No Child Left Behind? Issues and Options in the New World of Education

Adam Neilson

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by Adam Neilson[1]

I. Introduction

Predated by the Clinton administration's education program Goals 2000 and Ronald Reagan's report on the state of education in 1983, A Nation at Risk, the most recent incarnation of educational reform instituted by the government is the No Child Left Behind Act (NCLBA, or the Act) of 2001.[2] Its goal: use information gleaned from standardized testing to close achievement gaps between minority and low-income children and their Caucasian counterparts.[3] The act requires schools to make "adequate yearly progress" (AYP) toward meeting this goal, as defined by each state's education department. In order to measure their progress, schools are required to test students' math and reading annually during grades three and eight as well as once during high school. If a school's scores do not meet the AYP requirement for two consecutive years, they face escalating sanctions; these sanctions include redevelopment or revision of school curriculum, school-funded after-school tutoring, and even allowing students to transfer schools. If the school continues to miss target AYP scores, they will ultimately be faced with removing staff, restructuring the school's organization, and extending the school day and year, as well as appointing expert advisors to help get

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2 *See* No Child Left Behind Act, 20 U.S.C. §§ 6301-7941 (2007).

3 *Id.* § 6301.

the school back on track. These sanctions, based on the information gleaned from test scores, frame the argument in this article.

Sections II and III will focus on how the Act's reliance on standardized test scores runs counter to the aims of the Act. While the Act provides a needed accountability program in public education, ultimately this program has one major flaw: the test score information the Act uses is not good information. Furthermore, with consequences based on questionable information, the Act has diverted focus away from actual student learning and harmed the educational environment in the process, especially for low-income and minority students.

But despite the current body of evidence against NCLBA, there is unlikely to be any legal relief in the short-term. Section IV of this article will discuss obstacles facing legal challenges to the Act. The chief problem facing any legal challenge is a lack of standing. Though NCLBA has been signed for nearly seven years, schools are not required to be fully compliant with the Act until 2014. As such, there have not been any sanctions levied against non-compliant schools, and thus no injury has occurred. This section will go on to discuss this problem in conjunction with recently decided court cases involving the Act. Section V will then suggest a better course of action for challenging the NCLBA.

II. STANDARDIZED TESTS: ARE THEY RELIABLE?

One of the main issues in evaluating schools and students through the NCLBA arises from the Act's reliance on standardized testing. In general, demonstrating the validity of standardized tests is difficult. One of the main reasons for this is that there must be a large body of empirical evidence to support the test and its methodology.[4] This support must show that the test actually does measure what it sets out to measure and that the test does so in a fair manner. Research of this kind takes time to accumulate but is nevertheless necessary for proving test validity. The problem with the NCLBA is

4 *See* Mary Lee Smith & Patricia Fey, *Validity and Accountability in High-Stakes Testing*, 51 J. TEACHER EDUC. 334, 338 (2000).

that its state-designed and -implemented tests have not had the time to put together the necessary research, and without research, there simply is not enough knowledge about these tests to say they produce reliable measurements of proficiency. One of the gold standards in the field of standardized tests is the Iowa Test of Basic Skills, a test that has been used in some form since 1930, giving it ample time to demonstrate that it produces valid results. While it is true that the tests used for NCLBA compliance have to start somewhere, the difficulty lies in the fact that sanctions will be levied against schools and students before those tests are proven to be valid.

Another aspect confounding discussion of the Act's standardized tests is that test scores are being used to make important decisions. By placing such high stakes on test scores, the Act has created an educational environment where teachers forgo teaching as they would normally and instead specifically focus their curriculum on the test. This kind of environment, however, is problematic. When curriculum focuses on test material and strategies, it undermines the validity of the test since the test no longer measures learning in classrooms but rather the ability of a student to take a test. To illustrate, suppose a teacher gave an English test where students were asked to only point out all grammar mistakes. While passing this test might point to the student's ability in identifying grammar problems, this test cannot certify that the student is proficient in grammar because the test neglects to address related proficiencies such as the ability to use grammar properly in different contexts.

A study by Koretz, Linn, Dunbar, and Shephard[5] bears this out. In order to demonstrate how teaching to the test can affect test scores, Koretz et al. studied the scores of a group of students on two similar tests. The first test was a low-stakes test that had not been "taught to" in the classroom, and the second test was a high-stakes test which had been "taught to." Koretz et al. posited that if a taught-to high-stakes test indeed does measure actual achievement in these areas, students' scores on both tests should theoretically be

5 *See* Daniel Koretz et al., Professor, Harv. Graduate Sch. of Educ., Address at the American Educational Research Association: The Effects of High-Stakes Testing: Preliminary Evidence about Generalization across Tests (April 1991).

similar. However, their study showed that scores on high-stakes tests were months ahead of scores on low-stakes tests. They concluded that this was because "students are prepared for the high-stakes testing in ways that boost scores on that specific test substantially more than actual achievement in the domains that the tests are intended to measure." The scores in the high-stakes test did not actually point to achievement but rather the ability to take the test. Again, this type of study highlights that standardized tests, in their current context, are likely to produce questionable results. And unfortunately, these questionable results will be used to make far-reaching decisions.

III. AN UNDESIRABLE EDUCATIONAL ENVIRONMENT

As a result of the pressure to "teach to" tests required by the Act, schools are also finding that they must eliminate other educational areas like music, art, science, and even recess.[6] While reading, math, and science–the only areas currently tested under the Act–are definitely integral pieces to an adequate education for all students, so are subjects like art and science. A diverse education enriches students' educations and eliminating that diversity is one of the first steps toward creating a substandard learning environment on a national level. A diverse education also offers students a plethora of opportunities to find the area in which they excel, something that contributes to developing a love for learning. By taking these study areas away, schools run the risk of creating apathy among their students. In a book on standardized testing, one education expert writes, "Test-driven classrooms exacerbate boredom, fear, and lethargy, promoting all manner of mechanical behaviors on the part of teachers, students, and schools, and bleed schoolchildren of their natural love of learning."[7] These kinds of classroom settings are not desirable for students.

In low-income and minority schools, test focus is even more pronounced. In a study on the effects of high-stakes testing in these

6 *See* Marcia Gentry, *Examining Disability and Giftedness in Schools*, 10 PROF. SCHOOL COUNSELING 73, (2006).

7 PETER SACKS, STANDARDIZED MINDS 256 (Perseus Books 1999).

schools, researchers found that as the school year progressed toward end-of-year tests, schools with 30 percent or more poverty spent 27 percent more time on test preparation than low-poverty schools.[8] The total percentage of time spent on test preparation for these schools was 77 percent. The main problem with a 77 percent focus on tests is that it exacerbates the validity problem even further in minority and low-income classrooms. In these classrooms, the likelihood that test scores are not valid assessments increases with the amount of time spent on preparing. This cheats the students who are supposed to be benefiting from the Act. They need to be measured by fair and valid tests in order to help future students in these schools close the gap with white students.

Another peril of eliminating curriculum is that it sends a poor message to students. By mandating tests that ultimately define and limit curriculum, children learn that achieving high test scores is the primary function of education. Again, this is an area where the effects of NCLBA explicitly run counter to its aims. While it may be that sufficient learning will produce acceptable test scores, it is not necessarily the case that acceptable test scores point to sufficient learning. As students learn that test scores are their goal, they, along with their teachers and administrators, will find little use for actual learning beyond what they need to know for their tests. For some students, especially those students on the extremes of the educational spectrum, this test-centric culture will be devastating and will further alienate them from the system. Moreover, setting up a culture like this will also lead to an increased proclivity among students, teachers, and administrators to cut corners. Even now states are identifying loopholes and other means to circumvent the Act in order to exploit them.[9] They then use these loopholes to lower standards and delay full-scale implementation of the Act. It has become a race to the bottom. Not only are schools teaching to the test, they are also emphasizing the minimum each student needs to know. Ac-

8 Current Issues in Education: Volume 6 Number 8, http://cie.asu.edu/volume6/number8/ (last visited Jan. 17, 2008).

9 *See, e.g.,* Shelley B. Wepner, *Testing Gone Amok: Leave No Teacher Candidate Behind*, 33 Tchr. Educ. Q. 135, 136 (2006).

cording to one educational expert, this approach is fundamentally flawed because it

> [h]as very little to do with intellectual life, where risk-taking, exploration, uncertainty, and speculation are what it's about. And if you create a culture of schooling in which a narrow means/ends orientation is promoted, that culture can undermine the development of intellectual dispositions.[10]

While the reasons for reducing curriculum in schools are understandable, the problems that stem from that elimination contribute to the degradation of the learning environment. It is this degradation of the learning environment combined with a reliance on high-stakes testing that especially harms the very students the Act seeks to help.

IV. LACK OF POTENTIAL LEGAL RELIEF

In response to much of the data concerning tests and other problematic aspects of the NCLBA, many states and interest groups have turned to the legal system for relief from the Act's provisions. However, much like the Act's test reliance, legal challenges to the Act are problematic at best. In spite of taking the next logical step to the courts, these potential plaintiffs face significant obstacles that will hinder any efforts in this arena.

A. Constitutionality

One possible method is that of challenging the constitutionality of the NCLBA due to its infringement into education, an area of control traditionally reserved for the states. The Constitution provides that any power not expressly given to the federal government is a power given to the states,[11] and as there is no mention of education within the provisions of the Constitution, education has primarily

10 Elliot Eisner, *What Does it Mean to Say a School is Doing Well?*, 82 PHI DELTA KAPPAN 367, 369 (2001).

11 *See* U.S. CONST. amend. X.

remained the concern of the states. In the General Education Provisions Act (GEPA), the federal government makes a bold claim reasserting the limits to their influence in the public school system. They state that "no provision . . . should be construed to authorize any department, agency, office or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration or personnel of any education institution, school or school system."[12] The GEPA and the Elementary and Secondary Education Act (ESEA), both predecessors to the NCLBA, garnered much support from the states through this claim. Unfortunately, government action since then has not made good on that claim. From the time of the enactment of the GEPA, federal influence over public schools has increased, albeit indirectly, culminating with the provisions of the NCLBA.

Unfortunately, challenging the constitutionality of the Act faces two distinct issues: first, the Act is not a mandatory program, but merely a way for states to receive federal funding to supplement their own funding; and second, the Act's conditional disbursement of funding to states is subject to the discretion of Congress, an area where only a low threshold of constitutionality must be established.

Although there are a plethora of requirements for compliance with the NCLBA, the government maintains that compliance with its education programs is optional. The problem with this position from the states' point of view is that funding from the federal government is vital to schools in low-income areas. A study into the role of federal funding in low-income areas shows that federal funds comprised a more significant portion of revenues per student at the poorest schools than they did at the more affluent (11 percent versus 2 percent, respectively).[13] Despite the higher percentage of federal funding, these low-income schools still saw less money per student than did more affluent schools. Since the study concluded, the government has poured more money into school grants than ever before, making low-income schools even more dependent on these

12 20 U.S.C. § 1232a (2007).

13 *See* Jay Chambers et al., Study of Education Resources and Federal Funding: Final Report 10 (Dep't of Educ.) (2000).

funds, which are now only accessible through NCLBA compliance. As these states argue, the NCLBA is a de facto mandate from the federal level for these schools. Unfortunately, a challenge to the Act based on this information is likely to fail, given that the federal government's position is strong in this area.

As a reauthorization of the ESEA, the NCLBA builds upon some of the same principles that governed the ESEA, namely that the receipt of Title I funds (funds directed toward high-poverty schools) is meant to be supplementary and not sufficient for an adequate education.[14] Were these funds meant to be sufficient, the federal government would clearly be impinging upon the role of the states in education, and thus violating their stated position with regard to state sovereignty over education. As states and other stakeholders look into any challenge of the Act, particularly those based on insufficient funding, this distinction presents a significant obstacle.

Even further, states challenging the constitutionality of the government's withholding of funds face an even greater test. Given that the NCLBA is tied to the spending power of Congress, any challenge in this area would need to demonstrate that Congress had violated any one of four rules governing Congressional spending. In their decision in *South Dakota v. Dole*, the Supreme Court outlined these rules.[15] First, spending must be geared toward increasing the general welfare of the country.[16] Second, conditions for the receipt of federal funds must be unambiguous.[17] Third, the conditions stipulated through Congress must be related to the purpose of the funds.[18] Finally, the conditions themselves must not be unconstitutional.[19] States and other potential plaintiffs will be hard-pressed to demonstrate that the conditions of the NCLBA do not meet any of these criteria. Of these four rules, the one most suitable to potentially use

14 *See* 20 U.S.C. § 1114 (2008).

15 *See* S.D. v. Dole, 483 U.S. 203, 207-208 (1987).

16 *See id.*

17 *See id.*

18 *See id.*

19 *See id.*

against NCLBA is the first rule regarding general welfare. Unfortunately, however, the Supreme Court further qualified this rule by holding that a determination of whether Congressional spending is for the general welfare of the country or not should depend heavily on Congressional judgment.

B. Lack of Standing

To date, there have not been any constitutional challenges to the Act, though some have challenged the Act through different means. They, too, have met with significant obstacles. The most important among these obstacles is that of demonstrable legal standing. In *Ctr. for L. and Educ. v. Dep't of Educ*., the plaintiffs argued that the rulemaking committee created by the NCLBA did not meet the Act's stated goal of achieving an "equitable balance between representatives of parents and students and representatives of educators and education officials."[20] Further, the plaintiffs argued that because the committee did not have adequate representation for parents and students, the committee would be hindered in creating policy beneficial to all parties. The judge's ruling in this case is indicative of the problems plaintiffs face in establishing standing and injury.

For the two advocacy group plaintiffs, Center for Law and Education and Designs for Change, the court held that, as these groups sued on their own behalf, they did not meet the "irreducible constitutional minimum"[21] for establishing standing. Specifically, they could not demonstrate their particularized interests had been injured through the composition of the rulemaking committee. As for the sole individual plaintiff, Rachel Lindsey, a parent whose children attend a school receiving funds under NCLBA, the court held that she lacked standing to make a valid legal claim.[22] The court wrote that the Act did not give her, as an individual, any enforceable right to make sure the committee had been constituted in any particular

20 Ctr. for L. & Educ v. Dep't of Educ., 315 F.Supp.2d 15, 17 (U.S. Dist. 2004).

21 *Id.* at 22.

22 *See id.* at 29.

way, thus removing from consideration that she had, in fact, been injured.[23]

This case brings to light two problems facing future plaintiffs. First, because of the complexity of the NCLBA, establishing standing and demonstrating injury is problematic. Given that many of the sanctions against schools have not yet begun, demonstration of injury is unlikely to be as forceful in the short-term. Many short-term challenges to the Act will be based on tenuous arguments like the one here in Ctr. for L. and Educ. Some have tried to bring suit based on future sanctions,[24] but the courts have held that these suits also lack standing because the injuries are not ripe but are rather merely speculative. Second, because the cost of bringing suit is often prohibitive, many parents will need to enlist the help of groups with means beyond their own. Doing so further complicates the matter by moving the issue of standing further away from where the actual injury occurs and may reduce the forcefulness of their claims.

Of course, the success of challenges by advocacy groups depends, in part, on their choice of whether to sue on their own behalf or on the behalf of their members. In order to sue for their members, groups would The advocacy groups in *Ctr. for L. and Educ.* may have met with a different result had they instead sued on behalf of their members where the requirements for standing were perhaps more suited to the case.

C. Ripeness

Another of the few cases directly challenging the NCLBA elicits a similar legal obstacle. In *Conn. v. Spellings*, the state argued that as federal funds are insufficient for the state to implement all provisions required by the Act, that the state should be relieved of required compliance with those unfunded provisions.[25] Specifically, the state argued that the cost of administering standardized tests to all stu-

23 *See id.* at 28.

24 *See* No. 03-2232-KHV, 2003 U.S. Dist. LEXIS 18012, at 8 (D. Kan. 2003).

25 *See* Conn. v. Spellings 453 F.Supp.2d 459, 474 (U.S. Dist. 2006).

dents, including non-native English speakers and special education students, would cost more than the federal funding they received would allow.[26] According to the state, this inability to pay for the requirements of the Act violated the Unfunded Mandates Provision of the NCLBA.[27] This provision states that "nothing in this act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act."[28]

Though certainly the state's claim in this case is more forceful than that in *Ctr. for L. and Educ.*, the court similarly ruled against the state. In its ruling, the court held that since the required provisions had not yet been fully enforced, it lacked jurisdiction to rule on the state's complaints because the state's injury was not sufficiently ripe.[29] The court further clarified its ruling by writing that although the state had met the required thresholds for standing and injury, the final, unequivocal step by the Secretary to withhold funds would give the court cause to review the matter at hand,[30] in keeping with the prudential ripeness doctrine.[31]

The failure of both *Ctr. for L. and Educ.* and *Conn.* to move beyond preliminary proceedings may be disconcerting in light of the Act's many problems, but they do provide a good roadmap for future legal challenges. *Ctr. for L. and Educ.* elucidates the difficulty and necessity of demonstrating standing in NCLBA-related cases, while the findings in *Conn.* point to the extent in which a ripe injury will be vital to challenging the NCLBA despite the struggle to do so in the short-term. *Conn.* also touched on a potentially weak area in the defense of the NCLBA—its Unfunded Mandates Provision.[32] Mentioned previously, the federal government has a particularly strong case given that the NCLBA is, according to them, an entirely op-

26 *See id.* at 476.

27 *See id.*

28 *Id.* at 474.

29 *See id.* at 485.

30 *See id.*

31 *See id*. at 489-490.

32 20 U.S.C. § 7907 (2002).

tional program meant to supplement state and local education spending. Despite this, future plaintiffs may find success here if they can illustrate how they are or will be harmed by this "optional" program. A plaintiff from a high poverty area who can demonstrate particular harm due to the loss of federal funds when there were insufficient funds at the outset may be especially successful.

V. CONCLUSION

So where is change in the Act likely to come from? Clearly the Act is detrimental to learning in the classroom, and unfortunately, little progress has been made through the courts. The last option for remedying the problems with the NCLBA in the short-term is to go back to where the Act began: Congress. Fortunately, Congress seems to be amenable to making changes despite their earlier reluctance. In response to much of the pressure placed on the Act through the courts and in schools and communities, Congress began preparations for a reauthorization of the Act. Though the Act will continue to be in effect through 2014 regardless of the vote, reauthorization presents a promising opportunity for change. Already the government has made changes, most recently by expanding a pilot program for states wanting to use growth models to determine their AYP,[33] a big step forward in creating a fair system for schools. In fact, two of the Act's original creators have already begun work on introducing a few more needed alterations. [34]

Certainly, the future provides more options outside of pressuring lawmakers for change. Parents and school districts will be able to make forceful, ripe claims in courts as soon as sanctions begin being placed on them. The challenges most likely to succeed in precipitating change are those which incorporate various elements of failure in the Act, chief among them are the lack of sufficient funding for

33 *See* Press Release, U.S. Dept. of Educ., Secretary Spellings Invites Eligible States to Submit Innovative Models for Expanded Growth Model Pilot (Dec. 7, 2007) (on file with author).

34 *See* Alyson Klein & David J. Hoff, *NCLB-Renewal Ideas Circulate on Capitol Hill*, EDUC. WK., Jul. 18, 2007, at 25.

NCLBA programs and a pronounced detrimental effect in low-income and minority schools. The latter will be particularly forceful because this group is the target of the Act. Successful challenges will also likely stay away from questioning the constitutionality of the NCLBA. However, until the Act's sanctions become imminent for specific schools, the best course of action for addressing change in the NCLBA is continued pressure on lawmakers at all levels of government.