

Testimony of William L. Taylor  
Chairman, Citizens' Commission on Civil Rights  
Before the  
Commission on No Child Left Behind  
May 9, 2006

Co-chairs Thompson and Barnes and members of the Commission:

I thank you for the invitation to give testimony today to your Commission on the No Child Left Behind Act. You have asked me to address issues of assessment, in particular as they have arisen in a recent case, *Connecticut v. Spellings* in which I joined with other civil rights lawyers in seeking to intervene on behalf of the Connecticut State NAACP and individual parents and children.

Over the many years I have represented children in cases asserting their rights to equal educational opportunity there have been too many cases in which the litigation has devolved into a struggle between state and local government and occasionally the federal government as well over who should pay the bills for eliminating discrimination and providing educational opportunity. In the process the interests of the children tend to get lost. That is the potential problem in *Connecticut v. Spellings*. The State of Connecticut claims the federal government is not giving them enough money under NCLB to pay for the testing required under the Act. Therefore, the state says it should be excused from carrying out the assessments and from other duties established by the law. (It still wants to receive the federal grants, however.)

While my colleagues and I largely agree with the United States both on the legal questions and the policy issues involved in this dispute, we have a deep concern that neither side fully represents the interests of children in public schools whose hopes for becoming educated and productive citizens ride on the success of NCLB. That is why we have intervened on behalf of the NAACP and poor and minority children.

I. Connecticut v. Spellings

A. The legal issues.

I will not take the time of the Commission to detail the legal issues involved in the litigation. These will be decided by the federal courts. The thrust of the State's grievance is that it has been on the short end of "an unfunded mandate" which, it claims violates the Constitution and a provision of the NCLB Act.

But the NCLB is one of many federal grant programs enacted under our Constitution's Spending Clause to which, the Supreme Court has held in *South Dakota v. Dole* and other cases, the Congress can attach reasonable conditions. In addition as I have learned over the years from *Brown v. Board of Education* and its progeny, States may be required by the federal government to remedy deprivations of rights that they have engaged in, without any federal payment at all. In that sense, the Constitution itself is an unfunded mandate.

As to the provisions of NCLB itself, the Congress did recognize that

implementation would be costly and wrote a provision [Section 20 U.S.C. Sec. 6311(b) (3) (D)] prescribing levels of appropriations to be met to cover the new costs of assessments. If these levels were not met, states could temporarily suspend the administration of new assessments. Congress has met these appropriation levels every year. Yet Connecticut resolutely ignores this provision of the law which defeats its claim.

B. The Educational and Policy Issues.

The attack that Connecticut has launched on the assessment provisions of NCLB goes to the heart of the effort to improve educational opportunity for the most neglected children in the Nation.

In 1994 in the Improving America's School Act, a bipartisan Congress made a finding that is the foundation for subsequent efforts at school reform. All children can learn, Congress said, and all except those who have the most serious cognitive impairments can learn at the highest levels. If that is the case, it follows that high standards should be set and that school officials should be held accountable for student progress.

But accountability depends on having in place assessments that truly measure student gains. Since 1994, a great deal of work has gone into improving tests. The law insists that tests be aligned to standards. And elemental fairness requires that students be offered a curriculum that will prepare them to succeed on the tests.

Fortunately, many states have eliminated norm-referenced tests which may not accurately measure what a student knows or can do but only how the student performs compared to other students. But there is still too much reliance on multiple-choice, fill-in-the-bubble exams and not enough development of essay questions and constructed responses which can assess analytical skills and creativity.

With respect to the frequency of testing, Congress decided in enacting NCLB that in the elementary and middle-school grades, yearly testing was a needed step to determine school progress and it specified assessments in grades three to eight. This was a judgment made after serious debate and Connecticut should respect it rather than continue to ask for a special exemption.

So, too, the Department of Education has said that it would fund pilot projects for “growth models” which would measure individual student progress from year to year and allow schools and districts to meet their annual goals if students were on a trajectory to achieve proficiency even if they had not met it yet. I recently served on a peer review panel which evaluated eight state proposals the Department thought worthy of review. This is a serious and thoughtful effort and it should be supported even though it will cost money.

### C. The Achievement Gap.

The most egregious stance that the State of Connecticut is taking in this lawsuit is

its claims that the Court should order the Department to grant the state waivers from assessment requirements that apply to two groups with special needs—students with disabilities and English language learners.

Almost everyone agrees that that the NCLB took an important step to further equality of educational opportunity when it called for steps to eliminate the achievement gap between affluent students and students who live in poverty, white students and students of color, and students who have no special needs and those who do. The law made this goal operational by calling for disaggregation of these groups at the district and school level, stating that schools and districts must be held accountable not merely for overall progress, but for progress for each of the subgroups.

Yet Connecticut wants to escape responsibility for these fundamental requirements. In its complaint, the State seeks to assess students with disabilities at whatever level the state chooses to place them for instruction. So, according to the State, if a 12-year old student is placed in the fourth grade of a public school, he or she should be assessed at fourth grade level. This violates Section 6311(b) of the Act. The law does call for “reasonable accommodation” for students with disabilities. It recognizes that a limited number of students may be so severely cognitively impaired as to require alternative assessments. The Secretary has acted administratively to permit such alternative assessments for up to 3 percent of students with disabilities. This is in addition to other accommodations such as extra time to complete exams.

But Connecticut attempts to go far beyond these carefully drawn provisions by asking for the power to keep up to 100% of children with disabilities at the lowest grade levels and assessing their skills only at these levels.

Similarly, Connecticut seeks to exempt English language learners (“ELLs”) from assessment during their first three years in a United States school. Since 1994, Title I (via the IASA and now NCLB) has required that after one year, ELLs be assessed “to the extent practicable in the language and form most likely to yield accurate data on what such students know and can do in academic areas until such students have achieved English language proficiency. Section 6311(b)(3)(c). A broad consensus of experts in several states has concluded that testing in Spanish is practicable and will yield valid comparisons to tests conducted in English. A dozen states implement such tests.

In conversations I have had with Commissioner Sternberg, she has told me that if she authorizes tests in Spanish, she will have to have similar foreign language tests for Russian and German-speaking students or others whose first language is not English. This is simply wrong. The requirement of the statute is conditioned by the phrase “to the extent practicable.” While it is practicable to assess a substantial number of ELL students in Spanish, it may not be practicable to do so for other groups. Each case must be judged individually.

These are not trivial matters. If students with special needs are exempted from

assessments or if their assessment is delayed, then no one will be held accountable for their progress. They simply won't count. Yet this is the road that Connecticut is traveling.

What makes matters even worse is that Connecticut, one of the wealthiest states in the nation, has the widest academic gap between poor and wealthy students. One would think that the best minds in the state would be working to close that gap and fulfill the pledges of equal opportunity contained not only in NCLB but in the United States and Connecticut Constitutions. Instead Connecticut is busy concocting schemes and arguments to avoid its responsibilities.

## II. Data Quality Issues.

I note that this hearing also concerns data quality issues. The key question already indicated is the quality of assessment data and whether it provides a reliable guide to educators in bringing all students to proficiency. But I do want to note some other data needs that are critical to effective implementation of the law.

One is the requirement contained in 6311(b)(8) that states include in their comprehensive plans a narrative describing how the SEA will assist local agencies and schools to develop the capacity to comply with each of the requirements of the Act 6311(b)(8)(A). This is followed by other requirements for the plan including the "specific steps" that the State will take to "ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field

teachers” and the measures the SEA will use for evaluation and public reporting of the specific steps. 6311(b)(8)(C).

These provisions are critical to the success of NCLB. No one believes that one can wave a wand over children struggling today in the most neglected schools and produce success. It will require concrete steps to change these schools into institutions that nourish and support learning. Districts and schools need the help of the state to achieve the capacity to make fundamental changes.

And yet, despite repeated assurances to Connecticut that it has developed such a plan and that it would deliver the plan to us, it has not. We have concluded that no such plan exists.

Perhaps the most critical element of effective school reform is ensuring high quality teaching to the most deprived and neglected students. This may be the toughest challenge facing states and public school officials. Connecticut has been reporting that 98% of its classes are taught by highly qualified teachers. Yet a recent report by the Department of Education reveals that this is an erroneous statement, based on definitional deficiencies such as treating teachers with emergency licenses as highly qualified. The State concedes that its data system is inadequate and that it has reported incorrect and misleading information.

This does not inspire confidence that Connecticut has made a genuine commitment to making its public schools places of opportunity for all children. And I am sure Connecticut is not alone.

Conclusion.

As I noted at the outset, efforts to improve public schools and to equalize opportunities for all children have too often degenerated into squabbles over who bears responsibility for providing the resources.

Let us stipulate that funding at all levels is insufficient. In 2001, with heroic efforts by Senator Kennedy and Rep. George Miller, Congress enacted an appropriation which provided the largest increase in the history of Title I. Since then, however, federal funding levels have been flat.

States, which have the primary responsibility for public education, have done less, providing increases only in boom times. And the massive inequities caused by relying on property taxes for local school funding continue except in a few places where the courts have effectively intervened.

But we now have enough experience with educational reform to know that, with the commitment and skill of school leaders and communities, real change can be made.

While seeking more resources from all governmental channels, we cannot allow the effort to falter. This, after all, may be the last, best chance to save public education and our children.