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PRACTICAL PERSPECTIVES ON SCHOOL LAW & POLICY

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ESEA Reauthorization 2011: What will be the fate of NCLB?By *Sonja Trainor*

As *Leadership Insider* goes to press, all crucial players appear ready and willing to move forward to reauthorize the Elementary and Secondary Education Act (ESEA). In February, U.S. Secretary of Education Arne Duncan told a room full of school board members at NSBA's Federal Relations Network conference that he would do everything in his power to ensure that ESEA is reauthorized before the start of the 2011-12 school year. In 2010, the Obama administration released its *Blueprint for Reauthorization of ESEA*, which lays out its goals for the process. NSBA responded with its own key priorities for school boards. The new Congress appears ready to act.

This issue of *Leadership Insider* provides an overview of the major requirements of ESEA in its latest form, the No Child Left Behind (NCLB), practical and legal problems that have arisen in its 10 years of existence, and school boards' priorities for the new bill.

ESEA/NCLB

Enacted in 1965 largely as a categorical funding program to support at-risk students in urban and rural areas, ESEA was the federal government's first significant foray into public education on a large scale. When ESEA was reauthorized in 1988, some hints of future accountability measures appeared: State educational agencies (SEAs) could address schools that received Title I funds, but whose students had not made academic progress after two years of assistance.

In 2001, President George W. Bush pushed through ESEA's latest revamp, NCLB. Officials such as then Assistant Secretary of Education Diane Ravitch supported the new law, with its lofty purpose "that

all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments." 20 USC §6801.

Ideologues on both sides of the political spectrum lauded NCLB's goals, and they seemed to agree on the means of achieving it: (1) create challenging academic standards applicable to all students in a state; (2) use those standards to measure and report student progress to educators, the public, and parents; (3) disaggregate data for students according to at-risk factors such as race, ethnicity, disability, socioeconomic status, and English language learner status; (4) initiate reforms in schools and districts that do not produce certain student achievement outcomes; and (5) ensure that every child has a highly qualified teacher, and inform his parents if he does not.

Education experts, school officials, and the public now largely agree that NCLB needs to be fixed. By emphasizing student assessments in narrow subject areas and identifying schools that "fail," NCLB has become a symbol of a punitive approach to education reform, rather than a tool to ensure fairness and equity. Ravitch herself has become a spokeswoman against the failed promises of NCLB. She believes that, by imposing a deadline of 2014 for having all public school students testing at proficient levels in reading and math, NCLB set up schools for failure and paved the way for wide disillusionment with public education.

NCLB requirements

In exchange for Title I funds, states and school districts were required to submit plans laying out their NCLB implementation program. The new requirements, still in place

today, were extensive:

- **State academic standards.** States were to develop challenging academic content and student achievement standards including, at a minimum, math, reading, or language arts; a single statewide accountability system to ensure local educational agencies (LEAs) and schools make adequate yearly progress (AYP); and a timeline for progress and intermediate academic goals, ensuring that all students in all subgroups reached the proficient level of academic achievement as measured by state assessments in 12 years after school year 2001-02 (FY2014).

- **State assessments.** States had to develop assessments in at least math and reading/language arts, which would be the primary means of measuring AYP. Students were to be assessed at least once during specified grades, and yearly for grades three to eight beginning in 2005-06. Beginning in school year 2007-08, students were to be assessed in science at least once during grades three to five, six to nine, and 10 to 12. Assessments results were required to be disaggregated by subgroup within each state, LEA, and school.

- **School district plans.** LEAs had to file their own plans identifying assessments and achievement indicators and assuring authorities of efforts such as parental notice and technical assistance.

- **Notice to parents.** LEAs were required to provide numerous parental notices, including one to the parents of each student attending any Title I school, letting them know that they may request detailed information regarding the professional qualifications of the student's classroom teachers.

- **School improvement.** Three stages of school improvement were identified for schools that fail to make AYP for at least two years: "identified for improvement," "corrective action," and "restructuring."

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About NSBA

The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards and the school boards of the District of Columbia, Hawai'i, and the U.S. Virgin Islands. For more information, visit www.nsba.org/na.

About the National Affiliate Program

The National Affiliate Program extends NSBA's services directly to local school districts. School districts are eligible to join, provided they are members in good standing of their state school boards associations.

About the Council of School Attorneys

The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for the exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

Each stage of improvement required additional steps, starting with school choice for students and notice to parents, and leading up to alternative governance structures such as state takeover.

- **Highly qualified teachers.** LEAs receiving Title I funds were to ensure that teachers hired after NCLB are highly qualified. For most teachers, this meant full state certification, including through alternative routes, and no waiver of state certification requirements on an emergency, temporary, or provisional basis.

- **Limited English proficient students.** NCLB requires that such students meet academic standards and graduation requirements, take an annual assessment for English proficiency and the state assessment for math and reading/language arts with accommodations, and that their parents are notified about their child's placement as soon as it occurs.

- **Migrant and homeless students.** LEAs must adopt parental involvement policies and ensure access to education services for migrant students and homeless students. LEAs must ensure homeless students are able to obtain services for which they are eligible, provide the option of enrollment at a student's home school or the attendance area in which he/she resides and notice to parents of homeless students of their right to appeal placement.

- **Military recruiters, Boy Scouts, prayer, student surveys and privacy.** Schools received numerous mandates in these areas.

Reforms of the Obama administration

In 2009, after nearly 10 years of NCLB, the Obama administration initiated a bold edu-

cation spending plan, passed as part of the American Recovery and Reinvestment Act. An unprecedented \$100 billion in federal funds was funneled to states and school districts to weather the economic crisis. Four billion dollars were designated for a new competitive grant program for states: Race to the Top (RTTT).

Through RTTT, the Obama administration and Duncan sought to reward states that are leading the way in comprehensive, coherent, statewide education reform in four key areas that echoed the goals (if not the means) of NCLB:

- Adopting standards and assessments that prepare students to succeed in college and the workplace;
- Building data systems that measure student growth and inform teachers and principals on how to improve instruction;
- Recruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most; and
- Turning around the lowest-performing schools.

After the Education Department implemented several more grant programs, including RTTT funds awarded in September 2010 to two consortiums of states to develop a new assessment based on the Common Core Standards, the education community expressed its concern with the administration's emphasis on competitive grants. In early 2011, Duncan said that, going forward, 84 percent of federal money for education would remain in formula programs such as Title I and IDEA.

Read about Duncan's and Ravitch's remarks at NSBA's Federal Relations Network conference in Washington, D.C., in *School Board News Today* at <http://schoolboardnews.nsba.org>.

ESEA reauthorization: What's on the horizon?

By *Roberta E. Stanley, Director of Federal Affairs,
National School Boards Association*

School board members and educators throughout the U.S. have been preparing for and anticipating the reauthorization of the Elementary and Secondary Education Act (ESEA)/No Child Left Behind Act (NCLB) since 2008, the expected year in which a reauthorization would have taken place. Three years later, the hope is no less diminished, but the politics surrounding the law's reauthorization have clearly changed.

Two of the four Congressional leaders

who authored NCLB have departed—Sen. Edward Kennedy (D-Mass.), who chaired the Senate Committee on Health, Education, Labor, and Pensions (and who passed away in 2009), and Sen. Judd Gregg (R-N.H.), who served as the Ranking Republican on the committee. On the House side, then Chairman of the House Committee on Education and the Workforce, Rep. John Boehner (R-Ohio), has risen to become Speaker of the House, and Ranking Democrat Rep. George Miller (D-Calif.) is once

again in that slot after having been chairman of the committee for the past four years.

Clearly Speaker Boehner and Rep. Miller hold some sway in any deliberations on the consideration of NCLB. At the same time, the Senate Health, Education, Labor, and Pensions Committee is now chaired by longtime Sen. Tom Harkin (D-Iowa) and the Ranking Republican seat is held by Sen. Michael Enzi (R-Wyo.). Equally important, Rep. John Kline (R-Minn.) has taken over the reins of the House Committee on Education and the Workforce.

President Barack Obama will have an impact, too. While he does not have the pride of authorship in NCLB that former President George W. Bush maintained, Obama has a proven, tenacious, and supportive track record on education. His presidential campaign was rich with rhetoric on the overreliance on assessments in NCLB, and critical of the penalty-oriented nature of the law. His unprecedented drive for educational funding in the American Recovery and Reinvestment Act of 2009 shortly after taking the oath of office, teamed with a personal success story heavily reliant on his educational experiences, set him apart.

In the midst of these political musical chairs, school districts have been increasingly under pressure to meet the inflexible, steep requirements of NCLB that call for universal student proficiency in math and reading by 2014. School districts have consistently supported high standards for all students, including those for English language learners (ELLs), students in poverty, and students with disabilities. However, they have had to deal with the flawed design of the current accountability framework and, as a result, will over-identify all schools as failing.

The measurement framework that has evolved bases its assessment of school quality on a student's performance on a single assessment. It also mandates a series of overbroad sanctions that have not proven to have significant impact on improving student or school performance when compared to other options.

The Obama administration and U.S. Secretary of Education Arne Duncan revealed the Department's *Blueprint for Reauthorization of ESEA* in 2010, outlining in very broad terms proposed changes to the current law. With this release came renewed hope that there would be momentum for reauthorization. But the chances for reauthorization declined as a priority as

unemployment and the economy demanded more legislative attention—and the political landscape became more polarized in the most recent election cycle.

NSBA expressed support for many of the overall concepts offered in the *Blueprint*, with some tweaking, but also continues to oppose several specific recommendations. For example, NSBA opposes recommendations that: 1) place greater emphasis on competitive grants while funding for Title I formula-based grants remains the same; 2) condition Title I funding (or any major federal funding) on the adoption of state Common Core Standards; 3) mandate specific models that are not evidence-based to turn around low-performing schools; 4) expand the overemphasis on charter schools; and 5) continue the overemphasis on standardized tests.

As the administration was developing its *Blueprint*, NSBA was fine tuning its comprehensive, strategic framework for reauthorizing ESEA, aimed at improving the quality of educational services while ensuring maximum authority and flexibility to school districts that provide such services. This effort resulted in the development of nearly 40 specific recommendations (www.nsba.org/ESEARRecommendations.pdf). Congressional adoption of our recommendations would:

- Ensure states and school districts have greater overall flexibility to make educationally sound decisions. They would be free of mandates that unnecessarily or counterproductively hinder school districts from achieving their goals (e.g., mandating the expansion of charter schools and standardized tests as a measure of accountability; and conditioning federal funding on the adoption of state-led Common Core Standards).

- Ensure high-quality, valid, and reliable assessments for all students, including English language learners and students with disabilities.

- Support the use of multiple measures of academic achievement that will more accurately determine students' knowledge and performance and would reflect the kind of well-rounded education necessary to be successful in the 21st century economy, as opposed to judging success on their performance on a single assessment.

- Permit the use of growth models and other measures of student achievement that more accurately reflect student and school performance.

- Facilitate strategic interventions that are designed at the local or state level and are targeted to students and schools most

in need, rather than impose ineffective and costly sanctions.

- Provide states and school districts support and ensure flexibility to establish programs to enhance teacher/principal quality by focusing on preparation, recruitment, retention, and evaluation.

- Support efforts by school districts, through a separate funding stream, to develop, expand, coordinate, and enhance the quality and availability of voluntary pre-school programs for all 3- and 4-year-olds.

- Fully fund the law, along with other federal assistance programs that are critical to successfully achieving the goals of the new law, and limit the expansion of competitive grants where such expansion would result in level funding of formula-based grants that are so critical to students in poverty.

NSBA's recommendations are being well received as the 112th Congress organizes and gets about the business of legislating. With 96 newly elected members in the Republican-controlled House and nearly one-third of the Democratic-controlled Senate in their first term, NSBA is lobbying for congressional support with the strong engagement of our local school board members in their respective states and congressional districts.

Additionally, NSBA is lobbying House and Senate education committee members who have primary jurisdiction over education legislation. We continue to maintain our presence before House and Senate education committee formal hearings on various issues under ESEA. It is critical to urge Congress to:

- Reauthorize ESEA and incorporate the recommendations offered by local school board members that would improve the quality and delivery of educational services while maintaining maximum flexibility to schools and school districts in addressing their special circumstances.

- Conduct formal oversight hearings regarding significant federal regulations/policies—such as the Supplemental Priorities for Competitive Grant Programs—that impact K-12 education to ensure that actions by the executive branch are within its authority and the policy direction Congress intends.

- Enact legislation or request the Education Secretary to modify regulations to provide temporary relief to local school districts from the implementation of costly sanctions for not meeting the current law's flawed accountability system if the ESEA reauthorization is not completed by June 2011.

DO YOU AND YOUR LAWYER KNOW ABOUT THE COVERDELL TEACHER PROTECTION ACT?

Enacted as part of NCLB, the Coverdell Teacher Protection Act (CTPA) is intended to “provide teachers, principals, and other school professionals the tools they need to undertake reasonable actions to maintain order, discipline, and an appropriate educational environment.” On Feb. 8, the Missouri Supreme Court ruled that the CTPA is a valid exercise of Congress’s power under the Spending Clause, and that a superintendent was entitled to immunity under the CTPA from a negligence suit brought by a student who was injured during an assault by another student. *Dydell v. Taylor*, No. SC 90912 (Feb. 8, 2011).

NSBA joined the Missouri School Boards Association in filing an amicus brief in this case. Read it at www.nsba.org/MainMenu/SchoolLaw/AmicusBriefs/Dydell-v-Taylor.aspx.

Invite your attorney to join you for an informative webinar on this potentially valuable federal statute that provides immunity for school personnel. Attorney Derek Teeter from Husch Blackwell Sanders in Kansas City, the firm representing the school defendants in the *Dydell* case, will provide an overview of the act and the significance of the court’s ruling.

Register Today:
Teacher and Administrator Immunity: Federal Protection Against Personal Liability
Tuesday, May 17,
at 1 p.m. ET. Register at <https://www1.gotomeeting.com/register/290487896>.

Is NCLB constitutional?

So far, federal courts appear to say yes. In two major suits decided in recent months, federal courts of appeal were asked to determine whether NCLB was valid. A particular point of contention for states and school districts is the unfunded mandate

provision of NCLB (a holdover from prior versions of ESEA). That provision clearly states that the law does not mandate a state or local government to spend any funds or incur any costs not paid for by the law itself. Federal funding for Title I and other NCLB programs always falls short of the expenditures required of states and local school districts to implement it.

In one such challenge, *Pontiac v. Spellings*, 584 F.3d 253 (6th Cir. 2009), *cert. denied*, 130 S.Ct. 3385 (2010), nine school districts joined forces with teachers’ association groups and the National Education Association to file



a suit claiming that the mandatory testing provisions of NCLB violated the law’s unfunded mandate provision, and represented a Congressional overreach under the Constitution’s Spending Clause. After several appeals, the full Sixth Circuit split 8-8, effectively affirming the lower court’s dismissal of the

suit. It ruled that NCLB requires states and school districts to comply with its requirements, whether doing so requires expenditure of state and local funds or not. The U.S. Supreme Court declined to hear the case.

In *State of Connecticut v. Duncan*, 612 F.3d 107 (2nd Cir. 2010), Connecticut challenged the manner in which NCLB has been enforced by the U.S. Department of Education. On July 13, 2010, the Second Circuit decided that the case was not ripe for an appellate court decision and affirmed the district court’s dismissal of the case. The parties may bring the suit again.

Court rules ‘Highly Qualified’ regulation exceeds NCLB scope

A clear priority of NCLB was to ensure that all students in Title I programs are taught by “highly qualified” teachers, a concept defined as a teacher who “has obtained” full state certification (including through alternative routes) or has passed the state teacher licensing examination.

The Department of Education passed a regulation allowing the requirement to include a person pursuing an alternative route to a certification program who has worked as a teacher for three years or less, and who demonstrates satisfactory progress toward full state certification.

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit held the regulation was invalid because “demonstrates satisfactory progress toward” full certification does not fulfill NCLB’s clear intent that a teacher “has obtained” full certification. *Renee v. Duncan*, 623 F.3d 787 (9th Cir. 2010).

In an effort to override the court’s decision, Congress added a “note” to its appropriations bill passed in late December 2010, amending NCLB to say that a highly qualified teacher includes a teacher who meets the requirements in the regulation. The provision is effective through the end of the 2012-13 academic year.