Whither ESEA: The Controversy over NCLB and the Federal Role in Education?

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The No Child Left Behind Act of 2001 (NCLB)\(^1\) reauthorized the Elementary and Secondary Education Act (ESEA) and initially provoked a flurry of activity at the federal, state, local, and classroom level.\(^2\) But because of flaws in its design and implementation, NCLB ultimately caused more harm than good and did not improve public education significantly. Many of its problems were recognized early on and could have been addressed when it was originally due to be reauthorized in 2007.\(^3\) But, after Congress failed to successfully reauthorize the ESEA at that time, the U.S. Department of Education (“DOE”) stepped in, using waivers to promote another wave of flawed federal mandates. Now, competing bills have passed the House and Senate, and both have provisions that would curtail the recent emphasis federally-mandated reform strategies. But, no conference has been scheduled, and the White House and DOE have expressed concerns about both bills. With presidential primary campaigns under way and the Congress gridlocked, can an ESEA bill that would remedy some of the missteps of recent years be enacted into law?

This article presents the one lawyers’ observations about the implementation NCLB’s core provisions, including standards, assessment, adequate yearly progress, and the accountability measures that were mandated when schools or districts did not make sufficient progress as defined by NCLB and the states. It also discusses reform strategies pushed by DOE, summarizes key provisions of the House and Senate reauthorization bills, and analyzes the effects that those changes might have on public education.
I. NCLB’s Misguided Federal Imposition of Unproven Strategies

NCLB’s principal potential benefits lied in its recognition of the fundamental premise that all children can learn and have a right to be taught, and the corollary principle that educators, parents, and students should receive periodic assessments of how students are progressing toward the attainment of high academic standards. Moreover, from its inception NCLB required public reporting of the results of such achievement tests, not only in the aggregate, but also disaggregated by race, ethnicity, socioeconomic status, disability, and English language learner status. Such disaggregation is critical to any effort to ensure that our nation’s public schools are serving all groups of students, regardless of their background characteristics or special needs.4

On the other hand, the act was not simply a broad mandate that all students be assessed and that disaggregated results be reported by school, district and state. Rather, NCLB also established “accountability” mechanisms that included the unproven notion that sanctioning schools that fail to make a particular amount of progress (“adequate yearly progress” or “AYP”) in raising standardized test scores will lead to school improvement. To start with, the very definition of AYP was itself problematic, because it rested on the fiction that all students would be able to attain a proficient score by 2013-2014. As a result, not achieving AYP resulted in countless schools and districts being unfairly labeled as “failing.” This result in turn was used by many critics to deride the whole enterprise of public education in order to promote charters and vouchers.
NCLB also imposed a number of untested, federally-mandated remedies, driven more by ideology than by educational research. While NCLB, in 119 separate provisions, requires states and school districts to employ measures that are “scientifically based” and in five instances requires actions to be “research based,” the remedies that the act itself mandates for schools failing to make AYP were not themselves based on any clear scientific consensus or convincing educational research. Nevertheless, these measures not only were required nationwide but also were allocated a significant portion of Title I resources.\(^5\) These costly mandatory measures were also highly controversial both politically and ideologically.

For example, when a school failed to make AYP for two consecutive years, the first mandatory remedy was public school choice: Any school identified as needing improvement, corrective action, or restructuring must offer all students the opportunity to transfer to another public school that is not so identified.\(^6\) The DOE, moreover, has interpreted “another” school to mean two or more such schools.\(^7\) All students are to be given this opportunity, with preference to low-achieving students from low-income families. Educational research, however, does not uniformly suggest that providing students with an option to transfer will either be good for them or good for the school that they leave behind. Although there is fairly strong consensus that a number of initiatives improve student achievement — including, for example, implementing a challenging curriculum, implementing strategies that create more time for individual attention to students, and increasing time for teacher planning and learning\(^8\) — simply providing the choice of another school is not one of them.
Another problematic remedy prescribe by NCLB was supplemental educational services (SES), which the act required when a school failed to make AYP for the third year. The SES mandate required that children from low-income families attending Title I schools that failed to make AYP for three or more consecutive years must be given tutoring and other academic enrichment services from the state-approved provider of their choice. Potential providers could be a nonprofit or for-profit entity, a school district, an educational service agency, or a public, private, or charter school that the state has found to meet certain minimum federal criteria.

Again, there is no more educational research to support the notion that creating a free market for tutoring services will improve educational outcomes than there is to support school choice. Indeed, there are many reasons to believe that it is particularly difficult for outside SES providers to coordinate effectively with daily classroom instruction.

NCLB’s more severe sanctions also were unproven. Under corrective action, NCLB mandates not only the two policies discussed above but also that a school either (a) replace staff relevant to the failure to make AYP; (b) institute a new curriculum; (c) significantly decrease management authority at the school; (d) appoint an outside expert; (e) extend the school year or school day; or (f) restructure the internal organizational structure of the school. There was, however, little indication that simply mandating one of these six additional measures would have the desired result, and often it did not.
Similarly, NCLB’s final sanction, restructuring --which requires the adoption of one of several identified methods of reorganizing a school’s administrative structure when that school has repeatedly failed to make AYP -- was yet another unproven remedy. In this stage, a school district *was required* to adopt “alternative governance arrangements.” Restructuring was to occur if, after one full school year of corrective action, a school continued to fail to make adequate yearly progress. The act delineated five types of acceptable alternative governance arrangements:

1. Reopening the school as a public charter school
2. Replacing all or most of the staff, which may include the principal, who are relevant to the school’s failure to make adequate yearly progress
3. Entering into a contract with an entity, such as a private management company to operate the school as a public school
4. Turning the operation of the school over to the state, if permitted by state law and agreed to by the state
5. Any other major restructuring of a school’s governance arrangement consistent with the act’s requirements.

One of these five fairly extreme remedial measures was *required* if a school identified for corrective action failed to make adequate yearly progress, and all five could involve the reconstitution of the school under the supervision of either the school district, the state, a private company, or a charter grantee. As I have observed before, reconstitution sometimes can be an effective way of reforming a chronically failing school, if it is done right. However, as with most reform efforts, the key lies in the specifics of actual implementation.

In its provisions regarding choice, SES, corrective action, and restructuring, NCLB went too far in federally mandating specific education interventions and reforms. Not only were the particular
measures chosen unproven, the federal government is ill-suited to play the role of educational
diagnostician for local schools and school districts. Moreover, all these federally mandated
remedies to some degree promoted the privatization of public education. The federal ventured far
afield from its expertise by uniformly imposing specific and unproven remedial measures.
Professional educators, local school boards and even state education officials and state
legislatures are better equipped to determine how to improve public schools. The federal
government’s role should be to help identify which states, districts and schools need
improvement, but not to mandate precisely how the task of reform is accomplished.\textsuperscript{16}

II. DOE Waivers Expand Federal Overreach

While many in Congress began to understand the ways in which NCLB had departed from
traditional principles of federalism and local control of public education in harmful ways,
partisan gridlock prevented a timely reauthorization of ESEA. While the statute was originally
due to be reauthorized in 2007, a new law has not yet been enacted.

In 2011, as NCLB’s deadline for universal proficiency rapidly approached, DOE stepped into the
void. Secretary Arne Duncan began giving states “waivers” from some of NCLB’s more
punitive provisions. Ironically, however, DOE conditioned these waivers on the implementation
of even more flawed, unproven, federally-mandated education reform initiatives.

Prominent among these requirements was a change in teacher evaluation systems nationwide.
DOE required states to tie teacher evaluations to student test scores. This requirement has since
lead to numerous problems, including situations in which national teacher of the year candidates
are arbitrarily labeled unqualified.
III. Two Bills Emerge

During 2015 two bills to reauthorize ESEA finally emerged. The House passed the Student Success Act of 2015, H.R. 5. Later, the Senate pass the Every Child Achieves Act of 2015, S. 117. Both bills address a number of the flaws of NCLB and DOE’s waiver program. For example, they eliminate the mandate that teachers be evaluated based on tests scores and limit DOE’s authority over state accountability systems.

A number of national education groups, including the National School Boards Association, the American Association of School Administrators, and the National Education Association, have reacted favorably to the prospect of a reauthorization that addresses these and other flaws in NCLB and DOE policy. In contrast, the Obama Administration has pushed for federal requirements that states intervene in low-performing schools and the preservation of DOE authority.

The recent resignations of Speaker of the House Jim Boehner, one of the initial architects of NCLB, and of Secretary of Education, Arne Duncan, there is some doubt about what attention ESEA will now get on Congress’ crowded legislative calendar. There is also much speculation about how much President Obama is willing to do to push for the amendments that his administration has suggested.

IV. A Sensible Outcome?
Both the Senate bill and the House bill preserve some of the original intent of NCLB while also scaling back what many have now come to see as federal overreach in public education. If enacted into law, some version of these bills would likely have a beneficial effect.

What are some of key components of such sensible outcome?

1. Reaffirm the importance of local governance of public education.
2. Ensure adequate federal and state funding.
3. Target funding to schools with the highest number of low income students.
4. Eliminate AYP in favor of broader state measurements of multiple factors.
5. Maintain appropriate assessment schedules without over-testing.
6. Abandon federally mandated sanctions.
7. Keep teacher evaluation systems in state and local control and eliminate required use of student test scores.
8. Eliminate waivers in favor of a reauthorized ESEA.
9. States and districts should identify struggling schools and design and implement appropriate interventions.

If Congress can pass and the President can sign legislation that embodies most of these ideas, which are already included to some degree in the pending bills, it would be a good step for public education. Fundamentally, in reauthorizing NCLB, Congress should refrain from mandating any particular school improvement measures and school reform initiatives. There is no compelling research suggesting that school improvement funds nationwide should be used for public school choice or for the creation of free markets for tutoring services or test-score based
teacher evaluations systems. Changes in school and district management also should not be federally mandated. Rather, the federal government is far better situated to sponsor and disseminate research on the types of reform measures that actually improve schools and student performance in various contexts. States and school districts should be free to embrace proven models, adapt them to local conditions, and experiment with innovative solutions.

Finally, the funding levels for ESEA should be raised to more realistically reflect the significant increases in resources necessary to improve public education, particularly in our highest poverty communities. With locally driven educational improvement measures, and adequate federal funding, the ESEA could fulfill its promise and help to ensure that no children are left behind in America’s public schools.

Of course, there are other reforms at the federal level that might also help, but that may be less politically palatable. For example, a reduction in federal support for charter schools and increase in support for measures that promote desegregation or diversity would likely reap significant dividends. Likewise, reauthorizing and fully funding the Individuals with Disabilities Education Act is long overdue. But for now, a solid reauthorization of ESEA could set us on a path to undoing some of the harm caused by the last 14 years of federal education policy.
2 The National Conference of State Legislatures, for example, reports that there have been over 140 successful state legislative initiatives to set up procedures to comply with NCLB and maintain the federal funding tied to its implementation (See http://www.ncsl.org/programs/educ/educ_leg.cfm). On the other hand, there also have been concerted efforts by a few states to call on Congress to repeal or cut back on the federal control exerted by NCLB, including Utah (H.J. Res. 011S2, 2006 3rd Sp. Sess.), Florida (H.M. 893, 2006 Sess.) and Oregon (H.J.Mem. 27, 73rd Assem., 2005 Reg. Sess.).
4 Id.
11 Id. §6316(b)(8)(B).
12 Id. §6316(b)(8)(A).
13 Id. §6316(b)(8)(B).
15 Sneed and Borkowski, Reconstituting Schools (noting factors necessary for successful school reconstruction).
16 Another major flaw in NCLB is that it was never adequately funded. See, e.g., Borkowski and Sneed, Will NCLB Improve of Harm Public Education? (contrasting funding promises with actual appropriations in initial years of implementation). However, since the current Republican super-majority in the House makes significantly increased federal funding for public education highly unlikely, that issue is not revisited here.
18 AASA Statement: Senate Committee Passes ESEA Reauthorization Bill, http://www.aasa.org/content.aspx?id=37088 (“The Every Child Achieves Act restores the balance between federal, state and local government, returning leadership and decision making to the ground level, which is where education experts implement the law. By swinging the pendulum of federal overreach and prescription back to states, ECAA takes a critical step in acknowledging that federal policymakers are neither best positioned nor experienced in knowing what will work for the nation’s more than 13,000 school districts.)
Moreover, the versions of both bills that ultimately passed in the House and the Senate did not include amendments which would have allowed federal financial support for students participating in voucher programs. Funding for vouchers should not be part of ESEA.

I have previously advocated an additional federal role in establishing uniform national standards, see Borkowski and Sneed, Will NCLB...?, supra, but the many problems associated with the push to implement the Common Core have lead me to begin to reevaluate that proposition. That analysis, however, is beyond the scope of this paper.

But see supra, note 16.