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Unfunded Mandates? : An Analysis of Pontiac School Board v. Spellings,

The Legal Challenge to the No Child Left Behind Act

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### Abstract

The purpose of this paper was to analyze the court case *Pontiac v. Spellings*, a legal challenge to the No Child Left Behind (NCLB) Act filed in 2005. The methodology was to examine the briefs filed and the court decisions to analyze the legal arguments made by the parties to the lawsuit. The results were that the U.S. Circuit Court for the Sixth Circuit found that the language of the NCLB Act was ambiguous and did not give clear notice to the states and school districts regarding funding. The U.S. Secretary of Education appealed the court decision. States and school districts concluded that they did not have to pay for implementing provisions of the NCLB Act unless those funds were provided by the federal government. The case raised questions about future spending for education and spending priorities. Should education funding be increased?

### Introduction

On January 8, 2002, President George W. Bush signed the No Child Left Behind Act (NCLB) into law. The NCLB was a reauthorization of the Elementary and Secondary Education Act (ESEA) originally enacted in 1965 during the Great Society of President Lyndon B. Johnson's Administration. The goals of the NCLB were to close the achievement gap between successful students and at-risk students such as minority, poor, and disabled students. This was to be achieved by implementing nationwide achievement

standards. The NCLB was controversial because the federal government sought to impose uniform and nationwide standards and assessment criteria on the states. The legislation thus was seen as infringing on the right of states to mandate their own standards. The law thus raised issues of state's rights. More than 30 states raised objections to the No Child Left Behind Act. On April 20, 2005, the National Education Association (NEA), the largest teacher's union in the US with 2.7 million members, filed a lawsuit in the U.S. District Court for the Eastern District of Michigan in Detroit, Michigan, which has jurisdiction over the Pontiac School District, the leading plaintiffs in the case.

The Pontiac school district is an urban school system with 21 schools and 10,858 students, the majority of whom are minority students, most of them are black. The Laredo school district in Texas and six school districts in Vermont joined the suit. The Laredo school district is made up of 30 schools with an enrollment of 23,000 students, most of whom are minority students, most are Hispanic. The Vermont plaintiffs consisted of six single-school rural districts with a combined enrollment of 1,500 students, most of whom were white. The plaintiffs alleged that federal funding for meeting the nationwide achievement standards mandated by the No Child Left Behind Act had fallen \$27 billion

short of what Congress was supposed to provide. The plaintiffs argued that the law has required the 50 state departments of education, 15,000 school districts, and 90,000 schools to spend their own revenues to satisfy the federal mandates. This constitutes an “unfunded mandate”, they argued. Reg Weaver, the president of the NEA, argued that the act has depleted school budgets: “School budgets have been eaten up by the requirements of this law, so on behalf of parents and children we’re filing suit.”

They cited the provision of the act, section 9527(a), which mandated federal funding: “Nothing in this act shall be construed to authorize an officer or employee of the federal government to mandate a state or any subdivision thereof to spend any funds or incur any costs not paid for under this act.” The Bush Administration has maintained that federal education financing has increased since passage of the act.

The Bush Administration had launched a public relations campaign to promote the NCLB Act. Armstrong Williams was paid by the Administration to present a favorable and positive view of the act. This led to conflict of interest allegations because the government was perceived as engaged in public relations and failing to disclose government involvement. There have been acrimonious debates and heated accusations. Rod Paige, the former Secretary of Education, referred to the NEA as a “terrorist

organization”. The plaintiffs did not challenge the goals and objectives of the NCLB Act. The major issue is one of funding, or lack of funding thereof, in this case. The plaintiffs want the federal government to provide the necessary funds or to exempt the schools from the act if no funding is provided. The issue for the court deciding the case will be to determine if the law is underfinanced.

#### The Case: Pontiac School Board v. Spellings

The NEA brought the lawsuit challenging the NCLB on behalf of the Pontiac School District in Michigan, the Laredo School District in Texas, six school districts in Vermont, NEA state branches in Connecticut, Illinois, Michigan, Ohio, Utah, the Reading Educational Association in Pennsylvania, and the Texas State Teachers Association. The lawsuit challenged Section 9527(a) of the NCLB, requesting injunctive and declarative relief, asking the court to declare the Department of Education in violation of the statute and to prevent the Department of Education from imposing compliance with the NCLB when no federal funds are provided. Section 9527(a) reads as follows:

- (a) General Prohibition. Nothing in this Act shall be construed to authorize an officer or employee of the federal Government

to mandate, direct, or control a State, local education agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

The NEA argued that Margaret Spellings, the U.S. Secretary of Education, was in violation of this "Unfunded Mandates Provision" of the NCLB. The NEA maintained that the NCLB was under-funded. By requiring states to comply with the provisions and mandates of the NCLB to receive federal funds that were insufficient, Spellings was in violation of the Spending Clause of the U.S. Constitution. Article I, Section 8, the Spending Clause of the U.S. Constitution, allows Congress to make provision of federal funds to states based on compliance in the law which is stated in unambiguous terms. Former Secretary of Education Rod Paige had stated that "if it is not funded, it's not required." But the implementation of NCLB has been preconditioned on full compliance to obtain federal funds. Waivers have been denied to Maine and Connecticut. In order to obtain federal funding, all states must fully comply with all the requirements of the NCLB.

In the Pontiac School District, which consists of 10,858 students in K-12, federal funding has been inadequate. This shortfall has resulted in Pontiac having to provide its own funds to meet the NCLB requirements. Moreover, Pontiac has had to divert funds from programs to meet these NCLB requirements. Adequate Yearly Progress (AYP), as required under the Act, has not been met by several schools in the district. The impact of NCLB has been similar in the Laredo and Vermont school districts. This is why the lawsuit was brought.

The new NCLB requirements have placed financial burdens on school districts that did not exist earlier. Before NCLB, federal funding under OSEA was tied to the provision of “supplemental educational services” to students who were below a set income level, referred to as “Title I eligible students”, who made up 35% of the overall student enrollment. As noted by the National Conference of State legislatures in their February, 2005 Final Report, the NCLB requires and mandates that states and school districts implement “system-wide testing” and accountability criteria to ensure that all students meet the proficiency standards established by the federal government. The NEA supports the ambitious goals and objectives of the NCLB but argued that without adequate

funding, those goals and objectives cannot be met. What will result is that the NCLB will be “damaging our children and our schools” (Meier & Wood, 2004).

#### Is NCLB Unfunded?

The U.S. Congress set funding levels for NCLB: \$13.5 billion for Title I and \$12.9 billion for other NCLB programs in the first year. There would be an incremental increase in funding in each subsequent year, as detailed in the 2001 Congressional Report, H.R. Conf. Rep. No. 107-334 at page 693. According to the federal statute 20 U.S.C., Section 6333(a)(1), Congress set the statutory amount for Title I funding for 2002 at \$27.22 billion. The actual amount of appropriations in 2002 was \$10.35 billion. Moreover, the Otter School District in Vermont has no Title I eligible students and thus receives no federal funding under the NCLB, but must, nevertheless, comply with the NCLB mandates. So not only is the mandate under-funded, but for many school districts, the mandates have no application, but are, nevertheless, rigidly imposed on the states. In Michigan, for Fiscal Year 2005, the state will receive \$453.8 million less than that stipulated under the statutory amount set by Congress. Michigan will receive \$235.5 million less if the funding is at the authorization levels. In other words, at the statutory or actual funding levels, In Michigan, there will be a shortfall that the state must make up.



In Pontiac, the district will receive \$7.4 million less than that stipulated under the Title I statutory level and \$3.8 million less under the authorization level. In Fiscal year 2004, 10 states, 7,000 school districts, received less NCLB Title I funding than the year before. Based on the Fiscal Year 2008 education appropriations bill, the NEA calculated that the cumulative funding gap for NCLB program by 2008 will be \$70 billion.

#### Why is NCLB So Costly?

NCLB has mandated under 20 U.S.C., Section 6311(b)(1)(D), that states: 1) revise their curriculum standards in core areas; 2) develop standardized tests; 3) administer tests to monitor progress; 4) grade schools based on AYP; 5) ensure “highly qualified teachers”; and, 5) establish “proficiency”, which is a “high level of achievement”, for all students, including minority students, disabled students, low income students, and students who are not fluent in English. The goal is to administer 17 standardized tests to students and subgroups, consisting of ethnic and racial minorities, disabled students, low-income students, and students lacking an English proficiency. In the 2004-2005 school year, the NCLB mandated that six tests were required to be given. In the next school year, the requirement is that 14 tests be given in grades 3-8 and 10-12. A shortcoming of the NCLB standards is that math, science, and reading are priority subjects, which

neglects other important subjects such as history. This exposes a flaw of the NCLB.

Studies show that students in the US perform most poorly in social studies subjects such as history. In the MEAP tests in Michigan, students do very poorly in social studies. But the NCLB does not provide a way to resolve this problem because the Act has downgraded the social sciences.

According to the US General Accounting Office report 3-389 from May, 2003, for Fiscal Year 2002-Fiscal Year 2008, the cost of implementing the NCLB-mandated tests will be \$3.9 billion. But based on a January, 2004 report of the Center on Education Policy, this amount exceeds the funds available through NCLB. In other words, there are not enough funds provided by the NCLB budget to meet the projected costs of the tests mandated by the NCLB.

In some cases, the NCLB requirements are poorly planned. In Reading, Pennsylvania, the school district administered tests to Spanish-speaking students in English.

Predictably, these students did poorly on these tests.

There are substantial costs to school districts in enforcing the requirement that schools be graded and assessed yearly on whether they are in “need of improvement”, in “need of corrective action”, or in “need of restructuring”. School districts have to create expensive

and time-consuming data management systems to track and assess yearly progress. Moreover, districts and schools have to track the performance of all students, including those based on racial and ethnic groups, disability, economic level, and English proficiency. Schools must be graded on high school graduation rates, AYP progress, subgroup tests, overall student test performance, and whether teachers are highly qualified.

Critics of the NCLB have shown that the administrative costs required by the Act are not funded by the federal government (Mathis, 2003). One quarter of schools in the US have failed to meet AYP. Moreover, larger school districts fail to make AYP because of the diversity of their student population, which requires more funds, more specialized testing, and greater management. In a study in Texas, Jennifer Imazeki and Andrew Reshovsky found that to make AYP, it will take \$1.7 billion to achieve AYP. This is, however, \$1.2 billion more than is provided for in the NCLB. In Vermont, it would cost \$149.5 million yearly to raise student proficiency to NCLB- required levels, which is \$20.35 million more than is provided under the Act (Mathis, 2003). Moreover, if schools do not meet AYP standards, the districts have to devise plans to remedy those “failing” schools, which entails more costs and time. Districts have to provide “supplemental

services” if a school fails to make AYP after three years. These are additional financial burdens for the districts, for which there is inadequate NCLB funding.

The NCLB has also mandated new requirements for teachers. Teachers have to: a) pass a “rigorous State academic subject test” in the area taught; b) meet a state’s “high objective uniform state standard of evaluation”; and, c) have at least an undergraduate major in the area taught, a graduate degree in that area, or advanced certification. The upshot of this requirement is that districts have had to raise the salaries of teachers, without an appreciable increase in knowledge or proficiency. Reg Weaver, the president of the NEA, noted that in the Pontiac district, there has been a reduction in special education because the teacher who taught now has to be certified in all the subject areas she previously taught in. The result is that special ed students did not receive instruction (Weaver, 2005). Teachers who are experienced and who have the requisite knowledge must now have a BA and receive certification in the subject taught. This requirement has resulted in a rigid application with little benefit other than satisfying a bureaucratic mandate. The requirements for paraprofessionals have also been raised. After January 8, 2006, paraprofessionals must have a high school diploma and either an associate degree, two years of post-secondary study, or have passed a “rigorous assessment” in reading, math, and

science.

### Support for NCLB

The Pontiac v. Spellings lawsuit has brought into focus the conflict between the states and the federal government. Many states see the NCLB as an unwarranted intrusion into a state's domain, education. Some states, like Utah, have rejected federal funding under the NCLB in order to pursue their own state policies on education without federal interference.

Critics of the lawsuit argue that federal funding is adequate, that uniform federal guidelines are needed, that accountability and assessment and testing of achievement are necessary to ensure that the achievement gap is closed, and that a more appropriate lawsuit would have been one against the states under the 14<sup>th</sup> Amendment equal protection clause (Peterson, 2004). William Taylor of the Citizens' Commission on Civil Rights, argued that the lawsuit "lacks any legal foundation" and should be "quickly dismissed" (Taylor, 2005). Taylor noted that federal funding for education has increased and that the Pontiac district has received \$7 million under Title I of the NCLB. Moreover, Taylor emphasized the importance of having federally-enforced mandates. The federal government has to set standards, otherwise states will not be obligated to provide the

necessary funds or levels of proficiency.

#### Dismissal in U.S. District Court

The case was dismissed in the United States District Court for the Eastern District of Michigan, Southern Division at Detroit in a decision filed on November 23, 2005 by Judge Bernard Friedman. The district court based the dismissal of the case on Federal Rule of Civil Procedure 12(b)(6), for failing to state a claim upon which relief can be granted. The district court examined the language of 20 U.S.C. § 7907(a), which specified that the prohibition applied to “an officer or employee of the Federal Government”:

General prohibition. Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school’s curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

The district court decided that “[b]y including the words ‘an officer or employee of,’ Congress clearly meant to prohibit federal officers and employees from imposing additional, unfunded requirements, beyond those provided for in the statute.” Only

federal officers and employees could not impose unfunded mandates on the states. The U.S. Congress, however, was empowered to impose unfunded mandates according to the district court decision. The court concluded: “This does not mean that *Congress* could not, which it obviously has done by passing the NCLB Act.” Thus, Congress can require states or school districts to spend any funds or incur any costs not paid for under the NCLB Act. The plaintiffs, the School District of the City of Pontiac, et al. appealed the decision to the U.S. Circuit Court for the Sixth Circuit in Cincinnati, Ohio.

On April 3, 2006, six states and the District of Columbia, the Governor of Pennsylvania, school administrators, and state and local elected officials filed amicus curia briefs, “friend of the court” briefs, which supported the NEA's appeal of the dismissal.

#### Reversal in U.S. Circuit Court

The case was reversed in the United States Court of Appeals for the Sixth Circuit in a decision filed on January 7, 2008. The circuit court decided that states and school districts are not liable for the costs of complying with mandates under the No Child Left Behind Act (NCLB) that were in excess of the federal funding provided. The decision was based on the requirements mandated by the Spending Clause of the U.S. Constitution

which required that “clear notice” be given. The circuit court held that based on the “Unfunded Mandates Provision” of 20 U.S.C. § 7907(a) (2005), states and school districts did not have “clear notice” of their liabilities under NCLB Act in violation of the Spending Clause. In a 2-1 majority opinion by Judge R. Guy Cole, Jr., the circuit court reversed the decision of the district court and remanded the case back to that court for further court proceedings. There was a dissenting opinion by Judge David W. McKeague.

The circuit court decided the issue of standing by finding that the school districts had legal standing to bring the suit because the states and school districts were required to “spend state and local funds to pay for NCLB compliance”. This expenditure of funds by states and local school districts was found by the court to be an “injury in fact” because it is an injury that is “concrete and particularized”, is “actual or imminent”, and “the injury is fairly traceable to the challenged action of the defendant”, and that it is likely that the injury will be “redressed by a favorable decision.”

The court held that the language was ambiguous and unclear. A state or school district official could not make an “informed choice” as to what was required because the language was “short of being so evident that a State would clearly understand it to be the



interpretation Congress intended.” The court found that § 7907(a) prohibited federal officers from “controlling school curriculum and allocation of local funds,” but that it said “nothing about these officers mandating States to spend funds or incur costs for unauthorized obligations.” Finally, the court argued that if Congress were “concerned about this sort of ultra vires conduct by federal officers and employees, it could have said so expressly.”

The court noted the discrepancy in the former Department of Education Secretary Rod Paige’s interpretation of § 7907(a), that “if it’s not funded, it’s not required,” with his current position. The court used this evidence to support its conclusion that “NCLB does not provide clear notice that their interpretation (and, apparently, the former Secretary’s) is somehow misplaced.”

The court concluded: “But a state official deciding to participate in NCLB could reasonably read § 7907(a) to mean that her State need not comply with requirements that are ‘not paid for under the Act’ through federal funds.” The provision is ambiguous and does not present clear notice because “Congress has not ‘spoke[n] so clearly that we can fairly say that the State[s] could make an informed choice’ to participate in the Act with

the knowledge that they would have to comply with the Act's requirements regardless of federal funding." The Secretary of Education filed an appeal of the circuit court ruling, requesting an en banc rehearing before the full court. On June 13, 2008, the NEA filed a supplemental brief for the en banc rehearing supporting the circuit court ruling.

#### Conclusion

The Pontiac v. Spellings lawsuit shows how narrowing or eliminating the achievement gap is a difficult task. The case also highlights the controversial measures imposed by the NCLB. The NCLB sets laudable goals and objectives. But without adequate funds, those goals and objectives cannot be achieved. Moreover, are those mandates too rigid? Teachers and school districts need flexibility. Schools are not factories. The one-size-fits-all, assembly-line approach is not suitable in the school setting. Bureaucracy, regimentation, uniformity, and rigidity are not conducive in education. The Bush Administration has imposed a rigid, bureaucratized, and mechanistic model on education. There is an over-reliance on test results and testing in general.

The issue, however, is one about funding. The NEA does not object to the goals and objectives of the NCLB. Their only objection with the Act is that not enough money is

provided. The remedy will have to be determined by the district court as it rehears the case on remand.

There does remain the issue of misplaced priorities. Is education receiving the priority that is needed in the US budget to make the provisions of the NCLB Act viable? Is spending on the defense and military budgets too high? Is it feasible or possible to increase spending on education with the U.S. foreign policy imperatives on the ongoing “war on terrorism”, nation-building in Iraq and Afghanistan, and “humanitarian interventions” around the globe? The rhetoric is laudable and praiseworthy, but there is not sufficient funding to back it up. Clearly, this case shows how priorities need to be reevaluated and reassessed.

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