No. 05-2708

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SCHOOL DISTRICT OF THE CITY OF PONTIAC, *et al.*,
Plaintiffs-Appellants,

v.

SECRETARY OF EDUCATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PETITION FOR REHEARING AND REHEARING EN BANC

Of counsel:

KENT D. TALBERT
General Counsel
Department of Education
Washington, D.C. 20202

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

STEPHEN J. MURPHY, III
United States Attorney

JONATHAN F. COHN
Deputy Assistant Attorney General

MARK B. STERN
(202) 514-5089
ALISA B. KLEIN
(202) 514-1597
Attorneys, Appellate Staff
Civil Division, Room 7235
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

TABLE OF CONTENTS

Page

INTRODUCTION. 1

STATEMENT. 5

A. The No Child Left Behind Act.. 5

B. The District Court and Panel Decisions. 7

ARGUMENT.. 10

CONCLUSION. 15

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

Cases: **Page**

Arlington Central School District Board of Education v. Murphy, 126 S. Ct. 2455 (2006). 8, 15

Morton v. Ruiz, 415 U.S. 199 (1974). 14

Pennhurst State School v. Halderman, 451 U.S. 1 (1981). 8, 15

Statutes :

20 U.S.C. § 1226a(a). 4
20 U.S.C. § 1234c.. 7
20 U.S.C. § 1234d. 7

20 U.S.C.§§ 6301 et seq. 1
20 U.S.C. § 6301(3). 1
20 U.S.C. § 6302. 4
20 U.S.C. § 6311(a). 6
20 U.S.C. § 6311(b)(1)(A). 12
20 U.S.C. § 6311(b)(1)(B). 6, 9, 11, 12, 14
20 U.S.C. § 6311(b)(2)(A)(ii). 6, 11
20 U.S.C. § 6311(b)(3)(A). 6, 9
20 U.S.C. § 6311(b)(3)(C)(i). 6, 11
20 U.S.C. § 6311(b)(3)(C)(ix)(I). 6, 11
20 U.S.C. § 6311(b)(3)(D). 11
20 U.S.C. § 6311(c)(2) 13
20 U.S.C. § 6311(e). 6
20 U.S.C. § 6311(e)(1)(F). 14
20 U.S.C. § 6311(g)(2). 7
20 U.S.C. § 6312(c)(1)(D). 6
20 U.S.C. § 6316. . . . . 4, 6
20 U.S.C. §§ 6333-6336. 6-7

20 U.S.C. § 7907(a). . . . . passim

2 U.S.C. § 658(5)(I). 14

Legislative Materials:

H.R. Rep. No. 107-63(I) (2001). 3, 5, 6, 12, 14

S. Rep. No. 107-7 (2001).. . . . . 2, 12, 14

139 Cong. Rec. H7740-03. 15

INTRODUCTION

Pursuant to Fed. R. App. P. 35 and 40, the federal government respectfully requests expedited rehearing and rehearing en banc of a panel decision that raises a question of exceptional importance: whether states and their school districts must fulfill the commitments that they make to secure federal grants under the No Child Left Behind Act of 2001 (NCLB), 20 U.S.C.§§ 6301 et seq., regardless of whether federal funds cover the full cost of compliance.

The No Child Left Behind Act is a federal spending program that provides billions of dollars to assist the states and their local school districts in the education of elementary and secondary school children. As its name reflects, the Act aims to close "the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers." 20 U.S.C. § 6301(3).

In exchange for federal funds, a state voluntarily agrees to be held accountable for the academic progress of all its public school children, including specified subgroups. It submits a plan to the Department of Education that sets out the manner in which it will fulfill the Act's requirements. Each year, a participating state is told the amount that it will receive in federal funds, and, each year, the state is free to decline the federal funds and thus avoid any obligation to implement its plan. Nothing in the Act compels a state's participation in the program.

Nonetheless, a divided panel has ruled that states may choose to accept federal funds yet refuse to comply with the Act's requirements. Based on a perceived

ambiguity in one provision, 20 U.S.C. § 7907(a), the panel declared that states and their school districts "need not comply with the Act's requirements where federal funds do not cover the increased cost of compliance." Op.2.

As the dissent stressed, this ruling "has the absurd effect of eviscerating with a single provision the entire comprehensive scheme of accountability requirements and financial disbursements set forth in hundreds of pages of statutory text." Op.20 (McKeague, J.). Under the Act's plain terms, states must measure the academic progress of all of their public school children against uniform standards developed by the state – regardless of whether a particular school district receives any federal funds.

The ruling is equally at odds with the discretion that states retain under the Act. Although Congress has appropriated upwards of $60 billion dollars since the statute was enacted, it fully understood that the "Federal Government provides only a small fraction of overall funding for elementary and secondary education in the United States." S. Rep. No. 107-7, at 3 (2001). Thus, the states retain broad latitude under the Act to design their academic programs and the means by which progress is assessed. As the dissent stressed, it "simply defies commonsense to suggest that Congress intended to relieve States and school districts from compliance with the NCLB's requirements when the cost of compliance – which Congress does not control – exceeds appropriations[.]" Op.21.

Nor can the ruling be squared with the "unprecedented new flexibility" that the Act grants to school districts, "giving them the freedom to transfer up to 50 percent of [certain] federal education dollars they receive among an assortment of ESEA programs as long as they demonstrate results." H.R. Rep. No. 107-63(I), at 265 (2001). Under the panel decision, school districts retain this "unprecedented new flexibility" yet jettison the obligation to "demonstrate results." Ibid.

The panel decision rests on a mistaken reading of § 7907(a). That provision defines the scope of agency authority under the Act, by restricting the power of agency officials to add to the statutory conditions on receipt of federal funds. It thus protects the flexibility that the NCLB gives to participating states and school districts, by ensuring that federal officials do not micro-manage a state's educational system by adding mandates or by compelling specific expenditures. Section 7907(a) does not excuse compliance with the statutory conditions themselves or allow a state or its districts to evade the very commitments the state makes to secure federal funds.

The panel decision finds no support in the "clear statement" principle that it invokes, because there is no ambiguity in the statutory scheme. Notably, the plaintiff school districts are not joined in this lawsuit by their own states.

In the wake of the panel decision, the National Education Association (NEA) has publicly encouraged school districts to cease to comply with the NCLB, declaring that they would be on "solid legal ground" in refusing to use their own funds to implement

requirements not covered by federal grants. "Court Revives NEA Suit Against NCLB," Education Week (online issue Jan. 8, 2008). The risk of noncompliance is manifest. Because school districts have considerable discretion in determining how to spend federal funds, the panel decision allows them to redirect their resources and then claim that any noncompliance with the NCLB was caused by a lack of federal funds. Thus, after spending its NCLB funds on other allowable activities, a school district could claim it does not have sufficient federal funding to implement critical activities required under NCLB to assist students in low-performing schools, such as taking corrective actions to improve those schools and providing supplemental educational services for affected students (see 20 U.S.C. § 6316).

The ramifications of the decision are immediate and irreparable, and they extend for the indefinite future.[1] If school districts cease to comply with the Act, the consequences will be borne by the children who are, as a result, left behind. This damage cannot be undone. Accordingly, we respectfully request that the Court grant this petition on as expedited a basis as possible.

---

[1] Although the FY2007 appropriation (for the 2007-2008 school year) is the last appropriation authorized under the NCLB, see 20 U.S.C. § 6302, the authorization was automatically extended for another year, because Congress did not pass or formally reject legislation to extend the authorization. See 20 U.S.C. § 1226a(a). Congress passed the FY2008 appropriation under this extension of the authorization period. Thereafter, the NCLB conditions will remain in force unless they are repealed or replaced, as long as Congress continues to appropriate funds.

STATEMENT

A. The No Child Left Behind Act.

The NCLB is a comprehensive reform of the Elementary and Secondary Education Act of 1965 (ESEA), the federal spending program that provides the principal source of federal financial assistance to the states for the education of elementary and secondary school children. Before the enactment of the NCLB, a school could be deemed as making academic progress "regardless of whether its disadvantaged and ethnic minority students [were] improving." H.R. Rep. No. 107-63(I), at 273 (2001). By contrast, the NCLB is designed to hold "States, local educational agencies (LEAs) and schools accountable for ensuring that all students, including disadvantaged students, meet high academic standards." Id. at 281.

The Act grants "unprecedented new flexibility to local school districts," giving them "the freedom to target resources where they're needed most – from class size reduction, to higher teacher salaries, to technology in the classroom – and address needs that often change from one year to the next, since these transfers are not permanent and must be made on an annual basis." Id. at 265.

At the same time, the Act "demand[s] results in public education through strict accountability measures." Ibid. It "requires States and local schools to demonstrate results through annual reading and math assessments for students in grades three through eight," ibid. , and "ensures that States hold school districts accountable for

ensuring that schools make real progress each year, and do not have low standards for high-poverty schools." Id. at 273.

The requirement of "academic accountability" is the "centerpiece" of the Act. Id. at 281. To be eligible to receive funds under Title I, Part A, a state must submit a plan to the Department of Education demonstrating that it will comply with the statutory requirements. The plan must show that the state has challenging academic standards that apply "to all schools and children in the State." 20 U.S.C. § 6311(b)(1)(B) (emphasis added). The plan must show that the state is implementing a set of annual student academic assessments, id. § 6311(b)(3)(A), using "the same academic assessments ... to measure the achievement of all children," id. § 6311(b)(3)(C)(i); and providing for "the participation in such assessments of all students," id. § 6311(b)(3)(C)(ix)(I). (Emphases added.)

School districts are generally required to take steps to improve schools that fail to make adequate yearly progress, as defined by the state. See 20 U.S.C. §§ 6312(c)(1)(D), 6316. However, these remedial measures apply only to school districts and schools that receive Title I, Part A funds. See id. § 6311(b)(2)(A)(ii).

After a state has an approved plan on file with the Department of Education, it is eligible to receive Title I, Part A funds. See id. § 6311(a), (e). On an annual basis, the Department of Education notifies the state of the amount of Title I, Part A funds that it is eligible to receive in accordance with statutory formulas. See 20 U.S.C.

§§ 6333-6336. At that point, the state may decline the federal funds and thereby relieve itself of the obligation to comply with the statutory requirements for the year.

The Secretary is authorized to withhold funds from a state that fails to meet the Act's conditions until the Secretary determines that the state has fulfilled its obligations, see 20 U.S.C. § 6311(g)(2); 20 U.S.C. § 1234d, and to take other enforcement actions, see 20 U.S.C. § 1234c.

B. The District Court and Panel Decisions.

1. Plaintiffs are nine school districts, the NEA, and several NEA affiliates. Only one of the school districts is located within the Sixth Circuit. None of the districts are joined by their respective states, and no state is a party to this lawsuit.

Plaintiffs seek an order declaring that "states and school districts are not required to spend non-NCLB funds to comply with the NCLB mandates, and that a failure to comply with the NCLB mandates for this reason does not provide a basis for withholding any federal funds to which they otherwise are entitled under the NCLB." Prayer For Relief ¶1. They rely on the NCLB provision codified at 20 U.S.C. § 7907(a), which provides:

> Nothing in this [Act] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this [Act].

The district court dismissed the complaint, explaining that § 7907(a) restricts the ability of agency officials to add to the statutory conditions on receipt of federal funds, but does not excuse compliance with the statutory conditions themselves. R.20, at 7.

2. A divided panel reversed. As a threshold matter, the panel concluded that this lawsuit is justiciable despite the absence of any state plaintiff or any concrete controversy over the implementation of a particular NCLB provision. Op.6-8.

Addressing the merits, the panel observed that states must have clear notice of their obligations under federal spending programs. Id. at 8-10 (discussing Pennhurst State School v. Halderman, 451 U.S. 1 (1981), and Arlington Central School District Board of Education v. Murphy, 126 S. Ct. 2455 (2006)). The panel recognized that the NCLB puts the states "on clear notice" of their obligations to "fulfill the Act's various educational and accountability requirements, such as submitting plans to the Secretary, effectively tracking student achievement, and so forth." Id. at 15. Nonetheless, the panel concluded that § 7907(a) creates an ambiguity as to whether a state, "if it chooses to participate, will have to pay for whatever additional costs of implementing the Act that are not covered by the federal funding provided for under the Act." Id. at 10-11. Although the panel acknowledged that the Secretary's interpretation of § 7907(a) may be "correct," id. at 11, it concluded that a state official could "plausibly contend that she understood" § 7907(a) to provide that "her State need not comply with NCLB requirements for which federal funding falls short." Ibid.

Dissenting, Judge McKeague found no ambiguity in the statutory scheme. He observed that in "determining whether the clear-statement rule is satisfied, a court must not let itself focus myopically on one phrase or provision." Id. at 24. He explained that plaintiffs' interpretation of § 7907(a) "has the absurd effect of eviscerating with a single provision the entire comprehensive scheme of accountability requirements and financial disbursements set forth in hundreds of pages of statutory text." Id. at 20. For example, he noted that under the express terms of the Act, a "participating State must create statewide academic standards and all school districts in the state must test their public-school students under those standards." Ibid. (citing 20 U.S.C. § 6311(b)(1)(B), (3)(A)). Although non-funded districts are exempt from certain of the Act's requirements, "[p]ointedly, Congress did not tell non-funded school districts that they need not perform any testing in the first instance." Ibid.

More broadly, Judge McKeague explained that it "defies commonsense to suggest that Congress intended to relieve States and school districts from compliance with the NCLB's requirements when the cost of compliance – which Congress does not control – exceeds appropriations[.]" Id. at 21. He observed that "[e]ven with the NCLB, the federal government provides only 7% of the total funding for local education." Id. at 22. "The notion that Congress intended to pay in full for a testing and reporting regime of indeterminate cost, designed and implemented by States and school districts, not federal agencies, is not only nonsensical and fiscally irresponsible,

but also contravenes the traditional recognition of State and local governments' primary responsibility for public education." Ibid.

ARGUMENT

In exchange for federal funds, a state voluntarily agrees to implement its plan and thus to be held accountable for the academic progress of its children. Yet under the panel decision, a state may accept federal funds, year after year, and refuse to comply with the Act. As the dissent explained, such a regime is at odds with the text and structure of the Act and defies common sense.

1. Based on a perceived ambiguity in § 7907(a), the panel declared that states and school districts "need not comply with NCLB requirements for which federal funding falls short." Op.11. But as the dissent explained, there is no ambiguity in the statutory scheme. Plaintiffs' reading of § 7907(a) is impermissible because it creates irreconcilable conflicts with other NCLB provisions and with the statute as a whole.

The allegations of Otter Valley School District are illustrative. It alleges that it receives no Title I funds and thus cannot "comply with the NCLB testing mandates" without "devoting a considerable amount of its own funds to administering the NCLB-required tests." Complaint ¶ 45. In plaintiffs' view, Otter Valley therefore must be exempted from the NCLB's testing requirements. But the claimed exemption is flatly at odds with the terms of the Act. The Act requires participating states to create statewide academic standards applicable "to all schools and children in the State,"

20 U.S.C. § 6311(b)(1)(B), to use "the same academic assessments ... to measure the achievement of all children," id. § 6311(b)(3)(C)(i), and to provide for "the participation in such assessments of all students," id. § 6311(b)(3)(C)(ix)(I) (emphases added). Although Congress exempted school districts and schools that receive no Title I funds from certain remedial requirements, see 20 U.S.C. §§ 6311(b)(2)(A)(ii), "Congress did not tell non-funded school districts that they need not perform any testing in the first instance." Op.20 (dissent).

To the contrary, the Act provides that a state "may defer the commencement, or suspend the administration, but not cease the development, of the assessments" for "1 year for each year for which the amount appropriated for grants" for the assessments "is less than" specified amounts. 20 U.S.C. § 6311(b)(3)(D). To date, appropriations have met or exceeded those amounts. Nonetheless, in plaintiffs' view, a school district may exempt itself from the uniform statutory assessment requirement that is crucial to ensuring that the standards developed by its state are applied to all of its public school students, including the most disadvantaged.

Plaintiffs' position is equally at odds with the discretion that states retain under the NCLB to develop their academic programs. Congress recognized that the billions of dollars in federal aid were only a small fraction of the monies needed to ensure that children make adequate academic progress. Accordingly, Congress did not condition receipt of funds on compliance with predetermined uniform federal standards. Instead,

it asked participating states to develop their own academic standards and means of assessing student achievement. Although the standards must be challenging and uniformly applied, the federal government does not dictate their content or set a ceiling on a state's ambitions. To the contrary, the Act expressly provides that "a State shall not be required to submit such standards to the Secretary." 20 U.S.C. § 6311(b)(1)(A).

As the dissent stressed, it "simply defies commonsense to suggest that Congress intended to relieve States and school districts from compliance with the NCLB's requirements when the cost of compliance – which Congress does not control – exceeds appropriations[.]" Op.21. Nor can plaintiffs' position be squared with the "unprecedented new flexibility" that Congress gave to local school districts, allowing them "the freedom to transfer up to 50 percent of [certain] federal education dollars they receive among an assortment of ESEA programs as long as they demonstrate results." H.R. Rep. No. 107-63(I), at 265 (2001) (emphasis added). On plaintiffs' view, school districts keep the discretion but avoid the obligation "to demonstrate results," ibid., a result directly at odds with the purpose of the Act.

In the limited instances in which Congress intended to make a state's obligations under the NCLB contingent upon specified levels of federal funding, it said so explicitly. For instance, Congress undertook to "assume the full cost of administering State assessments under the" National Assessment of Educational Progress (NAEP). S. Rep. No. 107-7, at 2. The Act thus provides that states shall "participate in biennial

State academic assessments of 4th and 8th grade reading and mathematics under the [NAEP] ... if the Secretary pays the costs of administering such assessments." 20 U.S.C. § 6311(c)(2) (emphasis added). Apart from such specific provisions, however, states are accountable for implementing the plans that they design, without regard to the cost of implementation. No state is required to accept a grant and states have flexibility to define their obligations under their plans. But a state may not cap its duties at a particular level of expenditures, if the result would be noncompliance, and any plan that purported to do so would not be approved by the Secretary.

2. The panel decision rests on a flawed interpretation of § 7907(a). As the district court explained, § 7907(a) restricts the ability of a federal "officer or employee" to add to the statutory conditions on receipt of federal funds. It is one of a series of provisions that define the scope of agency authority in implementing the NCLB. Section 7907(a) protects the flexibility that the NCLB gives to participating states and school districts, by ensuring that federal officials do not micro-manage a state's educational system by adding mandates (such as curriculum or staffing directives) or by compelling specific expenditures (such as per pupil spending or teacher salaries). But it does not excuse compliance with the statutory conditions themselves.

Contrary to the panel's belief, this reading of § 7907(a) does not transform it into a meaningless protection against "rogue" federal officers. Op.11-13. Under ordinary principles of administrative law, agencies have broad power to impose requirements

in addition to those established by statute. "The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231 (1974). Congress included § 7907(a) in the NCLB in order to define the scope of agency authority.[2]

It is particularly anomalous to treat § 7907(a) – which plaintiffs mistakenly term the "unfunded mandates provision" – as a limitation on the statutory requirements, because Congress fully understood that statutory conditions on the receipt of federal funds are not "mandates." The Unfunded Mandates Act of 1995 expressly exempts "a condition of federal assistance" from the definition of "federal intergovernmental mandate." 2 U.S.C. § 658(5)(A)(i)(I). Thus, when the House and Senate committees reported on the NCLB, they reported that "[t]he bill contains no intergovernmental ... mandates as defined in the Unfunded Mandates Reform Act" because "[a]ny costs incurred by state, local, or tribal governments would result from complying with conditions of aid." S. Rep. No. 107-7, at 57; H.R. Rep. No. 107-63(I), at 406.[3]

---

[2] See also 20 U.S.C. § 6311(e)(1)(F) (Secretary has "authority to disapprove a State plan for not meeting the requirements of this part, but shall not have the authority to require a State, as a condition of approval of the State plan, to include in, or delete from, such plan one or more specific elements of the State's academic content standards or to use specific academic assessment instruments or items").

[3] Although the panel believed that its reading of § 7907(a) found indirect support in an exceptions clause in the Perkins Act, Op.13-14, that clause merely confirms that the agency may enforce compliance with certain provisions that

The panel decision finds no support in the "clear statement" principle that it invokes. Indeed, the panel itself emphasized that, unlike in Pennhurst and Arlington, the obligations of the NCLB are clear. Op.15. Each year, participating states are told what their allotment of Title I, Part A funds will be, and each year, they are free to decline the funds and thus avoid the federal requirements. If a state determines that it cannot, through the combined use of federal, state and local funds, implement its plan, its remedy is to decline the federal funds. But it cannot insist on continued federal funding while disclaiming any obligation to fulfill its own commitments. Although the panel decision rests on assumptions about what a hypothetical "state official could plausibly contend," Op.11, the actual state officials of Michigan, Texas and Vermont have conspicuously declined to support their school districts in this litigation.

CONCLUSION

For the foregoing reasons, the Court should vacate the panel decision and rehear this case en banc on as expedited a basis as possible.

---

obligate the states to make defined expenditures (such as to pay matching funds). The panel was likewise mistaken in believing that its reading of § 7907(a) found support in statements made in debates on earlier measures and in remarks by a former Secretary of Education, Op.15-17. Such statements could not override the clear requirements of the NCLB and, in any event, confirm that the concern was to define the scope of agency authority. See, e.g., 139 Cong. Rec. H7740-03, H7743 (daily ed. October 13, 1993) (noting that the "Goodling amendment" would, in conjunction with a written assurance from then Secretary of Education Richard Riley, alleviate the concern that the agency would "'compel school districts or schools to meet the standards'" that were voluntary under the Act).

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

STEPHEN J. MURPHY, III
United States Attorney

JONATHAN F. COHN
Deputy Assistant Attorney General

MARK B. STERN
(202) 514-5089
ALISA B. KLEIN
(202) 514-1597
Attorneys, Appellate Staff
Civil Division, Room 7235
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Of counsel:

KENT D. TALBERT
General Counsel
Department of Education
Washington, D.C. 20202

FEBRUARY 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2008, I caused copies of the foregoing petition to be sent to the Court by federal express overnight delivery and to the following counsel in the manner indicated:

Jeremiah A. Collins Alice O'Brien Bredhoff & Kaiser, P.L.L.C. 805 15th Street, N.W., Suite 1000 Washington, D.C. 20005-2207 (202) 842-2600 aobrien@bredhoff.com	By first class mail and by electronic mail
Robert H. Chanin NEA General Counsel 1201 16th Street, N.W. Washington, DC 20036 (202) 822-7035	By first class mail
Dennis Pollard Thrun Law Firm, P.C. Bloomfield Hills Office 38505 Woodward Avenue, Suite 2300 Bloomfield Hills, MI 48304 (248) 258-2850	By first class mail
Clare E. Kindall Assistant Attorney General 55 Elm Street, P.O. Box 120 Hartford, CT 06141-0120	By first class mail
Gene C. Lange Luman, Lange, Thomas & McMullen LLP 1660 L Street, N.W., Suite 506 Washington, DC 20036	By first class mail

James C. Harrison
Kari Krogseng
Remcho, Johansen & Purcell, LLP
201 Dolores Avenue
San Leandro, CA 94577

By first class mail

Joseph M. Miller
Special Counsel to
Governor Edward G. Rendell
Commonwealth of Pennsylvania
333 Market Street, 9th Floor
Harrisburg, PA 17126-0333

By first class mail

_____
Alisa B. Klein
Attorney

ADDENDUM