COURTSIDE

Unfunded Mandate?

BY PERRY A. ZIRKEL

ON 8 January 2002, President Bush signed into law the No Child Left Behind (NCLB) Act. Including various federal grant programs headed by Title I, NCLB allows states not to participate if they forgo the significant funds available under the Act.

Early in 2005, eight school districts from various states, including Pontiac School District in Michigan; a Vermont intermediate unit that contains 11 school districts; and the National Education Association along with 10 state and local NEA affiliates filed suit against Margaret Spellings, the secretary of the U.S. Department of Education, in federal district court in Michigan. Their alternative claims were that 1) the Act does not require states and districts to comply with NCLB's educational requirements if doing so would necessitate the expenditure of extra local funds to cover the additional costs of compliance and 2) the Act is ambiguous regarding whether districts are required to spend their own funds, thus violating the Constitution's spending clause. The plaintiffs alleged that in the years following the enactment of NCLB, Congress had not provided states and districts with sufficient federal funds to comply fully with the law.

In seeking a declaratory judgment that states and districts are not required to spend non-NCLB funds to comply with NCLB mandates and an injunction prohibiting the secretary of education from withholding any federal funds under NCLB due to noncompliance, the plaintiffs relied on the so-called unfunded mandate provision of NCLB, which states: "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 the Act."

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On 23 November 2005, the federal district court granted the secretary's motion to dismiss, concluding that the words "an officer or employee of" showed that Congress intended this prohibition to apply only to said individuals, not to the administering agency — the U.S. Department of Education. The plaintiffs promptly sought review by the Sixth Circuit Court of Appeals.

On 7 January 2008, a panel of three members of the Sixth Circuit, in a 2-to-1 decision, reversed the lower court's dismissal.[1] First, the majority addressed the threshold issue of standing, which requires a plaintiff to show that it has suffered an injury in fact that is 1) particularized and not hypothetical, 2) fairly traceable to the challenged action, and 3) likely to be redressed by a favorable decision. The majority concluded that the school districts met these three essential elements because they must spend state and local funds to pay for NCLB compliance. Thus, finding that one or more plaintiffs met the requirements, the court ducked deciding whether the NEA and its affiliates had standing in this case.

Next, the majority addressed the merits of the case, concluding that the plaintiffs had stated a triable claim that they were not liable for the additional costs of complying with the NCLB requirements. The majority based its conclusion on the clear-notice requirement that the Supreme Court had established for congressional enactments under the spending clause — specifically that when Congress attaches conditions to a state's acceptance of federal funds, these conditions must be set forth unambiguously so that the state can make an informed choice.

The defendant secretary of the U.S. Department of Education proffered two interpretations of the text of the so-called unfunded mandate provision. The first, which the lower court adopted, is that this section merely prevents officers and employees of the federal government from imposing additional, unauthorized requirements on the participating states. The second is that said provision simply emphasizes that a state's participation in NCLB is entirely voluntary but that once a state chooses to participate, it must fully comply with NCLB requirements regardless of the extent of federal funding.

In response, the court concluded that neither of these interpretations was clearly evident in the text of the disputed provision. One of the problems with the first interpretation, which is that Congress merely aimed the provision at rogue federal officers or employees, is that the language "officer or employee" could be reasonably read either as referring to the final clause, which

concerns additional costs, or as modifying only the middle clause, which concerns curriculum control. The problems with the second interpretation stem from the ambiguous meaning of "mandate" in the context of the disputed provision. Although relying on the text of the provision, the majority noted that the legislative history of the Act is at best unclear and, to the extent that it supports either party, it bolsters the plaintiffs' contention. The majority also noted that the former secretary of education, Rod Paige, supported the plaintiffs' view.

In concluding that the secretary's interpretations violate the clear-notice requirement of the spending clause, the majority clarified its acceptance of the plaintiffs' claim that their obligation to incur additional costs for compliance was not evident, as distinguished from the Act's clear notice that the states and school districts participating in NCLB must fulfill the Act's various educational and accountability requirements, such as submitting plans to the secretary and effectively tracking student achievement.

In remanding the case back to the trial court for further proceedings, the majority commented that if indeed Congress intends for states and districts to be liable for the additional costs of compliance, "the ball is properly left in its court to make that clear."

The dissenting judge forcefully argued that the majority's interpretation is contrary to the consistent historical understanding for centuries that the federal government has contributed a relatively small amount for its various education reform enactments. Accusing the majority of ducking the plaintiffs' principal argument by "creating ambiguity where none exists," the dissent first focused on the Act as a whole, advancing several reasons for its conclusion that said plaintiffs' claim was disingenuous. For example, the dissent asserted: "It simply defies common sense to suggest that Congress intended to relieve States and school districts from compliance when the cost of compliance — which Congress *does not control* — exceeds appropriations, but not when the amounts appropriated — over which Congress *has total control* — fall below the amounts school districts are eligible to receive."

Next, addressing the basis for the majority's decision, the dissent countered that "any reasonable State official, reading . . . NCLB with a clear eye, would understand that there was no guarantee that federal funds would match all of the costs controlled and incurred by States and local school districts." Specifically, the dissent relied on 1) the Unfunded Mandates Reform Act of 1995, which provides a definition of "mandate"; 2) the Perkins Vocational Education Act, which has a parallel provision but distinguishable statutory scheme; and 3) the context of NCLB as a whole, which makes clear that its various requirements apply beyond the schools that receive its funds. As for the majority's additional rationale, the dissent concluded, "assuming *arguendo* that . . . NCLB's legislative history is even relevant in this case, it lends little or no support to Plaintiffs' argument."

THE result of the decision by the Sixth Circuit panel is fluid at this point, for several reasons. First, the effect of the decision is not crystal clear. Reversing a dismissal typically means merely preserving the issue for trial, but in this case the facts are beyond dispute that Congress has not provided close to the funding for compliance with the Act, and the appellate panel has effectively decided the issue of the ambiguity of the unfunded-mandates provision as a matter of law. Nevertheless, the district court on remand would at least have to decide whether to grant the requested injunctive relief barring the secretary from withholding federal funds for noncompliance.

Second, the secretary of education has already filed a request for a hearing by the entire membership of the Sixth Circuit, thus putting the matter in abeyance until the Sixth Circuit either denies the motion or proceeds to review the matter *en banc*.[2]

Third, even though the NEA's legal counsel, Robert Chanin, who was the chief architect of the suit, expressed the view that the panel's decision provides persuasive legal grounds for districts beyond the Sixth Circuit to refuse to use their own funds to pay for NCLB obligations not covered by their allocation of federal aid, most districts are taking a wait-and-see approach.[3] One contributing factor may be Secretary Spellings' stern letter to all chief state school officers, alluding to Chanin's comments and warning: "No state or school district should regard the ruling as a license to disregard NCLB's requirements."[4]

Fourth, this decision represents a marked departure from the trend of previous litigation under NCLB — including the lower court's decision in this case — that ended various suits at the dismissal stage.[5] Connecticut Attorney General Richard Blumenthal, who lost one of these previous lower court cases and who plans to appeal it based on the panel's ruling, characterized its decision as "a bolt of legal lightning igniting a new powerful momentum to our No Child Left Behind case and congressional reform."[6] Yet, although it

cited the Sixth Circuit's decision, the Seventh Circuit has since affirmed the dismissal of a suit by two Illinois districts based on the purported conflict between NCLB and the Individuals with Disabilities Education Act (IDEA).[7] Moreover, although the NEA and the National School Boards Association (NSBA) are lobbying for dramatic increases in NCLB Title I funding before the current Congress, the many forces seeking modification or elimination of NCLB have largely created a stalemate with regard to the future of the Act, pending the next Presidential elections.[8]

Thus NSBA spokesperson Marc Egan's diagnosis seems to be on the mark: "There's no firm resolution legally coming down the pike anytime soon." In the meantime, while we await the Sixth Circuit's discretionary determination as to whether to reconsider the panel's decision, a few other quick clarifications warrant mention.

First, the panel's decision did not validate the plaintiffs' primary claim; rather, the majority based its decision on the perceived ambiguities in the unfunded-mandate provision. Although this provision is obscured by its legal gobbledygook, the clear-notice requirement would appear to apply to the Act as a whole, not to this one provision in isolation. In any event, one option for resolution would be for Congress to either clarify or eliminate this provision.

Second, the inevitable question of whether IDEA is similarly vulnerable because of its far-from-full funding is easily answerable; unlike NCLB and some other statutes originating in 1994-95,[9] IDEA does not contain the unfunded-mandate language.[10] Finally, it is not at all clear what the majority meant by its dictum that NCLB provides clear notice that participating states and schools districts must fulfill the Act's various educational and accountability requirements. In any event, if anything is clear, this new decision is not the end of a nationally significant story.

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1. *Sch. Dist. of City of Pontiac* v. *Sec'y of the U.S. Dep't of Educ.*, 512 F.3d 252 (6th Cir. 2008). Due to their heavy caseload, the federal appellate courts customarily use three-judge panels for their decisions. The Sixth Circuit covers Kentucky, Michigan, Ohio, and Tennessee.

2. Mark Walsh, "Spellings Asks 6th Circuit to Reconsider NCLB Ruling," *Education Week*, 13 February 2008, p. 26.

3. Mark Walsh, "Court Ruling in NCLB Suit Fuels Fight Over Costs," *Education Week*, 16 January 2008, pp. 1, 19.

4. David Hoff and Mark Walsh, "Sparring on NCLB Legal Ruling Continues," *Education Week*, 30 January 2008, p. 19.

5. See, for example, *Connecticut* v. *Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006) (dismissed pre-enforcement challenge for lack of subject-matter jurisdiction); *Alliance for Children, Inc.* v. *City of Detroit Pub. Sch.*, 475 F. Supp. 2d 655 (E.D. Mich. 2007); *Fresh Start Acad.* v. *Toledo Bd. of Educ.*, 363 F. Supp. 2d 910 (N.D. Ohio 2005) (dismissed tutoring provider's suits based on lack of private right of action in NCLB); *Ctr. for Law and Educ.* v. *U.S. Dep't of Educ.*, 315 F. Supp. 2d 15 (D.D.C. 2004) (rejected, primarily based on lack of standing, NCLB suit by two advocacy groups and parents); *Kegerreis* v. *United States*, 2003 U.S. Dist. LEXIS 18012 (D. Kan. 2003) (rejected teacher's NCLB suit based on prematurity and sovereign immunity); and *Ass'n of Cmty. Orgs. for Reform Now* v. *New York City Dep't of Educ.*, 269 F. Supp. 2d 338 (S.D.N.Y. 2003) (rejected parents' right to sue for alleged violations regarding the transfer and tutoring provisions of NCLB).

6. Walsh, "Court Ruling," p. 19.

7. *Bd. of Educ. of Ottawa Twp. High Sch. Dist. No. 140* v. *Spellings*, 2008 WL 351452 (7th Cir. 2008). However, in a partial victory echoing the threshold step under the Sixth Circuit's *Pontiac* decision, the Seventh Circuit ruled that the school districts had standing to sue the secretary of education, because NCLB requires them to "pay for more tests than they would administer if left to their own devices."

8. See, for example, David Hoff, "Amid Pessimism on NCLB, Talks Continue: Bush, NEA Get Blamed for Lack of Progress on Reauthorization This Year," *Education Week*, 19 December 2007, p. 18; and Sam Dillon, "For a Key Education Law, Reauthorization Stalls," *New York Times*, 6 November 2007, p. A-19.

9. NCLB carried over this provision from the previous version of Title I.

10. The only corresponding provision is limited to a prohibition against any federal government official or employee mandating or otherwise controlling school curricula. 20 U.S.C. § 1417(b) (2006).

File Name and Bibliographic Information

k0805zir.pdf
Perry A. Zirkel, COURTSIDE: Unfunded Mandate?, Phi Delta Kappan, Vol. 89, No. 09, May 2008, pp. 701-703.

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