In January, the United States Court of Appeals for the Sixth Circuit reversed the dismissal of an “unfunded-mandates” challenge to the No Child Left Behind Act (NCLB) brought by the National Education Association (NEA), several of its affiliates, and a number of school districts. The decision in School District of the City of Pontiac v. Secretary of the United States Department of Education has the potential to significantly undermine NCLB’s focus on accountability and student achievement (see “Court Jousters,” *legal beat*, page 11).

To understand the ruling of the Court of Appeals, it is necessary to know a little about the spending clause of the United States Constitution. The spending clause gives Congress the power to spend tax money in ways that it sees fit. Congress often uses that power to encourage states to adopt congressional policies by promising to send the states federal funding if they oblige. In many ways, laws passed pursuant to the spending clause are like contracts between the federal government and the states. There is a wrinkle, however; the Supreme Court has held that any law imposing conditions on the receipt of federal money pursuant to the spending clause must describe the conditions “unambiguously” to provide “clear notice” to recipients.

NCLB is a good example of a law passed pursuant to the spending clause. No state is required to follow NCLB—unless, that is, it wants to receive federal money for its education system. For states choosing to accept federal funding, NCLB does require that they implement a number of education policies.

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For example, the legislation obliges such states to test student performance in core subject areas and to disclose results on school and district report cards. States also must implement laws that hold schools and districts accountable if they fail to make “adequate yearly progress” in improving student achievement.

In their complaint the plaintiffs cited a number of studies purporting to show that the costs of complying with NCLB exceed a billion dollars per year in some states.

Thus, states promise to comply with the accountability and other requirements of NCLB in exchange for federal funding.

The source of the challenge by the NEA is an obscure provision of NCLB (often referred to as the “unfunded mandates provision”) that states, “Nothing in [NCLB] shall be construed to authorize an officer or employee of the Federal Government to…mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under [NCLB].” Secretary of Education Margaret Spellings had long interpreted the unfunded mandates provision as one that restricted federal officials from imposing additional requirements on states and school districts (that is, requirements above and beyond the ones expressly described in NCLB). Put differently, Secretary Spellings had interpreted NCLB as mandatory: if states wanted federal money (which they all did), they would have to comply with all of the act’s requirements.

Even after the states were aware of the secretary’s interpretation of the unfunded mandates provision, they kept taking the money. In other words, the states were willing to accept accountability and other obligations in exchange for the billions of dollars of federal funding authorized under the act. Nevertheless, the NEA and other plaintiffs filed a lawsuit claiming, among other things, that NCLB’s funding conditions were too “ambiguous” to be enforced. The plaintiffs argued that they should be required to comply with NCLB only if the federal government fully covered the cost.

In 2005, the trial court hearing the case agreed with Secretary Spellings. The court concluded that states and school districts are legally required to comply with NCLB if they accept federal funding, regardless of whether that funding is enough to cover the costs of compliance. Because it decided the case based exclusively on its view of the law, the trial court did not receive any evidence about the costs of complying with NCLB.

On appeal, the Sixth Circuit Court of Appeals, which has jurisdiction in Michigan, Ohio, Kentucky, and Tennessee, disagreed with the trial court. The Court of Appeals determined that the unfunded mandates provision could have led states and school districts to believe that they needed to comply only with portions of NCLB that were “fully funded” by the federal government. Therefore, the court concluded, the conditions under which the states and school districts agreed to accept federal funding were not unambiguous, as demanded by the spending clause. In other words, the court concluded that recipients of federal education funding may not have understood the need to comply with NCLB’s requirements, even though the head of the agency in charge of handing out the money had expressly told the recipients what was expected before they accepted it. If the decision of the Court of Appeals stands, the plaintiffs will be excused from any NCLB requirements that they can prove are not fully funded by the federal government.

Secretary Spellings has asked the full Court of Appeals to reconsider. If the decision is not reversed during further appellate proceedings (including possible Supreme Court review), the case will head back to the trial court for a determination of whether, in fact, federal funding fully covers the cost of complying with NCLB. The trial could be long and complicated given the breadth of NCLB and the tens of billions of dollars annually appropriated by the federal government to pay for it. At trial, the plaintiffs likely would need to disentangle all of the various state requirements from what NCLB demands in order to isolate the costs of complying with NCLB. Given that many states were already adopting testing and accountability regimens before NCLB was passed, that task could prove insurmountable. If there is a trial, it likely will involve a battle among competing expert witnesses. For example, in their complaint the plaintiffs cited a number of studies purporting to show that the costs of complying with NCLB, in particular the goal of 100 percent student proficiency by 2014 (see sidebar, page 45), exceed a billion dollars per year in some states. Some of those same studies conclude that the federal government currently is funding less than 5 percent of the estimated costs. Such studies may lack scientific merit, but, junk science or not, it will nevertheless be necessary for the government to bring in its own experts and conduct its own studies to rebut them.
If the plaintiffs can succeed in proving that federal funding does not cover the full cost of complying with NCLB, they may, in effect, be exempt from all of NCLB's requirements (at least for schools located in the Sixth Circuit). Because money is fungible, a state or district potentially can justify any particular non-compliance as a result of a deficiency in federal funding. In this instance, the large amount of flexibility given states in the use of federal funding could work against the federal government, essentially allowing the states and school districts to choose which requirements are "unfunded." In other words, states and school districts could continue to receive federal funding under NCLB without the need to comply with any of the requirements of the law—a result that would gut NCLB's emphasis on accountability.

Of course, Congress can eliminate the basis of the Court of Appeals decision by deleting or revising the unfunded mandates provision if and when it decides to reauthorize NCLB. Eliminating or modifying the unfunded mandates provision may prove difficult politically, however, and the decision of the Court of Appeals may add considerable complexity to the reauthorization process. For the moment, though, the plaintiffs have won the first round in their efforts to shed NCLB's accountability requirements while, at the same time, retaining NCLB funding.

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