



The Leader's Edge

AASA—American Association of School Administrators

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NCLB in the States

Arbitrary and Capricious: Two State Legislators Express Concerns About NCLB Implementation

Though Congress has had hearing after hearing regarding the reauthorization of NCLB, few of the hearings have focused on key implementation issues that have been handled in what two state legislators feel is an arbitrary and capricious manner. "Over the last six years," say Sen. Margaret Dayton, chair of the Utah Senate Education Committee, and Sen. Tom Gaffey, Chair of the Connecticut Education Committee, "the fundamental weaknesses of NCLB—top-down, punitive "reforms" with a fundamentally flawed, one-size-fits-all metric to determine performance—have forced the federal government to grant, albeit grudgingly, significant flexibility to some states to keep them from bolting from the flock. As chairs of senate education committees in two very different states, both of which have failed to receive significant flexibility from federal officials, we feel the issues of waiver authority and implementation flexibility deserve discussion and action by Congress before the reauthorization train goes racing down the tracks."

AASA has shared the same concern as many state lawmakers. Here is our detailed analysis of ways in which the implementation of state plan amendments and additional flexibility regarding NCLB have been inconsistent and thus should be evaluated as part of the reauthorization process.

Amending State Plans

Early in the implementation of NCLB, states discovered that Adequate Yearly Progress, the foundation of the statute, was a gross measure of school performance that arbitrarily over-identified failure and prescribed sanctions and punishments that had little or no support in educational research. Initially the federal government stonewalled most requests for relief, going as far as to declare Connecticut's education commissioner "un-American" for pushing for flexibility, and to threaten Utah with the loss of tens of millions of dollars of federal education funding not related to NCLB if the state dared to consider not complying with the law. But behind the scenes, states embarked upon a quest to determine whether a series of incremental amendments to their implementation plans could bring coherence to the statute.

By digging, scrounging and sharing information, states discovered that extensive flexibility from federal guidelines had been granted by the U.S. Department of Education to some states while at the same time "waivers" were publicly dismissed by administration officials. Exceptions from federal rules granted to one state were arbitrarily denied to its neighbors without clear and consistent guidelines for those decisions. Plan amendments were often approved verbally; those approved in writing were buried deep within the Education Department's website; and requests denied were not recorded at all due to a misguided notion of privacy protections for state education agencies cited by the department.



How extensive were the plan amendments? In the early stages of implementation, the states—especially those with a decade-long commitment to standards-based reforms, testing and accountability—faced an intractable problem: how to reconcile the immediate requirements of NCLB with the hard-fought, state-bred reforms already in place? Many came to the conclusion that NCLB was not complementary to state-based reforms and not up to the challenge of working to enhance state education systems. To maintain the integrity of their reform efforts, states negotiated individually by asking the U.S. Department of Education for modifications from broad NCLB requirements. In some examples, such as a request to change the threshold for subgroup size, the amendments were small and seemingly insignificant. In others, the modifications were considerable. For example:

- **New York Allowed Retakes: New York** was one of the early implementation states touted by the administration as evidence that NCLB was a flexible federal initiative. But New York had a problem: the state's Regents exams, administered since 1865, allowed students to retake tests as needed. NCLB prohibits retakes. In January 2003, just 15 minutes before a White House press conference celebrating NCLB successes, New York officials were still insisting that retakes be permitted as part of their plan or they would not join the press conference. New York prevailed and the Department of Education allowed retests. Meanwhile, many other state officials requested retests (allowed under *state* accountability systems) but were rebuffed. In December 2005, almost three years later, newly drafted guidelines reversed course, allowing 11 states to include retesting in their accountability plans.
- **Nebraska's Local Assessments:** NCLB's requirement of a statewide test for students in grades 3-8 was applied to every state—except **Nebraska**. Nebraska officials held true to their state's unique local testing system, requiring the U.S. Department of Education to accept their local system for the state to participate in NCLB. Many other states, especially those using an alternating state/local testing system prior to NCLB and whose petitions to then-Secretary of Education Rod Paige for a waiver were summarily dismissed, would have welcomed this flexibility. Four years later, the U.S. Department of Education announced a review team had determined Nebraska was out of compliance with NCLB's testing requirement. For those of you old enough to remember, the irony of this posturing reminds us of Claude Rains' famous line in "Casablanca": "I am shocked that gambling is going on here," said his character, Captain Renault, as he pocketed his winnings.
- **English Language Learners (ELL) in California:** NCLB requirements include testing ELL within one year of entering a public school. Two states took the strong stance that English proficiency was a long-term issue and argued that their large ELL populations would make it virtually impossible for schools to meet AYP proficiency targets. **California** proposed that all ELL students be excluded from AYP calculations for five years. Exempting any group from AYP calculations was forbidden by the law, but federal officials agreed to a three-year exemption for California, under the condition that the state not reveal the exemption.
- **ELL in Arizona:** In May 2003 high-level federal officials verbally approved an exemption for **Arizona's** ELL children from AYP calculations as a last-minute concession when the Department of Education was eager to announce all 50



states had complied with NCLB. Unfortunately, the verbal commitment was made dependent upon absolute secrecy. In addition, federal officials failed to communicate the terms of the deal to federal audit teams, which cited Arizona for non-compliance. In August 2006 the state superintendent announced that parts of Arizona's accountability plan, previously approved, had been retroactively disallowed by a federal compliance audit. The superintendent in Arizona threatened to have the matter settled in federal court.

Tweaking AYP

After initial public declarations against those who wanted flexibility in their plans, the U.S. Department of Education quietly began urging states to seek amendments with an array of statistical manipulations designed for one purpose: to mitigate the failures of the federal performance formula (AYP) as a legitimate measure of student achievement. AYP was modified by confidence intervals (17 states) and safe harbor (17 states), standard errors of measurement (4 states), uniform averaging of AYP (4 states) and the use of rounding rules (5 states). The use of an index—whereby states (13) receive “partial” credit for achievement short of proficiency—completes this assortment of statistical adjustments. The use of multiple statistical adjustments undercuts the validity of NCLB for parents lacking a handy psychometrician to analyze and explain the data. Who else could quantify student progress when the yearly educational yardstick varies from 29 to 41 inches? To compensate for AYP's failings, the Department of Education essentially scuttled any pretense of meaningful year-to-year performance comparisons within a state. Even so, each state had to approach the department as a supplicant when amending state plans to include any of these flexibilities and arbitrary decisions are apparently the rule, not the exception.

Additional Changes

By April 2005, amidst growing national pressure (legislative actions circumscribing state participation in NCLB, legal challenges to the law and a chorus for change), the department announced additional flexibilities. This “new path” focused on areas in which a nationwide consensus had developed: a growth component to further redefine AYP and a series of changes to the testing of special education students.

- **Growth:** Central to the shortcomings of AYP is its approach to measuring student success. Rather than measure individual progress over time (determining where a student began and ended in a school year), AYP compares the performance of this year's 4th grade class to last year's 4th graders, providing a very gross measure of performance of groups of students, not individual performance. In response to overwhelming consensus for change, the Department of Education announced that it would allow up to 10 states the opportunity to use a growth model in addition to using AYP to calculate student performance. The subsequent announcement allowed two states, Tennessee and North Carolina, to experiment with a hybrid growth model that measures individual student performance but still holds states to the “group” proficiency targets that are so problematic with AYP. The department has since approved the experiment in six more states. Ironically, congressional reauthorization action will reportedly require all states to use a growth model or face sanctions.
- **Special Education:** The contradiction between federal special education law and NCLB is stark: IDEA requires special education students be taught and



tested at their ability level while NCLB requires testing at grade level. To address the conflict, the department initially allowed 0.5 percent of students (those considered severely cognitively disabled) to be excluded from AYP calculations of grade-level testing scores. However in late 2003, the department released new rules raising that percentage to 1 percent (about 10 percent of special education students). The Department of Education's "new path" initiative cited new research justifying another change: an additional 2 percent of students (20 percent of special education students) might be tested using alternative, grade-level achievement standards. This series of rule changes potentially exempted a total of 30 percent of special education students from AYP. But there was a catch: states were expected to meet 27 different requirements to be eligible for the 20 percent flexibility. (This included a requirement that each state's high school reform initiative pass muster with the secretary of education, thereby accomplishing through regulation what Congress had earlier rejected when the administration unsuccessfully attempted to turn vocational money in the Perkins Act into a high school testing program.) In addition, states were required to develop five different tests for five groups of special education students. Finally, states were required to have a standard subgroup threshold, or N size. The state of **Washington** proposed an N size change to be eligible for the 20 percent flexibility. The request was denied, with the empty explanation from federal officials that the state was simply trying to get the 20 percent exemption.

- **Illinois** and its "N" size: In April 2005, Illinois requested a change in its threshold for reporting the test scores of groups of students. Rather than use a fixed number to identify "significant" groups, the state wanted to report on groups that made up a significant percentage of its population, in this case 15 percent. **Florida**, among others, had requested this same change and was granted federal approval. Several other states including **California** and **Texas**, had already been using a similar N size structure for several years. But permission for Illinois was denied and instead federal officials offered an alternative: raise the N size from 40 students to 45 and use a "confidence" interval when determining the calculation for student achievement. When a national wire service reported in May 2006 on the effect of changing N sizes and using statistical measures to adjust for AYP's failings, the department's response was to accuse states of "manipulations"—the very practices they had been approving.
- **Oregon**, after being turned down for the initial round of "growth model" flexibility, reapplied and was again denied. But why? Federal officials cited a recent state revision of standards (upward) as an example of instability within the system. This was despite the fact that Tennessee had also revised standards and applied for a growth model waiver and was approved.

Politically Motivated?

Perhaps the most problematic of the flexibilities are those seemingly granted in response to politics. In this category, it is useful to consider the experience of three states: Virginia, Texas and Florida.

- In August 2005, **Texas** Commissioner Shirley Neely announced that Texas law exempts the test scores of up to 9 percent of students (about 90 percent of special education students) from grade-level proficiency tests.



Immediately, the number of Texas schools on the AYP watch list dropped from 1,718 to 402 and the number of failing districts dropped from 517 to 86. The U.S. Department of Education fined the state \$444,000 for an unrelated infraction (quietly rescinded as part of the "Katrina" aid package) and negotiated a new exemption of 5 percent of students (50 percent of special education students) from AYP calculations for the 2005-2006 school year. Every other state has been denied permission to exempt more than 30 percent and most remain at 10 percent.

- A common complaint from states with long-standing and advanced accountability systems is that AYP paints "failure" with a broad brush. **Florida** is a good example of the problem. Over 87 percent of Florida schools were identified as failing in the first year of NCLB and of those, 22 percent received a grade of "A" or "B" under the Florida accountability system. Florida's NCLB plan (approved by the U.S. Department of Education) now contends that an "A" or "B" performance under state rules moderates AYP failure by dubbing that performance "provisional AYP attainment." No other state has this extraordinary stipulation.
- Under NCLB rules, schools in their first year of improvement must offer school choice transfers and tutoring in the second year. States such as **West Virginia** have requested permission to reverse the order, under the common sense argument that students should be offered tutoring before transferring to another school. The federal department denied these requests until August 2005, when **Virginia**, a state that has consistently and actively considered opting out of NCLB and defaulting to their venerable Standards of Learning, was granted an exemption. Four districts in Virginia were approved to experiment with this reversal. It's unclear what other states would have to do to receive approval for the same change.

Lessons Learned?

The fact that some states were granted extraordinary flexibility while others were not leads one to wonder what lessons states are to draw. Is uneven flexibility and waiver authority a symptom of the problem or a solution to the problem? Are some state accountability systems worthy of special treatment while others are not? Does the ability of a state to successfully bargain depend on how big the state is, how closely aligned to the administration it is or how willing it is to draw a line in the sand? Does an army of well-connected lobbyists who benefit from the confusion and arbitrary nature of the approval process (and many of whom, having put the law together, now represent the states in their petitions to the federal government) do anything to improve public education while they make a fortune acting as the intermediary between states and the federal Department of Education?

NCLB has demonstrated that inappropriate and excess federal statutory authority tempts bureaucrats to wield heavy-handed authority over state and local officials arbitrarily, capriciously and sometimes with possible political motives. Despite the admirable and articulate goals of NCLB and the wealth of data that confirms an educational underclass in educational attainment, the process-oriented prescriptions of NCLB offer few options and fewer resources for successful intervention for students who often start school years behind their advantaged peers.



At present, the unequal treatment being accorded states undermines the U.S. Department of Education's effort to portray NCLB as fair, consistent and effective. NCLB appears to have morphed from a complicated, top-down reform to what the Harvard Civil Rights Project calls "a set of bargains and treaties with various states."

By tradition and design, we have 50 different education policy laboratories that have given us a variety of successful approaches that states have demonstrated can improve student performance and close the achievement gap. But these approaches take time, money and the long-term commitment of parents, teachers, local and state education officials—not federal mandates handed down from above and selectively enforced.

Our system of government is rightfully predicated on a distrust of centralized power exercised arbitrarily from afar. The children of this country deserve a comprehensive overhaul of NCLB that focuses on results, not processes; that respects state and local autonomy, not centralized federal power; and that provides real reform, not a series of temporary fixes dependent upon favoritism, confrontation and politics. The current rush to reauthorize NCLB ignores the above concerns, grants the secretary of education more discretionary authority and fails to offer assurances that these abuses are not repeated.

— Sen. Margaret Dayton, Chair, Utah Senate Education Committee, and Sen. Tom Gaffey, Chair, Connecticut Education Committee