heightened showing is required, as it is clear that the Secretary cannot fully represent their interests.

First, as stated above, Intervenors have strong, legally-protectable interests in this action. Second, Intervenors’ interests are unique and particularized, and clearly distinct from those of the Secretary, who must balance a variety of governmental concerns and political issues in her enforcement of NCLB. Courts have recognized that governmental representation is not always adequate because government agents are subject to multiple, sometimes conflicting, constituency demands. *See, e.g., San Juan County, Ut. v. United States*, 420 F.3d 1197, 1212 (10th Cir. 2005) (ruling government’s obligation to represent the interests of the public generally is not necessarily coextensive with its representation of intervenors’ particularized interests); *Smuck*, 408 F.2d at 181 (finding school board may not adequately represent individual parents and children, as it may be influenced by “considerations of publicity, cost, and delay”).

The United States Department of Education is, at heart, a political institution. The Secretary must consider a vast array of interest groups, each with their own stake in the interpretation and enforcement of the Act. While the Secretary clearly supports the Act, these multiple concerns may, understandably, affect her ability to represent the particular concerns of the parents and children here. *See Johnson v. San Francisco Unified Sch. Dist.*, 500 F.2d 349, 353-54 (9th Cir. 1974) (finding school board would not clearly adequately represent certain specialized student interests).

In addition, while settlements of government litigation are generally desirable, assurance is needed that any agreement will be in the best interests of Intervenors. Courts have recognized that the government's interest in settlement may render it an inadequate representative of certain parties. *See Assoc. Gen. Contractors of CT, Inc.*, 130 F.R.D. at 11; *Assoc. for Fairness in Bus., Inc. v. New Jersey*, 193 F.R.D. 228, 232 (D. N.J. 2000). Indeed, the Secretary has recently made several concessions to particular states and school districts in the enforcement of NCLB, and has signaled her intention to be "flexible" in making further compromises. *See Lynn Olson, Room to Maneuver: The Federal Government has Responded to Criticism of the No Child Left Behind Act by Giving States Greater Flexibility in How to Comply*, Education Week, Dec. 14, 2005. This so-called flexibility has included allowing other states to escape important provisions of the Act, which Intervenors would argue to preserve.

Thus, while the Secretary is clearly dedicated to the Act's general terms, there is reason to allow intervention. "Even if the Secretary is performing his [or her] duties, broadly conceived, as well as can be expected, the [intervenor] may have a valid complaint about the performance of 'his lawyer.'" *Trbovich*, 404 U.S. at 539 (allowing intervention by union member where Secretary of Labor was party). At the very least, Intervenors offer a unique perspective and are

capable of a more vigorous representation of their own interests. *See New York Pub. Interest Research Group v. Regents of the Univ. of the State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) (stating that increased vigor of advocacy is tantamount to differing interest). The United States Department of Education can speak intelligently about global policy concerns, but it is the children enrolled in Connecticut’s public schools and their parents who can speak clearly and passionately about what is at stake for the beneficiaries of this Act.

This point is emphasized by certain disagreements between Intervenors and the Secretary as to the governing law. As discussed more fully in the attached Motion to Dismiss, while Intervenors join in portions of the Secretary’s Motion, and believe that Connecticut’s Complaint should be dismissed, they disagree with the Secretary’s interpretation of the requirements of NCLB. In her Motion, the Secretary argues that “the development and implementation of modified-standard assessments for certain disabled students, and the development and implementation of foreign language assessments for LEP students” is not required by the Act. Motion at 28-29. To the contrary, such assessments have been mandated by Congress. *See* 20 U.S.C. § 6311(b)(3)(C). This Court need not reach the issue of each specific testing requirement of NCLB because, as the Secretary’s Motion makes clear, there is no question that in accepting Title I funding, Connecticut agreed to implement a rigorous educational testing program that contemplated the use of its own state funds. Nonetheless, the decision in this case should not rest on grounds that are erroneous and that would be detrimental to the Intervenors.

II. ALTERNATIVELY, THIS COURT SHOULD GRANT PERMISSIVE INTERVENTION UNDER RULE 24(B)

Should this Court determine that Intervenors are not entitled to intervention as of right in this action, this Court should exercise its discretion and grant Intervenors permissive intervention. For these children, this litigation is not about what Connecticut perceives as its

responsibilities to fund a national mandate. For these children, this litigation is about Connecticut's responsibility to them. Before the State is permitted to deny these students the tools and opportunities that will allow them to succeed in school and in life, the State must be held directly accountable to the children it proposes to harm.

A district court may, in its discretion, permit a party to intervene in an action if the movant's "claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). In exercising its discretion concerning permissive intervention, a court should further consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.*; see also *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987); *Bridgeport Harbour Place I, LLC v. Ganim*, 269 F. Supp. 2d 6, 8 (D. Conn. 2002).

Intervention is appropriate here because Intervenors present questions of law and fact nearly identical to those of the present action: Like the Secretary, Intervenors argue that Connecticut is obligated to fulfill the statutory requirements of No Child Left Behind in exchange for educational funds that it has already accepted. Like the Secretary, Intervenors assert that there is no constitutional or legal reason for Connecticut to shirk its obligations to provide certain basic educational services to the children in its schools.

Furthermore, Intervenors' participation will not unduly delay this action or in any way prejudice the rights of the present parties. Intervenors' application is made in timely fashion and any resulting delays should be minimal. See *United States v. Yonkers Bd. of Educ.*, 518 F. Supp. 191, 202-3 (S.D.N.Y. 1981) (granting permissive intervention when timely application made on behalf of parties directly interested in litigation).

Moreover, any minor delays are greatly outweighed by the benefits of Intervenors' participation in this action. As children, and the parents of children, currently enrolled in some of Connecticut's most disadvantaged schools, Intervenors provide a different and important perspective on the Act's impact on Connecticut's educational system. Moreover, as the individuals who will be directly affected by Connecticut's bid to avoid its responsibilities under NCLB, Intervenors are well-motivated to vigorously defend the Act's implementation. Finally, to the extent that settlement is contemplated in this case, it is essential the Intervenors be party to those discussions in order to ensure that the interests of those the Act was intended to help are directly represented, without the dilution that comes from a need to cater to competing political interests. In short, if anyone should be part of this suit, it should be the individuals most directly affected by this action, whose education and future will be deeply impacted by its outcome.

CONCLUSION

For the foregoing reasons, this Court should grant Intervenors' motion for intervention of right or, alternatively, allow permissive intervention.

Dated: New York, New York
January 30, 2006

By: /s/ James E. d'Auguste
Steven M. Pesner, P.C.
Andrew J. Rossman
James E. d'Auguste, Ct. Bar No. 26848
Sarah J. Baumgartel
AKIN GUMP STRAUSS HAUER & FELD LLP
590 Madison Avenue
New York, New York 10022-2524
(212) 872-1000

William L. Taylor
Dianne M. Piché
LAW OFFICE OF WILLIAM L. TAYLOR
2000 M Street NW Suite 400
Washington, DC 20036
(202) 659-5565

John C. Brittain, Ct. Bar. No. 101153
Erika K. Woods
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue NW Suite 400
Washington, DC 20005
(202) 662-8600

Dennis Courtland Hayes
Victor Goode
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE
4805 Mt. Hope Drive
Baltimore, MD 21215
(443) 676-1514

James J. Walker, Ct. Bar No. 411767
WALKER AND ASSOCIATES
251 Long Ridge Rd., Suite One
Stamford, CT 06902
(203) 324-0091

Attorneys for Intervenors