

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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EUNICE STATON, LATASHA GIBBS,
CHARLENE WILSON

Plaintiffs,

-against-

NEW YORK CITY DEPARTMENT OF
EDUCATION; JOEL KLEIN, CHANCELLOR
NEW YORK CITY DEPARTMENT OF
EDUCATION; ALBANY SCHOOL DISTRICT;
AND LONNIE PALMER, SUPERINTENDENT,
ALBANY SCHOOL DISTRICT

Defendants.
-----X

Index No.:

CLASS ACTION
COMPLAINT

Plaintiffs, by their attorneys, allege upon personal knowledge as to their own acts, and upon information and belief as to all other matters, as follows:

PRELIMINARY STATEMENT

On January 8, 2002, President George W. Bush signed into law the No Child Left Behind Act ('NCLB'). Beginning this 2002-2003 school year, NCLB required that parents be provided with the immediate right of transferring their children out of failing schools and into schools that were not failing. As President Bush stated, "We will not accept a school that does not teach and will not change." The law also required that eligible parents have the right to free Supplemental Educational Services ('SES') for their children in failing schools -- such as tutoring -- provided by an approved vendor of their choice.

Despite the clear wording of NCLB that unequivocally provides parents the right to transfer their children immediately out of failing schools or receive free SES, and despite the clear message from President Bush and the leaders from both houses of Congress, today hundreds of thousands of children in New York City, Albany, and other parts of New York

State today remain trapped in failing schools because local educational authorities (LEA) have trampled upon these parental rights to transfer their children from a failing to a non-failing school and to free SES. Parents have been intentionally misinformed, misled and uninformed about their rights under NCLB. Worse, some parents have requested transfers for their children out of failing schools, only to have those requests illegally denied. Such wrongful conduct by defendants violates federal law and the New York State Constitution, and has rendered meaningless the core purpose of NCLB, as stated by United States Secretary of Education Rod Paige, to “make sure we’re providing all of our children with access to a high-quality education.”

NATURE OF ACTION

1. This is a class action lawsuit brought pursuant to Article 9 of the Civil Practice Law Rules (CPLR), 42 U.S.C. § 1983 and NCLB on behalf of plaintiffs and all parents and legal guardians (collectively, “Parents”) and children who have been, and continue to be, deprived of their rights under NCLB and the New York State Constitution to, (i) transfer children out of a school identified pursuant to NCLB regulations as one for “School In Need of Improvement Year 1,” “School In Need of Improvement Year 2,” “Corrective Action,” or “School Under Registration Review” (hereinafter, a “Failing School”) to a public non-failing school, and (ii) provide SES, as set forth in NCLB, to eligible children who remain in Failing Schools. The defendants have not complied with these critical aspects of NCLB statute and its final regulations. This class action also seeks declaratory relief that defendants’ failure to comply with NCLB is in violation of the New York State Constitution Article XI, Section 1.

2. Congress and the President of the United States have created and conferred an unambiguous right of immediate public school choice for Parents and their children in Failing

Schools and for SES pursuant to NCLB. These rights are clear and not so vague and amorphous that their enforcement would strain judicial resources.

3. The provisions of NCLB giving rise to those rights are couched in mandatory terms. In addition, plaintiffs and the potential class members in Failing Schools are the very class for whose special benefit the statute was enacted.

4. The legislative intent of NCLB neither explicitly nor implicitly denies, and indeed creates, the remedies herein requested that relate to NCLB. It also is consistent with the underlying purposes of the legislative scheme of NCLB to imply these remedies for plaintiffs.

5. As to the claims made herein relating to NCLB, those claims are not traditionally relegated to state law or in an area basically the concern of the States.

6. As to the claim made herein that violation of NCLB constitutes a violation of New York State Constitution Article XI, Section 1, plaintiffs have a right to seek declaratory relief thereunder.

THE PARTIES

7. Eunice Staton is and was at all relevant times a Parent of two children attending New York City Public School PS 30 (‘PS 30’) and one child attending New York City Public School IS 172 (‘IS 172’). PS 30 and IS 172 were identified as Failing Schools by the New York State Education Department (‘NYSED’) on September 4, 2002.

8. Latasha Gibbs is and was at all relevant times a Parent of two children attending New York City Public School PS 30. PS 30 was identified as a Failing School by the NYSED on September 4, 2002.

9. Charlene Wilson is and was at all relevant times the legal guardian of a child in Arbor Hill Elementary School ("Arbor Hill"). Arbor Hill was officially identified as a Failing School by the NYSED on September 9, 2002.

10. Defendant Joel Klein is the Chancellor for the New York City Department of Education (NYCDOE). The NYCDOE is the LEA responsible for implementing the provisions of NCLB in New York City.

11. Defendant NYCDOE is the LEA responsible for implementing the provisions of NCLB in New York City.

12. Defendant Lonnie Palmer is the Superintendent for the City of Albany School District and head of its Board of Education. The City of Albany School District is the LEA responsible for implementing the provisions of NCLB in the City of Albany.

13. Defendant City of Albany School District is the LEA responsible for implementing the provisions of NCLB in the City of Albany.

CLASS ACTION ALLEGATIONS

14. Plaintiffs bring this action as a class action pursuant to Article 9 of the CPLR on behalf of themselves and all other persons who have children or are children in a school designated as a Failing School and who (i) have requested transfers to non-failing public schools which were denied, (ii) never were informed, or properly informed, of their right to transfer their children to non-failing public schools and now wish to do so, (iii) have requested SES and were denied, and/or (iv) never were informed, or properly informed, of their right to receive SES as of the close of business on January 24, 2003, and now wish to receive such services. Members of this class also seek a declaratory judgment that defendants'

failure to comply with NCLB is violative of the New York State Constitution Article XI, Section 1.

15. This action is properly maintainable as a class action. As of January 24, 2003, there were several hundred thousand children in Failing Schools throughout New York State, and approximately 284,010 in New York City and Albany. Thus, the members of the Class are so numerous that joinder of all members is impracticable.

16. Plaintiffs' claims are typical of the claims of the members of the Class, and the plaintiffs and all members of the Class have been denied rights as a result of defendants' wrongful conduct complained of herein.

17. Plaintiffs will fairly and adequately protect the interests of the members of the Class, and have retained competent counsel in this case of first impression. Plaintiffs have no interest antagonistic to, or in conflict with, the Class plaintiffs seek to represent.

18. A class action is superior to other available methods for the fair and efficient adjudication of the claims asserted herein because joinder of all members is impracticable. Furthermore, because of the nature of the damages suffered, the likelihood of individual Class members presenting separate claims to redress the wrongs done to them is remote.

19. There are questions of law and fact common to the Class, including:

a. Whether the failure by defendants to notify, or properly notify, Parents with children in Failing Schools of their rights under NCLB provides Parents with the right to assert those rights during the 2002-2003 school year;

b. Whether Parents were notified, or properly notified, of their rights under NCLB;

c. Whether Parents who attempted to exercise those rights under NCLB had them denied; and

d. Whether defendants' failure to comply with NCLB constitutes a violation of the New York State Constitution.

BACKGROUND

THE NCLB ACT

20. The purpose of NCLB is to “ensure that all children have a fair, equal and significant opportunity to obtain a high quality education” by, *inter alia*, “holding schools, local educational authorities and States accountable for improving academic achievement of all students, while providing alternatives to students in such schools to receive a high-quality education.” *See* 20 U.S.C. §6301 *et seq.*, relevant sections attached to the Charles King Affirmation dated January 26, 2003, (the “King Affirmation”) as Exhibit 1.

21. The local entities responsible for complying with NCLB are the “local education agencies.” *Id.* at §§6316 and 7801(26). Here, they are the NYCDOE and Albany School District.

22. Pursuant to NCLB, a school is identified for school improvement (that is, a Failing School) by the State Education Agency (“SEA”) when that school fails to make “adequate yearly progress” (“AYP”) as defined by the SEA for two consecutive years. *Id.* at §§6311(b) and 6316(b). Once a school is identified as a Failing School, “the LEA must provide all students enrolled in the school with the option to transfer to another school served by the LEA.” (emphasis added). *Id.* at §6316(b)(1)(E). “An LEA must provide public school choice by the beginning of the 2002-2003 school year for schools identified for improvement for 2002-2003 based on 2001-2002 assessment results.. An LEA must offer choice to all

students in an eligible Title I school until the school is no longer identified for improvement.”

See United States Department of Education, *Public School Choice Draft Non-Regulatory Guidance*, December 4, 2002, B-2, B-5, pp. 4, 6, attached to the King Affirmation as Exhibit

2. Pursuant to the final regulations for NCLB promulgated December 2, 2002, “An LEA may not use lack of capacity to deny students the option to transfer.” See 34 CFR §200.44(3)(d), attached to the King Affirmation as Exhibit 3.

23. In addition to the right to transfer, a child from a low-income family (determined on the same basis an LEA makes Title I allocations to schools) also has the right to receive SES once the school that child is attending is identified as a Failing School for a second year.

24. Under NCLB, when a student is attending a school that has not made AYP for three consecutive years -- which includes schools designated by the NYSED as “Schools In Need of Improvement Year 2,” “Schools Under Registration Review,” or “Corrective Action” -- that student’s Parents must be provided opportunities to select SES for their child. Qualified SES are academic assistance such as tutoring, remediation, and other educational interventions. See King Affirmation Exhibit 1, at §6316(c)(1). Such services shall be available not later than the first day of the 2002-2003 school year. *Id.* at §6316(b) and (e). These services are to be delivered “from a state-approved provider selected by the student’s parents.” *Id.* at §6316(e). The approved providers can be a non-profit entity, a for-profit entity, an LEA, or a public school. *Id.* at §6316(b)(4).

25. NYSED approves providers for these services. Once approved, districts are mandated to complete a detailed agreement with SES providers for each individual student receiving SES. See New York State Education Department Request for Qualifications for

Supplemental Educational Services Providers, Section 1.2, attached to the King Affirmation as Exhibit 4.

THE PRESIDENT OF THE UNITED STATES AND CONGRESSIONAL ARCHITECTS
OF NCLB HAIL PARENT RIGHTS UNDER STATUTE

26. One of the chief reasons President Bush (who first submitted this legislation to Congress), House sponsors Congressmen Boehner and Miller and Senate sponsors Senators Jeffords and Kennedy have all hailed NCLB is because it finally gave Parents the right to (i) ‘immediate public school choice’ through the instant option to transfer children out of Failing Schools and (ii) receive SES for eligible children who remain in Failing Schools.

27. When President Bush signed NCLB into law, he stated that NCLB would give Parents the option to either transfer their child out of a Failing School, or obtain for that child tutoring or other SES. Specifically, President Bush stated, “There must be a moment in which Parents can say I have had enough of this [failing] school. Parents must be given real options in the face of failure in order to make sure reform is meaningful.” See Statement by President George W. Bush, January 8, 2002, attached to the King Affirmation as Exhibit 5. Calling parental options the “second principle” of NCLB legislation, President Bush explained, “Any school that doesn’t perform.. a parent will have these options, a better school, a tutor, or a charter school. We do not want children trapped in schools that will not change and will not teach.” Id.

28. During the Congressional debate, sponsors of the bill and other members of Congress repeatedly referred to (i) the immediate right Parents had to transfer their children out of Failing Schools and (ii) the right to seek SES. These statements include, but are not limited to:

- “As passed out of committee, [NCLB] provides immediate public school choice for children in schools identified as failing after just 1 year. That is public school choice. This provision will give Parents the freedom to choose a better-performing public or charter school to educate their children. The bill also allows parents to seek supplemental educational services, such as tutoring, after-school services and summer school programs for their children.”(emphasis added). Congresswoman Pryce. See 147 Cong. Rec. H2298, *H2299, attached to the King Affirmation as Exhibit 6.
- “[This bill] provides an escape route for students trapped in chronically failing schools.”Congressman Boehner (R-OH), Chairman of House Committee on Education and the Workforce, who introduced the bill in the House. Id. at 147 Cong. Rec. H2310, *H2311; and
- “[W]e are going to empower parents to assist their children when they have a child in a failing school and who is being left behind and is from a low-income background. We have given them a lot of tools that allow them to take action which affects their child’s education.” Senator Gregg. Id. at 147 Cong. Rec. S13322-03, *S13327.

29. In addition, United States Education Secretary Rod Paige has stated repeatedly that the four pillars of NCLB are “accountability, local control, research-based reform and expanded parental options.” See “Education Watch,”5/18/01, attached to the King Affirmation as Exhibit 7.

DEFENDANTS’ FAILURE TO COMPLY WITH THE PROVISIONS OF NCLB AND THE DENIAL OF RIGHTS OF PARENTS AND CHILDREN TO PUBLIC SCHOOL CHOICE AND SES

30. Notwithstanding that fact that Parents were to be informed “well in advance of the 2002-03 school year” whether their child was in a Failing School, the NYSED released the list of 487 New York Failing Schools only after school had started for this year: September 4, 2002, in New York City; and September 9, 2002, for the rest of the State. In New York City, there were 331 schools identified as Failing Schools, with approximately 282,000 children attending these schools. In Albany, there were three schools identified as Failing Schools, with approximately 2,010 children attending these schools.

31. As set forth below, none of the defendants have complied with NCLB requirements that safeguard and provide the right to immediate public school choice and availability of SES for children in Failing Schools. Parents either have not been informed, or properly informed, of their rights, or have been misinformed and misled. Further, Parents who have sought to assert their right to transfer their children out of Failing Schools to a non-failing school have been denied illegally.

THE NEW YORK CITY LEA FAILED TO COMPLY WITH NCLB
AND, THEREFORE, DENIED THE RIGHTS OF NEW YORK PARENTS AND
CHILDREN TO PUBLIC SCHOOL CHOICE AND SES

A. PARENTS HAVE BEEN ACTUALLY, EFFECTIVELY AND ILLEGALLY DENIED
THE RIGHT TO TRANSFER THEIR CHILDREN OUT OF FAILING SCHOOLS

32. The failure of the New York City LEA to comply with NCLB requirements has left hundreds of thousands of children trapped in Failing Schools, violating NCLB and their right to an education as guaranteed by the New York State Constitution Article XI, Section 1. In fact, due to the failure of the New York City LEA, “eligible families were notified at the last minute, if at all.” See “Policy Eases the Way out of Bad Schools,” Abby Goodnough, New York Times, 12/9/02, attached to the King Affirmation as Exhibit 8. Thousands of Parents had their transfer requests rejected. Id.

33. The New York City LEA has failed to comply with NCLB with respect to transfer rights in a number of ways. First, the New York City LEA has failed to inform numerous Parents with children in Failing Schools that they had the right to transfer their children immediately. Neither plaintiff Eunice Staton nor plaintiff Latasha Gibbs ever received any information about their rights under NCLB. See Eunice Staton Affidavit dated January 25, 2003, (“Staton Affidavit”) ¶3; Latasha Gibbs Affidavit dated January 25, 2003 (“Gibbs Affidavit”), ¶3. A recent poll conducted by the Foundation for Educational Reform and

Accountability (“FERA”) that was released on December 19, 2002, shows that 75% of Parents with children in Failing Schools were unaware that their children were in Failing Schools, and 94% were likely to request transfers to a better school. See Press Release for FERA, “Survey of NYC Parents: Strong Support for Increased Parental Options as Klein Gets Ready to Overhaul School System,” 12/19/02, p. 4, attached to the King Affirmation as Exhibit 9.

34. Second, numerous Parents received inaccurate information concerning the right to transfer. Some Parents with children in Failing Schools received a letter dated May 2002 that informed Parents their children were in Failing Schools, and purported to “explain what [the Parents’] options are under new federal legislation (No Child Left Behind Act of 2001).” See Principal Sheryl Donovan letter dated May 2002, attached to the King Affirmation as Exhibit 10. On the right to the transfer children out of Failing Schools, the letter stated, “it is our duty to inform you that you have the option to request a transfer to a higher performing school with [sic] the district that has not been identified as needing improvement. Please be aware that due to factors such as mandates for class size reduction, not all transfer requests may be accommodated.” (emphasis added.) Id. This description is completely contradicted by NCLB regulations that state “an LEA may not use capacity to deny students the option to transfer.” See King Affirmation Exhibits 2, 4.

35. One Parent learned in September 2002 from a list printed in a newspaper that her first-grade son qualified for a transfer. See “School Transfer Delays Slammed,” Joe Williams, New York Daily News, 9/20/02, attached to the King Affirmation as Exhibit 11. When she called to inquire about a transfer, she was told that she was months too late. Id.

36. One Parent stated “the problem was they weren’t even letting parents know that they had a choice.” This parent tried to transfer her son to another school and was told they

were at capacity. See“Lawsuits a Possibility for Choice Struggle,” Kathleen Lucadamo, The New York Sun, 12/3/02, attached to the King Affirmation as Exhibit 12.

37. Finally, the overwhelming majority of requests by Parents to transfer their children out of Failing Schools were actually denied outright by the New York City LEA. Nearly 5,000 of the 6,400 transfers that were requested were rejected. See King Affirmation Exhibit 8.

38. NCLB requires that information must be provided to Parents“through broader means of dissemination such as the Internet, the media, and public agencies serving the student population and their families.” See King Affirmation Exhibit 3, at §200.36(c)(2). This was done inadequately or not at all. See King Affirmation Exhibit 8; Staton Affidavit at ¶3; Gibbs Affidavit at ¶3.

B. ELIGIBLE PARENTS HAVE BEEN EFFECTIVELY DENIED SUPPLEMENTAL EDUCATIONAL SERVICES FOR THEIR CHILDREN

39. Parents whose children are eligible for SES from the vendor of their choice under NCLB have been misinformed, misled and not contacted about this right by the New York City LEA. Neither New York City class plaintiff Staton nor Gibbs received any information from their school or school district about available SES. See Staton Affidavit at ¶3; Gibbs Affidavit at ¶3. Moreover, Ms. Staton was specifically told there were no tutoring services being offered at IS 172. See Staton Affidavit at ¶8.

40. Jill Chaifetz, Executive Director of Advocates for Children, has stated that none of the Parents they talked with received information about available SES, such as tutoring. See“Free Tutoring Fails to Draw Many Students,” Abby Goodnough, New York Times, 11/15/02, attached to the King Affirmation as Exhibit 13. The recent FERA survey, revealing that 75% of those Parents with children in Failing Schools were not aware their

children were in a Failing School, which supports Ms. Chaifetz' point. See King Affirmation Exhibit 9.

41. The FERA survey also found that 97% of Parents with children in Failing Schools support the right to SES, far less than the percentage of Parents with qualifying children in Failing Schools who have availed themselves of this right.

42. In addition, those Parents who have, in fact, learned that their children are entitled to SES, pursuant to NCLB have found it extraordinarily difficult to obtain the SES and SES provider of their choice for a variety of reasons. In some parts of New York City, schools are promoting their own programs over the services of private SES provider vendors, and were warned to be skeptical of outside providers. See "City Undermines Choice on Tutoring," Kathleen Lucadamo, New York Sun, 11/25/02, attached to the King Affirmation as Exhibit 14.

43. Parents have also found the list of SES providers difficult and time consuming to process and understand, rather than in a format that is understandable and easy to read. See King Affirmation Exhibits 13, 14.

44. Other Parents have been directed to a particular school SES provider option only to be told subsequently that SES is not available for their child's grade, or when they have attempted to reach the SES providers offered, not to have their calls unreturned. Id.

45. Pursuant to NCLB and its regulations, children in Failing Schools are entitled to SES from an approved SES provider or SES providers of their choice, provided the funding is available. To date, Plaintiff Class has not received such SES and are now precluded from receiving such help in 2002-2003 school year because of a November 15, 2002, New York City LEA deadline (subsequently extended to November 27, 2002) to sign-up for the year.

46. Currently, there are hundreds of thousands of children eligible to participate in New York City's SES options, but many do not do so due to the failure of defendants to comply with NCLB.

47. In sum, the New York City LEA's failure to comply with NCLB includes, but is not limited to:

- Illegal denial of transfers requested by Parents with children in Failing Schools to non-Failing public schools;
- No information provided to numerous Parents on the right to transfer their children from Failing Schools;
- No parental notification of the right to transfer or to receive SES that complies with the statutory and regulatory requirements of NCLB;
- No process to accommodate transfers from Failing Schools to non-failing schools; and
- An improper cutoff of SES for children who never knew they had the chance to receive it.

**THE ALBANY LEA FAILED TO COMPLY WITH NCLB
AND, THEREFORE, DENIED THE RIGHTS OF PARENTS AND CHILDREN TO
PUBLIC SCHOOL CHOICE AND SES**

A. NON-EXISTENT OR INADEQUATE PARENTAL NOTIFICATION

48. From the time the Albany Failing Schools were identified by the NYSED on September 9, 2002, to December 2002, the Albany LEA did absolutely nothing with respect to parental notification of their right to transfer their children out of Failing Schools or their right to receive SES. In fact, Plaintiff Charlene Wilson still has never received any information from the Albany LEA. See Charlene Wilson Affidavit dated January 25, 2003 ('Wilson Affidavit'), ¶5. Further, the Albany LEA failed to comply with NCLB requirements that it "promptly notify parents of all students enrolled" at Failing Schools that the schools were declared as such.

49. While here have been some communications sent to some Parents with children in Failing Schools, these communications fail to meet the parental notification requirements of NCLB. For example, Hackett Middle School Principal James Gaudette wrote a letter to Hackett Parents concerning NCLB, but the letter does not include, as required under NCLB's regulatory guidelines:

- An explanation of what the designation of Failing School means;
- Why the school received the designation;
- A comparison of Hackett's academic achievement to non-failing schools;
- An explanation of the actions the district and NYSED have taken to improve academic performance;
- A list of schools for children to transfer into, there being none within the school district transfer options as both middle schools are Failing Schools;
- A description of the performance and quality of choice options available;
- A deadline for choice options; or
- Mention of a way to communicate choices in a number of ways, including mail, e-mail and fax.

See King Affirmation Exhibit 1, at §6316(b)(6).

50. A press release posted on the Albany CSD's website, dated September 4, 2002, does not include, as required by NCLB's regulatory guidelines:

- An explanation of what designation as a Failing School means;
- Why the school received the designation;
- A comparison of Failing Schools academic achievement to that of non-failing schools;
- An explanation of whether it is the school district's responsibility or NYSED's responsibility to steer reforms underway to improve academic achievement;
- An explanation of how Parents can become involved in addressing those academic issues that caused the Failing School designation;

- An explanation of the parental option to transfer a child out of a Failing School to another non-failing school;
- A list of non-failing schools for children to transfer into;
- A description of the performance and quality of choice options available;
- A deadline for choice options; and
- A way to communicate choices in a number of ways, including mail, e-mail and fax. Id.

51. The Albany LEA's December 2002 newsletter addressing NCLB provisions

does not include, as required by NCLB's regulatory guidelines:

- An explanation of what designation as a Failing School means;
- Why the school received the designation;
- A comparison of Failing Schools academic achievement to that of non-failing schools;
- An explanation that NYSED is the entity "involved" in the designation;
- What the school, district and NYSED is doing to address those academic performance problems;
- An explanation of how Parents can become involved in addressing those academic issues that caused the Failing School designation;
- An explanation of the parental option to transfer a child to from a Failing School to a non-failing school;
- A list of non-failing schools for children to transfer into;
- A description of the performance and quality of choice options available;
- A deadline for transfer options;
- A way to communicate choices in a number of ways, including mail, e-mail and fax;
- A list and description of approved SES providers;
- A correct procedure for obtaining assistance with SES options; and
- A reasonable deadline to choose a provider.

See “A Message from Assistant Superintendent for Instruction Dr. Eva Joseph, attached to the King Affirmation as Exhibit 15.

52. NCLB requires that information must be provided to Parents “through broader means of dissemination such as the Internet, the media, and public agencies serving the student population and their families.” See King Affirmation Exhibit 3, at §200.36(c)(2). This was done inadequately or not at all.

B. PARENTS HAVE BEEN ACTUALLY, EFFECTIVELY AND ILLEGALLY DENIED THE RIGHT TO TRANSFER THEIR CHILDREN OUT OF A FAILING SCHOOL

53. The federal regulations and guidelines for NCLB clearly state that an “LEA must provide public school choice, by the beginning of the 2002-2003 school year” to students in Failing Schools. See King Affirmation Exhibit 3. However, the Albany LEA has still failed to provide this option to Albany Parents with children in its three Failing Schools, Arbor Hill Elementary, Philip Livingston Middle School (“Livingston”) and Hackett Middle School (“Hackett”).

54. In December 2002, the Albany LEA sent some Parents a misleading “message” in its December newsletter from Albany’s Assistant Superintendent for Instruction, Dr. Eva Joseph. See King Affirmation Exhibit 15. With respect to Arbor Hill, Dr. Joseph stated that it is a Failing School, and Parents had the option to transfer children to another school but, in direct contradiction to NCLB regulation providing that an “LEA may not use capacity to deny students the option to transfer”, see King Affirmation Exhibit 3, at §200.44(6)(d), Dr. Joseph states that “most elementary schools within the district are currently at capacity and transfer options are limited.” See King Affirmation Exhibit 15.

55. In addition, Dr. Joseph directed that Parents interested in transferring children out of Arbor Hill to a non-failing school in the district should contact “Pupil Services” because “that office maintains a complete and updated list of openings at each elementary school.” Id.

56. However, when that office was contacted in January 2003, it had no such information or list of openings at the other elementary schools. Further, the office had no knowledge of any of the claims made by Dr. Joseph in the Albany School District’s newsletter. Dr. Joseph’s office has subsequently stated that no such list exists, but that the Pupil Services Office will be responsible for creating such a list as soon as possible.

57. Although the United States Department of Education has stated that parental notification must, at a minimum, “identify each public school, including public charter schools that the parent can select” and “describe the performance and quality of those schools of choice.” See King Affirmation Exhibit 3, at D-2. Dr. Joseph’s message does not provide any of that information.

58. In addition, Dr. Joseph failed to include the following information, which is required by NCLB, in her message:

- an explanation of what the identification of “school in need of improvement” means, a comparison of Failing School academic achievement to that of non-failing other elementary or secondary schools in the school district, and a notation that the NYSED is the agency that is “involved” in this process;
- The reasons for identification as “in need of improvement”;
- An explanation of what the identified Failing School is doing to address the problem of low academic achievement;
- An explanation of what the school district and/or NYSED is doing to help the school address the achievement problem;
- An explanation of how Parents can become involved in addressing those academic issues that caused the identification of the school as a Failing School;

- An explanation of the parental option to transfer a child out of a Failing School to a non-failing public school; and
- The availability of SES (if applicable).

See King Affirmation Exhibit 1, at §6316(b)(6).

59. As for Albany's other two Failing Schools, Hackett and Livingston, Dr. Joseph stated in the December 2002 newsletter that students seeking to transfer from there have "no real opportunity within the district under this law" to transfer. Id. But, she fails to state that Hackett and Livingston students could transfer to the New Covenant Charles School ("New Covenant").

C. ELIGIBLE PARENTS HAVE BEEN EFFECTIVELY DENIED SES FOR THEIR CHILDREN

60. With respect to children attending Livingston and Hackett, the Albany LEA has not provided options for SES, as required in NCLB for schools with limited choice options to receive SES. Therefore, they have been denied this opportunity.

61. With respect to Arbor Hill students, Dr. Joseph states in her December 2002 message that the Albany LEA sent a letter in October 2002 to eligible Arbor Hill Parents indicating that NCLB has made SES available to their children. However, in neither the October 2002 nor the December 2002 newsletters did it provide Parents with notice, as required by NCLB, of:

- The identity of approved providers of SES that are within the school district or whose services are reasonably available; and
- A brief description of the SES, qualifications and demonstrated effectiveness of those SES providers.

See King Affirmation Exhibits 15, 1 at §6316(b)(6).

62. Instead, Dr. Joseph refers all interested Parents to contact the Pupil Services Office. However, that office does not have such information or a list for distribution.

63. To date, Plaintiff Class has not received SES and wish to receive such services immediately.

64. In sum, Albany's failure to comply with NCLB includes, but is not limited to:

- No information furnished to numerous Parents on the right to transfer their children from Failing Schools;
- No parental notification, or improper notification, of the right to transfer or SES that complies with the statutory and regulatory requirements of NCLB;
- Misleading and wholly inaccurate information to Arbor Hill Parents about transfers from Failing Schools;
- No process to accommodate transfers from Failing Schools, even though the Albany LEA represented to Parents it did have such a process in its December newsletter;
- No parental notification to Livingston and Hackett Parents informing them that their children could transfer to New Covenant, and no attempt to establish a cooperative agreement with nearby school districts to provide out-of-district transfer options for students at Livingston and Hackett;
- Prohibiting eligible Livingston and Hackett children from receiving SES; and
- No process to accommodate SES requests.

AS AND FOR A FIRST CAUSE OF ACTION

(Violation of the No Child Left Behind Act of 2001,
20 USCA § 6301 *et. seq.*, Against All Defendants)

65. Plaintiffs, on behalf of themselves and the Class they seek to represent, repeats and realleges the allegations contained in paragraphs 1 through 64 of this Complaint as if fully set forth herein.

66. NCLB requires, in relevant part, that defendants provide plaintiffs and the Class they seek to represent (i) the immediate right of transferring their children out of Failing Schools and into schools that are non-failing and (ii) the right for eligible Parents to obtain SES (at no additional cost) for their children who remain in Failing Schools from an SES

provider of their choice, and (iii) parental notification of such rights that complies with NCLB.

67. Defendants have failed to meet these requirements by: (i) denying the option to transfer children out of Failing Schools into schools that are not failing; (ii) denying SES; and (iii) failing to notify, or properly notify, plaintiffs and the Class they are seeking to represent, of their rights under NCLB, all in violation of NCLB.

68. Defendants have failed to comply with the requirements of NCLB, and, therefore, are in violation of 20 USCA § 6301 *et. seq.*

69. Plaintiffs and the Class have suffered grievous and irreparable harm as a result.

AS AND FOR A SECOND CAUSE OF ACTION

(Violation of Article XI of the New York State Constitution, Section 1,

Against All Defendants)

70. Plaintiffs, on behalf of themselves and the Class they seek to represent, repeats and realleges the allegations contained in paragraphs 1 through 69 of this Complaint as if fully set forth herein.

71. Article XI, Section 1 of the New York State Constitution provides that “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children may be educated.” Children in Failing Schools do not receive the minimum education guaranteed by the New York State Constitution. NCLB provides Parents whose children are in Failing Schools with options that, if taken, would reach the minimum educational threshold guaranteed by the New York State Constitution.

72. By denying the option to transfer out of Failing Schools into schools that are not failing, by denying SES, and by failing to notify, or properly notify, plaintiffs and the

Class they are seeking to represent of their rights under NCLB, defendants have caused what President Bush, Congressmen Boehner and Miller and Senators Jeffords and Kennedy sought to prevent: “children trapped in schools that will not change and will not teach.” Accordingly, defendants are in violation of the New York State Constitution.

73. Plaintiffs and the Class have suffered grievous and irreparable harm as a result.

RELIEF REQUESTED

Plaintiffs, on behalf of themselves and all other persons similarly situated, respectfully request that this Court:

74. Enter a judgment pursuant to 42 U.S.C. §1983 declaring that defendants have failed to comply with the requirements of 20 USCA §6301 *et. seq.*, and that such failure constitutes a violation of each of (i) the No Child Left Behind Act of 2001, 20 USCA §6301 *et. seq.*, (ii) 42 U.S.C. §1983, and (iii) Article XI of the New York State Constitution, Section 1;

75. Enter an Order requiring defendants to: (i) provide parental notification that complies with NCLB requirements immediately; (ii) transfer out all students in Failing Schools into schools that are not failing upon proper request from Parents; and (iii) provide immediate SES to all eligible students in Failing Schools in accordance with the requirements set forth in NCLB;

76. Award the plaintiffs their reasonable attorneys’ fees and costs incurred in connection with this action pursuant to 42 U.S.C. §1988 and CPLR 909;

77. Retain jurisdiction of this case until defendants have fully complied with the Orders of this Court; and

78. Award such other and further relief as the Court deems just and proper.

DATED: January 26, 2003
Glen Cove, New York

CROWE, DEEGAN, DICKSON AND BENRUBI, LLP

By: _____

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