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Waive to the Top: The Dangers of Legislating Education Policy from the Executive Branch

By Benjamin Riley

Nearly everyone in the education community agrees that the time has come to end, or seriously repair, the No Child Left Behind Act (NCLB); however, the process of doing so has become drawn out and contentious. With Congress not moving quickly enough to reauthorize the law, President Obama has announced a way to help states get around NCLB's requirements. His 2011 Elementary and Secondary Education Act (ESEA) Flexibility plan grants certain states waivers from NCLB accountability requirements if they agree to a series of preset conditions, including adopting challenging academic standards, developing educator evaluation systems, and improving the lowest-performing schools. Although many states are enthusiastic about obtaining this relief, the waiver plan poses several notable risks. Legally, it remains to be seen whether the executive branch has the authority to craft national education policy without the approval of Congress. Politically, support for waivers may wane as states begin to implement the administration's favored policies, particularly upon implementing the challenging Common Core standards. And logistically, the creation of two wholly different federal accountability regimes—waiver states and NCLB states—poses an incredible challenge for federal oversight.

In early February 2012, President Barack Obama delivered long-awaited news: it is the end of No Child Left Behind as we know it. To quote from Monty Python, No Child Left Behind (NCLB) has "ceased to be, shuffled off its mortal coil, run down the curtain, and joined the choir invisible." In a speech delivered at the White House, President Obama announced that eleven states will no longer be required to meet NCLB's requirements for improving student learning. "We've offered every state the same deal," he declared. "We've said, if you're willing to set higher, more honest standards than the ones that were set by No Child Left Behind, then we're going to give you the flexibility to meet those standards."[1]

A quick history lesson on recent education legislation: No Child Left Behind is the name for the

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Key points in this *Outlook*:

- The Obama administration's new waiver program offers states an enticing deal to escape the requirements of the No Child Left Behind Act, but at the risk of creating federal education policy chaos down the road.
- While greater state flexibility sounds appealing, the Obama administration's attempt to legislate from the executive branch raises serious constitutional questions and entails major political and operational risks.
- The waiver program may result in a balkanized education system in which wholly different standards undermine national progress and federal coordination.

current reauthorization of the Elementary and Secondary Education Act (ESEA), a statute passed by the United States Congress that has established federal education policy since 1965. For the last five years or so, a general consensus has emerged among education policymakers and practitioners that NCLB is seriously flawed and in need of fixing. Though ESEA technically expired in 2007, it will remain the law of the land until a new law replaces it, which is something Congress has, until this point, failed to do.[2] And so NCLB has continued to lumber along, zombie-like, despite its rejection by virtually every major education constituency, including teachers, parents, and policymakers.

Meanwhile, two years ago, the Obama administration launched a competition called Race to the Top (RTT). States were invited to compete for federal dollars in return for adopting challenging academic standards (known as the Common Core State Standards), turning around low-performing schools, building useful data systems, and recruiting and training effective teachers and principals. During the two phases of the competition, the US Department of Education (ED) received applications from forty-six states and awarded grants to eleven states and the District of Columbia. Although competitive grant programs can be politically unpopular—particularly when there are more losers than winners—President Obama remains an enthusiastic supporter of RTT, calling it "the most meaningful reform of our public schools in a generation."[3]

With numerous schools facing NCLB-related penalties—an estimated 48 percent of schools failed to make adequate yearly progress in 2011[4]—the Obama administration announced in September 2011 that it would offer states "waivers" to get out from under NCLB. This proposal, which the administration refers to as ESEA Flexibility, takes many of the ideas underlying RTT and expands their application in order to slay the NCLB zombie.[5] To receive a waiver, states must adopt college- and career-ready standards (read: the Common Core); develop a plan to identify and improve the bottom 15 percent of schools (or "priority" and "focus" schools); and develop teacher and principal evaluation systems "based on multiple valid measures, including student progress over time."[6] In essence, this system could be called "Waive to the Top."

For the moment, the administration's waiver plan looks to be a winning strategy on a number of fronts. President Obama, for instance, can point to waivers as an example of the administration's taking bold action while a do-nothing Congress dithers and squabbles. Governors and state chiefs that receive waivers can claim victory back home and allege that they have freed their state from the tyranny of NCLB's onerous requirements. And for superintendents, principals, and teachers fearing the stigma of being placed in NCLB's regime of "program improvement," this newfound flexibility provides antacid-like relief.

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Yet, there are hints of storm clouds gathering afar. Indeed, the central thesis of this piece is that the administration's ESEA Flexibility plan carries three serious risks—primarily legal, but political and operational as well—that may prove to be its undoing. This should give both waiver skeptics and supporters pause, because once we get past the political rhetoric, there are real kids whose education opportunities will be affected should this country descend into education policy chaos. What follows is an assessment of the rocky road ahead.

The Legal Risk

The first risk facing the ESEA Flexibility plan: does the administration possess the actual authority to grant waivers with conditions? The first thing to note is that section 9401 of ESEA clearly gives the secretary of education the authority to waive NCLB's accountability provisions, the widely loathed adequate yearly progress (AYP) metric. Specifically, the law requires states to explain how a proposed waiver would "increase the quality of instruction [and] improve the academic achievement of students" and to "describe, for each school year, specific, measurable educational goals . . . that would be affected by the waiver and the methods to be used to measure annually such progress for meeting such goals and outcomes."[7]

What section 9401 does not obviously do, however, is provide the ED with the authority to prescribe the methods states seeking a waiver will use or—perhaps more important—set additional conditions to obtain a waiver. The statute is simply silent on this front. Maybe

the ED can designate in advance what "methods" it deems acceptable—for example, adopting Common Core standards, focusing on the bottom 10 percent of schools, and developing teacher evaluations—but then again, maybe not. The absence of a prohibition does not equal a mandate of authority.

What do the courts say about this? By now, it is well established that Congress, as befits the branch of government entrusted to enact laws, is authorized by the Constitution's spending-power clause to attach conditions to the receipt of federal funds in pursuit of a policy objective. The Supreme Court recognizes four restrictions, however, on Congress's authority in this respect. First, any condition attached to federal funds must promote general welfare (which, in practice, means anything goes). Second, and most important, the condition must be "unambiguous, enabling the state to exercise their choice knowingly, cognizant of the consequences of their participation." Third, conditions are illegitimate if they are unrelated to the purpose of the law or regulation they are attached to (for example, Congress could not attach a Medicare provision to No Child Left Behind). Finally, other constitutional provisions may independently bar the grant of federal funds.[8]

Returning now to NCLB, Congress has applied all sorts of conditions to the receipt of federal education funding. Indeed, the entire federal education accountability regime (testing, AYP, and standards) set forth under NCLB involves states creating state plans that meet the requirements of the various titles that comprise NCLB (for example, Title I funds low-income schools, and Title II supports teacher training).

So, no one seriously questions whether Congress possesses the authority to condition education funding in this fashion. But the question of whether the Department of Education has the authority to attach explicit conditions to education funding is another matter entirely.[9] While case law addressing this question is sparse, one interesting decision does hint at how a court might view this issue: *Commonwealth of Virginia Department of Education v. Riley*.[10]

The *Riley* case involved the intersection between federal education law—in this case, the Individuals with Disabilities Education Act (IDEA)—and Virginia's state education policy. Under IDEA (much like NCLB), the federal government provides financial assistance to states to fund the education of disabled students, provided that states submit a plan that grants "all children with disabilities the right to a free appropriate public education."[11]

For many years, Virginia had a policy wherein it ceased to provide a free education to disabled students who were expelled or suspended long-term for misconduct unrelated to their disabilities. Upon learning of this in 1993, the ED threatened to withhold the entirety of Virginia's annual $60 million IDEA grant unless Virginia agreed to provide educational services (such as private tutoring) to the disabled students who had been expelled or suspended long-term.[12] In other words, the ED imposed a condition on Virginia receiving federal education funding.

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The United States Court of Appeals for the Fourth Circuit wasted little time invalidating the ED's attempt to meddle with Virginia's education policy. The court found that IDEA requires states only to provide disabled children with access to free public education; the act does not require states to "provide education services even to those handicapped youths who have forfeited the right to a free education by willfully engaging in contumacious conduct."[13]

The court also held that "for Congress to condition a state's receipt of federal funds, *it must do so clearly and unambiguously*." Put another way, if "Congress has not unequivocally conditioned receipt of federal funds in the manner claimed by the Department of Education," then the ED cannot require states to adopt its favored policy. The court concluded that because neither the text of IDEA, nor its legislative history, nor even its purpose "suggests, much less mandates with the clarity necessary to confirm that Congress actually confronted and deliberately decided," that states must provide private tutoring to disabled students who are expelled.[14]

Ultimately, the court decried the Department of Education's intrusion upon Virginia's education policy as violating the Tenth Amendment to the Constitution. In the words of Judge Michael Luttig:

> I would think that a Tenth Amendment claim of the highest order lies where, as here, the Federal Government withholds the entirety of a substantial

> federal grant on the ground that the States refuse to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States. In such a circumstance, the argument as to coercion is much more than rhetoric; it is an argument of fact.[15]

The application of *Riley* to NCLB waivers should be obvious. In both instances, the ED has imposed a condition that does not derive from a clear and unambiguous congressional mandate. Nonetheless, there are some caveats. For one thing, the *Riley* decision is what lawyers like to call "distinguishable" from the administration's waiver proposal. Whereas Virginia had no choice but to comply with federal demands to receive IDEA funding, the administration's ESEA Flexibility offer provides states with a genuine choice: (1) seek a waiver, or (2) maintain the status quo under NCLB. Of course, both the president and US Secretary of Education Arne Duncan have said NCLB is broken, so this choice is somewhat Hobson's-like, but that may not matter legally.

Finally, a complicated question also exists surrounding who has the legal standing to stop the administration from granting waivers. States that have received a waiver are obviously not going to litigate, and states that do not apply for a waiver would have trouble showing any "injury" that could be traced to the administration's granting of waivers to other states. The most obvious candidate, then, may be Congress itself, but "the law of congressional standing . . . is a doctrine fraught with analytical inconsistency and uncertainty."[16] Still, one has to wonder whether House Speaker John Boehner's legal team is looking into the possibility.

Despite the legal haziness, one might reasonably ask: how should a court adjudicate the legality of ESEA Flexibility? Certainly, the goals embodied in the administration's proposal sync up nicely with many already contained in NCLB. It is also a powerful legal defense to point out that states are not obligated to seek a waiver. And the fact that everyone agrees that NCLB is broken will not be lost on a judge.

At the same time, a very serious separation-of-powers argument can be made against conditional waivers: "Given that Congress cannot act, I am acting," Obama said when he announced the waiver plan, but that is not exactly how our tripartite system of "small-d" democratic government is supposed to work.[17] And while most left-of-center readers will not be persuaded by Judge Luttig's plea to the Tenth Amendment, consider the following hypothetical scenario: It is January 2013, and our newly elected Republican president has offered waivers to states under the Affordable Care Act, provided they agree to raise the Medicaid eligibility age, reduce health benefits for illegal immigrants, and defund family planning efforts. Many Republican governors eagerly apply for and receive such waivers while Democrats scream bloody murder, and America drifts toward two separate health care systems, one red and the other blue. The problem with political expediency is that eventually the perpetrator may become the victim.

The Political Risk

The next major risk facing the administration's ESEA Flexibility plan is that political forces will coalesce to oppose and kill it. How likely is that to happen?

Thus far, the administration has handled the politics of waivers brilliantly. The eleven states that have been granted a waiver already—Colorado, Florida, Georgia, Indiana, Kentucky, Massachusetts, Minnesota, New Jersey, New Mexico, Oklahoma, and Tennessee—are diverse both geographically and politically, which is further evidence of the bipartisan loathing for NCLB. With twenty-six additional states applying in the second round, the coalition of the waiver-willing is broad and deep. And at least with some constituencies, the administration benefits from the fact that the waivers preserve a robust federal role in education, at least compared to ESEA-related bills approved by the US Senate and House of Representatives education committees over the past year.

That said, it is a tired-but-true cliché in politics that the winds can shift quickly. Numerous states have expressed reservations about waivers, including Alabama, Alaska, California, Louisiana, Montana, Nebraska, Pennsylvania, Texas, West Virginia, and Wyoming. Already some very red states (Utah and South Carolina) are starting to reconsider their adoption of Common Core standards, which are all but a requirement to receive a waiver. And Congressional Republicans have made no secret of their disgust at the administration's waiver plan: "Rather than work with us," said Rep. John Kline, chairman of the House Education and the Workforce Committee, "Secretary Duncan and the President have decided to issue waivers in exchange for states adopting policies [they] want them to have, not changes that we've put into law."[18]

Meanwhile, on the left side of the ledger, Randi Weingarten, the influential president of the American Federation of Teachers, says parts of the all-or-nothing waiver package give her "cause for concern."[19] Similarly, Governor Jerry Brown of California would no doubt like to see NCLB-related mandates lifted, but at the moment seems intent on submitting a waiver request that will not meet any of the administration's conditions. Sure, California is an aberration and Governor Brown marches to the beat of his own drum, but the state is responsible for educating 20 percent of our nation's kids. Add Texas (representing 8 percent of children nationwide) and the other holdout states, and suddenly you realize that, even if every state that applies for a waiver receives one, which is unlikely, more than one-third of the nation's children will continue to attend schools subject to NCLB's mandates.

Ultimately, the fact that the president himself delivered the waiver announcement is proof that he and his advisers think this is a winning issue, politically. And if he and Secretary Duncan can continue to control the message of increased flexibility and less teaching to the test—then they will succeed in winning over the public. But if both the right and left flanks peel off, particularly as folks delve into the details of approved waivers, the administration may find itself defending a policy with very few allies. Which outcome is more likely? My professional pundit's Magic 8 Ball says, "Outlook Hazy."

The Implementation Risk

Now let us imagine a happy scenario for the administration, in which an overwhelming majority of states have obtained an ESEA waiver, and the skilled attorneys at the US Department of Justice have successfully slain the rash of lawsuits filed around the country. Under such a scenario, the president can declare victory and feel confident that our nation's education system is back on track. Or can he?

Well, no. Because even if the administration survives the clear-and-present political and legal risks it faces, that will still leave the task of making sure the states actually implement the policies they have adopted and that these policies actually improve the education we provide to our children. To be sure, this is a risk inherent to any change in education policy but one that is significantly heightened here.

It is all too easy for state departments of education to pretend to be faithfully implementing federal law while secretly (or not so secretly) working to undermine it. If the civil servants who are responsible for executing the administration of state education policy conclude that waivers will not be around for very long, how hard will they work to implement waiver-related policy? How hard would you work on a project if you thought it might be scrapped in a year or so?

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There is also the nontrivial concern that the ED lacks the capacity to oversee fifty different state education programs, some of which will be waiver programs and others of which will continue to function under NCLB's accountability metrics. The latter states might reasonably assume that, since President Obama and Secretary Duncan have declared NCLB broken, the ED will not be in a position to enforce accountability metrics. The result may be the creation of a two-tiered federal education system—where waiver states are held accountable and NCLB states are not held accountable—that will be radically complicated to oversee. This is a patchwork quilt that is already threatening to come apart at the seams.

What This All Means

What conclusions should we draw from this risky business of waivers? First, whether the administration has the legal authority to condition waivers upon states adopting preselected policies is very much an open question. I suspect it is only a matter of time before someone sues to stop waivers from happening—and all it takes is one judge to enjoin the administration's actions and throw the whole plan into question.

Second, while the administration has managed the politics of waivers successfully thus far, there is a nontrivial risk of support evaporating, from both the left and the right.

Finally, even if waivers survive legally and politically, I question the wisdom of creating a balkanized education system that will subject a handful of states—including the two biggest—to the accountability regime of NCLB while creating a wholly different standard for those states

that obtain a waiver. Say what you will about the federal government's role in education: one limited and appropriate function it can serve is to create a common metric to employ in measuring educational improvement. The administration may want to "waive to the top," but for some states, this new policy may be a wave goodbye.

Notes

1. President Barack Obama, "No Child Left Behind Flexibility" (remarks, Washington, DC, February 9, 2012), www.whitehouse.gov/photos-and-video/video/2012/02/09/president-obama-speaks-no-child-left-behind-reform#transcript (accessed March 5, 2012).

2. Although both the US House of Representatives and the US Senate education committees have approved ESEA-related legislation in the past twelve months, nothing has moved to the floor of either chamber for a general vote (apart from one House bill to support charter schools).

3. President Barack Obama, "The State of the Union Address" (speech, Washington, DC, January 25, 2011), www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address (accessed March 5, 2012).

4. Alexandra Usher, *AYP Results for 2010–11* (Center on Education Policy, 2011), www.cep-dc.org/displayDocument.cfm?DocumentID=386 (accessed March 5, 2012).

5. US Department of Education, "ESEA Flexibility," www.ed.gov/esea/flexibility (accessed March 5, 2012).

6. White House, "Bringing Flexibility and Focus to Education Law" September 23, 2011, www.whitehouse.gov/sites/default/files/fact_sheet_bringing_flexibility_and_focus_to_education_law_0.pdf (accessed March 5, 2012).

7. "Waivers of Statutory and Regulatory Requirements," Sec. 9401 of *No Child Left Behind Act of 2001*, Public Law 107-110, 107th Cong. (January 8, 2002), www2.ed.gov/policy/elsec/leg/esea02/pg110.html (accessed March 5, 2012).

8. The leading case on this doctrine, sometimes referred to as "permissible versus impermissible conditions," is *South Dakota v. Dole*, 483 U.S. 203 (1987).

9. Some people believe that because George W. Bush's secretary of education, Margaret Spellings, issued conditional waivers, this somehow makes President Obama's waivers legal. It does not. Government officials do illegal things all the time, and therefore it is simply a question of whether anyone challenges their actions in court. The fact that former secretary Spellings issued waivers with conditions would be marginally helpful to the ED in defending a lawsuit, but certainly not dispositive. It is also important to note that Spellings's waivers were dramatically different in degree and kind from what Secretary Duncan is issuing.

10. See *Commonwealth of Virginia Department of Education v.Riley*, 106 F. 3d 559 (4th Cir. 1997). Riley refers to Richard Riley, former secretary of education and no relation to the author here.

11. See Sec. 504 of *Rehabilitation Act of 1973*, 34 C.F.R. 104.33.

12. For the insatiably curious, a total of 126 disabled students were expelled or long-term suspended in Virginia in 1993. With barely concealed contempt, the court's opinion cited one instance where a student diagnosed with Attention Deficit/Hyperactivity Disorder (ADHD) brought a knife to school, threatened to stab a female classmate, and then lied about having the knife on his person. Because of IDEA's due-process requirements for disabled students, it took Virginia four hearings, drawn out over eight months, to prove the student's knife threats were unrelated to his ADHD "disability," and therefore that he could be expelled from school.

13. See *Commonwealth of Virginia Department of Education v. Riley*.

14. Ibid.

15. *See Commonwealth of Virginia Department of Education v. Riley*. Contumacious (adj.): "Stubbornly or willfully disobedient to authority."

16. Jay R. Shampansky, "Congressional Standing to Sue: An Overview," CRS Report for Congress, June 19, 2001, http://congressionalresearch.com/RL30280/document.php?study=Congressional+Standing+to+Sue+An+Overview (accessed February 28, 2012).

17. White House, "Remarks by the President on No Child Left Behind Flexibility," press release, September 23, 2011, www.whitehouse.gov/the-press-office/2011/09/23/remarks-president-no-child-left-behind-flexibility (accessed March 5, 2012).

18. John Kline, "Chairman Kline Unveils GOP Vision to Fix No Child Left Behind" (event, American Enterprise Institute, Washington, DC, February 9, 2012), www.aei.org/events/2012/02/09/congressman-kline-unveils-gop-vision-to-fix-no-child-left-behind/.

19. Randi Weingarten, American Federation of Teachers, "On Waivers for NCLB Requirements," press release, September 22, 2011, www.aft.org/newspubs/press/2011/092211.cfm (accessed March 5, 2012).