



The Ninth Circuit v. Reality

Highly qualified teachers don't grow on trees

by JOSHUA DUNN and MARTHA DERTHICK

The No Child Left Behind Act (NCLB) has been a bold assertion of federal government power vis-à-vis the states. But a 9th Circuit case from California, *Renee v. Duncan*, provides a reminder that federalism still lives, even in NCLB. The case involves an attempt by Public Advocates in San Francisco to compel the state

to satisfy the law's requirements that all teachers of core subjects be highly qualified, and if some are not, that less-qualified teachers not be employed disproportionately in poor and minority areas.

As standards of qualification, the law names possession of a bachelor of arts, subject-matter competence, and certification or licensure by the state. Importantly, it leaves standards of certification to the states.

California, like many states, has relied heavily on interns, such as members of Teach For America (TFA), to staff schools in poor areas. Public Advocates claims that it has been able to do this because a Department of Education (DOE) regulation fails to implement the law faithfully. The offending regulation provides that teachers enrolled in "alternative routes" to certification—which is government-speak for Teach For America and similar programs—may be found qualified if they are making satisfactory progress. Public Advocates, on behalf of Californians for Justice, the California chapter of ACORN, and individual parents of children in Title I schools, says that this creates an impermissible loophole in the law: that to be certifiable, enrollees must have completed their alternative route. About 10,000 teachers in California fall short of the standard that the lawsuit seeks to enforce.

The suit has followed a quixotic path. Initially, in 2008, a district judge held for the U.S. secretary of education, ruling that the department's regulation did not violate the discernible intent of Congress. The plaintiffs appealed. On appeal, the federal government introduced the argument that they lacked standing because their case failed a test of "redressability." Even if the court ruled in their favor, the secretary could not tell California how to define certification.

At first, the appellate court embraced the government's claim, and remanded the case with instructions to dismiss for lack of standing. But one of the judges evidently had second thoughts, because the court granted the plaintiffs' petition for a rehearing, and in September 2010 reversed both its own decision about standing and the district judge's ruling about

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the validity of the department's regulation. It found that the regulation *does* violate the intent of Congress.

Much of the discussion within the court centered on how California would respond to a decision for the plaintiffs, and how the federal government might induce a response that would redress the alleged injury.

The court majority did not dispute that NCLB leaves certification to the states, but said that even if the secretary could not dictate California's standards, he could threaten to withhold grants-in-aid from a state that is not in compliance with the law. The court seemed to think that this would be a viable course of action.

Beyond the federalism question lies the deeper issue, seemingly of less concern to the court majority, of where to find highly qualified teachers to staff classrooms in poor and minority areas. Even when reinforced by a court, Congress cannot solve this problem by decree. As Judge Richard Tallman said in dissent, California cannot order highly qualified but unwilling teachers into schools where they don't want to teach. Teachers, he averred, "are human beings...not pawns on a chessboard that can be distributed at will."

We very much doubted that the secretary of education would threaten the country's most populous state, which teeters on the brink of bankruptcy, by holding back funds. Congress, under pressure from TFA and perhaps taking account of the severe disruption of schools that could result from the 9th Circuit's decision, resolved this judicially created imbroglio by writing the DOE's regulation into law. In typical congressional fashion, it added language to December's continuing resolution to fund the government until March. The 9th Circuit, which is routinely overturned by the Supreme Court, can add Congress to the list of institutions dissatisfied with its legal judgment.

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