TURBULENT POLICY DEMANDS AND ETHICAL DILEMMAS: THE IMPACT OF FEDERAL EDUCATION POLICIES ON SPECIAL EDUCATION PROGRAMS AND SERVICES

Susan C. Faircloth, Ph.D.
The Pennsylvania State University

In a recent letter to the Council of Chief State School Officers, the Assistant Secretary, Office of Elementary and Secondary Education remarked, “one of the most difficult issues facing States and school districts today is the inclusion of students with disabilities in their State assessment and accountability systems” (Simon, 2004). These challenges are clearly evidenced in the implementation of the No Child Left Behind Act of 2001, Public Law 107-110 (NCLB), a landmark event in the education of all students, particularly those with disabilities.

The NCLB is based, in part, on closing the achievement gap among students. To identify and mitigate these gaps, student achievement data must be disaggregated according to poverty levels, race, ethnicities, disabilities, and limited English proficiencies. Those schools in which any subgroup fails to make adequate yearly progress (AYP) are subject to sanctions. According to Sergiovanni, Kelleher, McCarthy, & Wirt (2004), this increased attention to accountability and results, “…potentially creates tension and conflict for the school leader who may be held singularly responsible for improvement in student performance…” (p. 207). In effect, the implementation of the NCLB forces school leaders to choose between two competing values, that of the individual student and that of the school at large. The primary question framing this dilemma is: how to balance the expectation that the individual needs of students with disabilities will be met while ensuring that schools meet or exceed federal requirements for adequate yearly progress, as defined by the NCLB, or face sanctions.
In this article, I argue that the implementation of the No Child Left Behind Act creates what Sergiovanni et al. (2004) term “turbulent policy demands” which foster ethical dilemmas for the principalship. I am concerned specifically with the impact of the implementation of this Act on students with disabilities, as it appears that there is discontinuity between the principles of this Act and the Individuals with Disabilities Education Act (IDEA), the preeminent federal law governing the education of students with disabilities. Although IDEA is student centered and emphasizes the individual child, No Child Left Behind is an example of standards-based reform, which emphasizes uniform learning standards and outcomes rather than the individual child (McDonnell, McLaughlin, & Morison, 1997). This is particularly evident in the Act’s requirement that students with disabilities be included in State assessments used to determine adequate yearly progress of individual schools. Although the inclusion of students with disabilities in such assessments is consistent with IDEA’s requirement that students with disabilities be included in State and district wide assessments, there is concern regarding the potential for overemphasis of test scores and a lack of emphasis on the individual child.

As the school leader, the principal is charged with implementing externally imposed policies, such as the NCLB. Failure to do so may result in loss of employment, designation of the school as in need of improvement or state–takeover. These are real dilemmas that must be addressed in an ethical, reasoned and timely manner.

Federal Education Policies and the Education of Students with Disabilities

Three key pieces of federal legislation are germane to this discussion: The Individuals with Disabilities Education Act (IDEA), The 1997 Reauthorization of the Individuals with Disabilities Education Act (IDEA 97), and The No Child Left Behind Act (NCLB). Each of these Acts sets forth federal requirements governing the provision of education to students with disabilities. This discussion is particularly concerned with discontinuity between the requirements set forth in IDEA, IDEA 97 and the NCLB, as they potentially create dilemmas for the principal in the administration and supervision of special education programs and services.

Individuals with Disabilities Education Act

Until the 1970s, students with disabilities were subject to exclusion from public education. Two landmark cases helped to establish their right to education. The first case, Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania, (1971), was brought on behalf of students with mental retardation in the state of Pennsylvania. This suit charged that students with mental retardation were not receiving public education in violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution (Katsiyannis, Yell, & Bradley, 2001). The second case, Mills v. Board of Education (1972), was a class action lawsuit filed by the parents and guardians of children with a range of disabilities including behavioral disturbances, hyperactivity, mental retardation, and physical impairments. The plaintiffs claimed that the District of Columbia excluded these students from public education without proper due process. Collectively, these cases created a backdrop for special education legislation nationwide. In 1974, following the rulings in the PARC and Mills cases, Congress substantially amended existing laws to include “the goal of full educational opportunity for students with disabilities” (Katsiyannis, Yell, & Bradley, 2001, p. 325). In 1975, the Education of the Handicapped Act was amended and renamed as Public Law 94-142, the Education for All Handicapped Children Act (EAHCA). Since 1975, this law has undergone numerous amendments and is currently authorized as Public Law 105-17, the Individuals with Disabilities Education Act (Katsiyannis, Yell, & Bradley, 2001).

Six principles guide this law (Turnbull & Turnbull, 2000):

- zero reject which requires that no child with a disability be denied the right to an education,
- nondiscriminatory identification and evaluation using multiple forms of assessment that are not racially or culturally discriminatory,
- free and appropriate public education, dependent on an individualized education program,
- education in the least restrictive environment to the extent appropriate in the regular education setting,
- the right to be informed and to be heard prior to government action, and
- parent participation and shared decision making.

1997 Reauthorization of the Individuals with Disabilities Education Act

The 1997 reauthorization of IDEA requires that students with disabilities be included in general state and district-wide assessment programs, with appropriate accommodations and modifications provided as needed (20 USC §1412(a)(17)(A)). In issuing these amendments, Congress noted “Over 20 years of research and experience has demonstrated that the education of children and youth with disabilities can be made more effective by having high expectations for such children and ensuring their access in the general curriculum to the maximum extent
The No Child Left Behind Act of 2001

The No Child Left Behind Act (NCLB) of 2001 is the most recent amendment to the Elementary and Secondary Education Act of 1965, Public Law 89-10. The original legislation was part of the war on poverty led by President Lyndon B. Johnson and was aimed at meeting the educational needs of at-risk student groups. In January of 2002, this Act was reauthorized and signed into law as The Elementary and Secondary Education Act as Amended by the “No Child Left Behind Act of 2001”, P.L. 107-110. President Bush hailed the NCLB as the “cornerstone of [his] administration” (U.S. Department of Education, 2002a). The purpose of the Act is “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and State academic assessments” (20 USC 6302 § 1001).

The four guiding principles of the NCLB are:

- increased accountability,
- increased flexibility for states, school districts, and schools in the use of federal funds,
- increased choices for parents of children from disadvantaged backgrounds, and

The Impact of the NCLB on the Education of Students with Disabilities

There are at least three elements of the NCLB, which have direct and immediate consequences for the education of students with disabilities. These include: accountability and adequate yearly progress, standardized assessment, and the requirement that all teachers be highly qualified. Each of these is briefly outlined below.

Accountability and Adequate Yearly Progress (AYP)

Adequate yearly progress is determined by each state using the results of content based assessment, graduation rates, and at least one other academic assessment, such as: achievement on state or locally administered assessments; changes in retention; attendance rates; percentages of students participating in and completing gifted and talented, advanced placement, and college preparatory programs (20 USC 6311 §1111(2)(C)(vii)). Schools failing to achieve AYP face sanctions. Prior to imposing sanctions, states are required to take action to assist schools inremedying those factors related to failure to achieve adequate progress. Schools failing to make AYP in year one are required to develop school improvement plans. If adequate progress is not made in year two, the school is identified as a school in need of improvement and corrective actions are taken. A corrective action is defined as

“action by the local education agency (LEA) that (1) substantially and directly responds to-- (i) the consistent academic failure of a school that led the LEA to identify the school for corrective action; and (ii) any underlying staffing, curriculum, or other problems in the school; (2) is designed to increase substantially the likelihood that each group of students ……enrolled in the school will meet or exceed the State's proficient levels of achievement as measured by the State assessment system; and (3) is consistent with State law (20 USC 6316(b)(7)).

Examples of corrective actions include reopening the school as a public charter school; replacing all or most of the current staff, including the principal; entering into a contract with a private organization for the operation of the school; takeover of the school by the State; and additional efforts to drastically restructure the governance of the school (20 USC 6316(c)(8)(A)-(B)). In addition to corrective actions, the school must notify parents of the option to transfer students to other public schools that have not been identified as in need of improvement.

Standardized Assessment

According to the NCLB, AYP is determined by students’ performance on standardized assessments used to assess achievement on “challenging academic standards.” These standards are aligned with the State’s academic content standards and must “specify what children are expected to know and be able to do; contain coherent and rigorous content; and encourage the teaching of advanced skills” (20 USC 6311 §1111(b)(1)(D)(i)(I)-(III)).

Effective during the 2005-2006 school year, all students, including those with disabilities, must be assessed in reading/language arts and mathematics each year in grades 3-8 and at least once in grades 9-12. During the 2007-2008 school year, students will be assessed in the sciences at least once in grades 3-5, 6-9, and 10-12. Two levels of high achievement – proficient and advanced – and one level of lower achievement – basic- are described by the Act (20 USC 6311 §1111(b)(1)(D)(ii)(II)-(III)). The ultimate goal is for all students to reach proficiency in reading, mathematics, and science within a twelve-year period (i.e., by the end of the 2013-2014 school year).

Proficiency is measured and reported at both the school and subgroup levels. In order to address academic achievement gaps, and to demonstrate that the
achievement gap is being closed as a result of the NCLB, the Act mandates the disaggregation and reporting of data based on poverty levels, race, ethnicities, disabilities, and limited English proficiencies. Scores on these achievement tests must be disaggregated and reported by subgroups unless the number of students within a subgroup is so small that it would yield statistically insignificant or unreliable data or would lead to the identification of an individual student (20 USC 6311 §1111(b)(2)(c)(v)(II)). A minimum of 95% of all students within a given subgroup must be included in the test results used to determine adequate yearly progress. For example, the scores of at least 95% of all students with disabilities must be included in the scores used to determine the groups’ and ultimately the schools’ yearly progress. To prevent faulty reporting of data, the NCLB prohibits the systematic exclusion of the scores of the lowest performing students or subgroups (U.S. Dept. of Education, 2002b).

As noted, the test scores of students with disabilities are included in the determination of AYP. For these students, accommodations and/or modifications must be provided in accordance with their Individualized Education Programs (IEP). Effective January 8, 2004, federal regulations were implemented allowing for alternative content standards and corresponding assessments for students with the most significant cognitive impairments (Title I – Improving the Academic Achievement of the Disadvantaged, Final Rule, 2004; U.S. Department of Education, 2003). However, a cap was placed on the number of students achieving proficiency or advanced scores on such assessments who may be included in the overall calculation of proficiency rates for the determination of adequate yearly progress. This cap is equivalent to a maximum of one percent (1%) of the total school population or ten percent (10%) of all students with disabilities (House Education and the Workforce Committee, 2003). Although this rule makes provisions for students with the most severe cognitive impairments, the majority of students with disabilities are still required to participate in “regular” assessments. It is interesting to note that during the 2000-2001 school year, four disability categories, specific learning disabilities, speech or language impairments, mental retardation, and emotional disturbance accounted for nearly 90% of the total population of students, ages 6-21, receiving special education services (U.S. Dept. of Education, 2002b).

The use of caps and the determination of what constitutes the most significant cognitive impairments is somewhat contentious. For example, IDEA requires the use of alternative assessments, regardless of type or degree of disability, to be determined collaboratively by the IEP team rather than singularly determined by the school. Further, there is no universal agreement as to the definition of the most significant cognitive impairments. This definition is left to the discretion of the states. Allbritten, Mainzer and Ziegler (2004) characterize the cap as “arbitrary” and suggest that the use of caps will increase the amount of paperwork, costly evaluations, and due process hearings.

Highly Qualified Teachers

In addition to content standards and content-based assessment, the NCLB recognizes the importance of highly qualified teachers to the improvement of student achievement. Under this Act, all teachers of core academic subjects (e.g. English, reading/language arts, math, science, foreign languages, civics and government, economics, arts (as determined by the State), history, and geography (20 USC 7801 §9101(11)) must be deemed highly qualified by the end of the 2005-2006 school year. Each state establishes its own criteria for highly qualified teachers.

Although special education teachers are not specifically referenced in the Act, the highly qualified teacher requirement (CEC, 2003) could pose a dilemma for special education as it is already facing a chronic shortage of special education teachers (Brownell, Sindelar, & Bishop, 2002; U.S. Dept. of Education, 2001). This shortage is linked to “an insufficient number or supply of new special education teachers, increasing student enrollments, a shrinking reserve pool (i.e., the number of teachers not currently employed), high teacher attrition rates …” (McLeskey, Smith, Tyler, & Sanders, 2002, as cited in Brownell, Sindelar, & Bishop, 2002), and an increasing number of students in special education (U.S. Dept. of Education, 2002b). This shortage is of particular concern to schools in poor urban and rural areas, as well as to students with emotional and behavioral disorders (American Association for Employment in Education, 1999, Ingersoll, 2001, National Center for Education Statistics, 1997 & Riley, 1998, as cited in Brownell, Sindelar, & Bishop, 2002). According to the U.S. Department of Education (2003, as cited in McLeskey, Tyler, & Flippin, 2003) more than 47,000 special educators “…lacked appropriate special education certification” (p. 10) during the 2000-2001 school year; an increase of 23% over 1999-2000. The Council for Exceptional Children (Kozleski, Mainzer, Deshler, Coleman, & Rodriguez-Walling, 2000, as cited in McLeskey, Tyler, & Flippin, 2003) estimates more than 200,000 open positions in special education by 2005.

The Ethics of Justice, Care, Critique, and the Profession

As discussed, there are a number of challenges, including the use of standardized assessments, the
determination of adequate yearly progress, and the recruitment and retention of highly qualified special education teachers, that are inherent in the implementation of the No Child Left Behind Act. These challenges require school leaders to take swift and effective action or face sanctions. To paraphrase Noddings (1984, as cited in Leonardi, 2001), everything we do as educators has moral overtones. Building upon this thought, the following section will illustrate how Shapiro and Stefkovich’s (2001) model of decision making offers a framework by which the school leader may respond to challenges posed by the implementation of the NCLB; challenges which some may consider to be morally or ethically charged when working with students with disabilities and other highly vulnerable populations. Shapiro and Stefkovich (2001) offer four perspectives or lenses through which these and other ethical tensions may be resolved. These lenses include the ethics of justice, care, critique, and the profession. Each of these lenses may be used individually or collectively depending on the issue at hand.

The Ethic of Justice

The ethic of justice is based on principles of law, fairness, equity, and justice (Shapiro & Stefkovich, 2001). In keeping with this ethic, the school leader makes decisions resulting in the greatest good for the greatest number of students (Raphael, 1994, as cited in Denig & Quinn 2001). Although the ethic of justice is often equated with the law, Howe and Miramontes (1992) argue that there is a distinction between law and ethics. As a result, one will be able to make a distinction between whether a law is ethical or legally binding. For example, there have been numerous legal challenges to the Individuals with Disabilities Education Act. These challenges have been based, in part, upon interpretation of the intent of the Act and its applicability in given situations, such as those involving issues of placement, appropriate education, provision of related services, etc.

Howe and Miramontes (1992) characterize the relationship between the law and ethics as follows:
1. laws may be the subject of ethical critique,
2. laws are neither fully guided by nor devoid of the need for ethical deliberation,
3. laws are open to interpretation, which may be ethical in nature, and,
4. when a law does not require interpretation, it still “presupposes ethical commitments” (p. 9).

Although Howe and Miramontes distinguish between the legality and ethicality of law, they also caution that these distinctions are not always easily made nor should they be. As such, there are situations in which the legal thing to do may not be the ethical thing to do and vice versa. For example, it may be legal to provide alternative content standards and corresponding assessments to a limited number of students with the most significant cognitive impairments, while requiring the remainder of students with disabilities to complete the standard state mandated tests, but is it ethical?

The fundamental tension of an ethic of justice perspective rests between the maximization of benefits for all and respect for individual rights (Strike, 1999). The provisions of the NCLB clearly favor maximization of benefits for all students. The dilemma for school leaders lies in the realization that maximizing the benefits for all students may occur at the expense of protecting the individual rights and special needs of students, particularly those with disabilities.

The Ethic of Care

In contrast to the ethic of justice, the ethic of care emphasizes “people and their development” (Beck & Murphy, 1994, p. 16). A school leader who espouses the ethic of care will be more concerned with the student’s development as an individual and less interested in the test scores that the student produces. Further, Noddings suggests that the purpose of assessment would be to assess what a student knows rather than to assess whether a student has learned a particular curriculum or content as is required by the NCLB (Noddings, 1992, as cited in Beck & Murphy, 1994). Although the NCLB presumes that equity, as measured by challenging academic content standards and assessments, is the answer to a widening academic achievement gap, this practice can result in the placement of sanctions not only on the schools, but on the individual students whose educational programs become less individualized, and some might characterize, less caring, in an attempt to ensure adequate yearly progress at the group and school levels.

The ability to follow the law while recognizing and responding to the individual needs of students is essential for special education programs and services for which much of their work is guided by the development and implementation of Individualized Education Programs as required by IDEA. In essence, this is not an argument against the ethic of justice in the education of students with disabilities. In fact, special education is founded on the right to education as established, in part, by the 5th and 14th amendment right to due process and the 14th amendment right to equal protection under the law. Without federal legislation, children with disabilities might continue to be denied educational access as they were until the 1970s. The point is that acting solely on the ethic of justice may be insufficient to ensure that students with disabilities continue to receive the individualized education that they need and are guaranteed under federal law.
From Noddings’ (1999) perspective, the ethic of care may compensate for some of the limitations of an ethic of justice. In this same vein, one might argue that the school leader has a moral obligation to abide by the policies set forth in laws such as the NCLB and IDEA. However, in doing so, the school leader would not be required to blindly follow these policies, but to interpret them in such ways as to meet the needs of the individual while remaining true to the underlying intent of such policies (Crittenden, 1984, as cited in Beck & Murphy, 1994). In effect, the ethic of care may be used not only as an alternative to the ethic of justice, but as a complementary means of viewing and responding to dilemmas engendered by externally imposed policies.

**The Ethic of Critique**

A third lens, the ethic of critique, facilitates a critical analysis of potentially adverse effects on each of the subgroups within a school, including students with disabilities. The ability to conduct such an analysis both within and across subgroups is increasingly important given that many racially and ethnically diverse students, as well as those from lower socioeconomic levels, are disproportionately represented in special education.

According to the U.S. Department of Education (as cited in Oswald, Coutinho, Best, & Singh, 1999):

- greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities. More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population (p. 194).

During the 2000-2001 school year, nearly six million students, ages 6 to 21 were served under the Individuals with Disabilities Education Act. This represented an increase of more than 28% over the 1991-92 school year. Students with disabilities, ages 6 to 17, accounted for 11.5% of the total school population in pre-kindergarten through grade 12. Approximately 62% of students served by special education programs and services were White, 19.8% Black, 14.5% Hispanic, 1.9% Asian/Pacific Islander, and 1.5% American Indian/Alaska Native (U.S. Dept. of Education, 2002b).

As this illustrates, special education serves diverse groups, many of which have been historically marginalized in the educational system. The question remains, will the NCLB serve to close the academic achievement gap or to simply magnify the differences not only in the achievement of racially and ethnically diverse students, but those who have disabilities? Hess and Brigham (2000) argue that standardized assessments, such as those used in determining adequate yearly progress, lend legitimacy to an educational system in which there are differences in indicators of educational achievement, such as graduation, dropout rates, and college entry, based on race, ethnicity, socioeconomic status, and I would add, disability status. Brandt (2000, as cited in Defur, 2002) argues that high-stakes tests have negative impacts on low income and minority students. Others have cited unintended consequences of high-stakes testing such as decreased grades as a result of increased standards (Pasi, 2000, as cited in Defur, 2002) and increased drop-out rates (Olson, 2000, as cited in Defur, 2002).

One of the dilemmas for school leaders is finding a way to ensure that marginalization of students with disabilities, as well as those from culturally, linguistically, and socioeconomically diverse groups, is not intensified by the implementation of the NCLB. The ethic of critique provides both a voice and an outlet for school leaders to consider, and if needed, voice concern about the impact of the implementation of this Act on each of the student groups within the school.

**The Ethic of the Profession**

In addition to the ethics of justice, care and critique, the school leader may opt to act based on the ethic of the profession, the newest addition to the decision making model proposed by Shapiro and Stefkovich (2001). Although professional ethics are often equated with codes, rules and principles as is the ethic of justice, Shapiro and Stefkovich (2001) expand this concept, to recognize “…professional ethics as a dynamic process requiring that administrators develop their own personal and professional codes” (p. 21) of ethics. This perspective acknowledges that a school leader who responds ethically is one who has struggled with the concepts of justice, care, and critique and who has come to terms with the fact that there are often tensions between the ethical codes of the profession and the personal and professional judgments of the individual. In the end, the ethical school leader places the best interest of his or her students at the center of all decisions.

Although the study of ethics is a relatively new component of administrator preparation programs, practitioners and academics recognize that school leaders are moral agents and as such should be prepared to respond ethically to a variety of challenges and dilemmas (e.g. Shapiro & Stefkovich, 2001; Sergiovanni et al., 2004; Sobol, 2002; Willower & Licata, 1997). Mirroring this demand for ethical leadership, national associations such as the Interstate School Leaders Licensure Consortium (ISLLC) have incorporated ethics into their standards for school leaders. ISLLC’s (Council of Chief State School Officers, 1996) Standard 5 states, “A school administrator is an educational leader who promotes the
as evidenced in this discussion, implementation of the NCLB poses ethical dilemmas that cannot simply be addressed through mainstream approaches to school leadership. As Sobol (2002) writes, educational leaders have the power and the duty to influence the education of large numbers of students. Moreover, they work in organizations and complex political environments where competing values and beliefs must be moderated toward wise and just ends. Such enterprises cannot be conducted well by administrative technique and politics alone; they must be informed by a larger sense of purpose and guided by clearly delineated ethical considerations (p. 84).

According to Nash (1996, as cited in Leonardi, 2001, p. 8), “every resolution to an ethical dilemma … considers the act, the intention, the circumstances, the principles, the outcomes, the virtues, the narrative, the community, and the political structures.” Although not a panacea, Shapiro and Stefkovich’s (2001) model of decision making, incorporating the ethics of justice, care, critique and the profession, offers a variety of lenses through which the impact of federal education policies may be viewed, as well as a means by which school leaders may respond when faced with turbulent policy demands.

Conclusion: Responding Ethically in the Face of Turbulent Policy Demands

The policies invoked by the NCLB are an example of what Boyd (2000) terms as the “R’s of school reform.” The development and implementation of these policies has been shaped, in part, by “the belief, or hope, that changing structures and policies can somehow lead to fundamental reform and improvement of public schools…” (Boyd, 2000, p. 233).

If, as Boyd (2000) suggests, real progress in the education of marginalized student groups, including those with disabilities, is unlikely to flow just from the “R’s of school reform” (restructuring, reculturing, reconstituting, reinventing, replacing) (p. 246), the question remains, where do we go from here? Do school leaders invoke the ethic of justice and implement the current round of reforms because it is the legal and just thing to do? Do they circumvent the law, in favor of a more caring approach in hopes that their boards and local communities will support them if their schools face sanctions? Do they publicly and openly critique the law? Or, do they respond to the law, according to the ethic of the profession, and do what is in the best interest of individual students while attempting to comply with the law as best they can without compromising their professional or personal code of ethics? Unfortunately, there are no simple answers to these questions.

As evidenced in this discussion, implementation of the NCLB poses ethical dilemmas that cannot simply be addressed through mainstream approaches to school leadership. As Sobol (2002) writes, leadership. As Sobol (2002) writes,
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EDITORIAL CONTACT INFORMATION: Address all papers, editorial correspondence, and subscription information requests to: Professor Paul T. Begley, 207B Rackley Building, Department of Education Policy Studies, Pennsylvania State University, University Park, Pennsylvania, 16802 United States of America. Tel. 814-863-1838 Fax 814-865-0070 E-mail: ptb3@psu.edu