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Obama's NCLB Waivers

Are they necessary or illegal?

Education Next talks with
Martha Derthick and Andy Rotherham

President Obama sparked much debate in Washington with his plan to grant states waivers from provisions of the No Child Left Behind Act (NCLB), conditional on their willingness to embrace certain reform proposals sketched out in the administration's March 2010 proposal, "A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act." State leaders have cheered the president's decision to offer them much-needed relief from onerous requirements. Key Republican leaders, including Senators Lamar Alexander (TN) and Marco Rubio (FL), and Texas governor Rick Perry, have blasted the move as overstepping executive authority. Is the president right to issue conditional waivers? Are the conditions themselves a good idea? In this forum, Martha Derthick and Andy Rotherham weigh in. Derthick is professor emerita of government at the University of Virginia and coauthor of the legal beat column for Education Next. *Rotherham is a former White House aide to President Clinton, former member of the Virginia state board of education, cofounder of Bellwether Education, and columnist for* Time *magazine.*

Martha Derthick: When the framers of the United States Constitution wrote that it is a duty of the chief executive to "take care" that the laws be faithfully executed, they can hardly have imagined a law so freighted with perverse and destructive consequences as No Child Left Behind. And if they had imagined any such thing, they would likely have assumed that the legislature would be quick to correct its work.

But that is not the case in our time, and the Obama administration, confronted with a train wreck, has responded with an offer to waive the most onerous provisions of the law. The offer is conditioned, however, on the state governments' acceptance of a set of "principles" put forth in a document titled "ESEA Flexibility." Flexibility is the new watchword at the Department of Education (ED), though the administration promises that it implies no sacrifice of "accountability," which has been the watchword for roughly two decades.

It is hard to see what else the administration could have done, given the failure of Congress to make corrections itself, the manifest impossibility of carrying on with the law as written, and the protest that would have come from Democrats in Congress and the army of education reformers if the administration had simply settled for waivers. It enjoys broad waiver authority under the law, and waiver provisions in federal law have repeatedly been upheld in court. On the other hand, nothing in the law authorizes it to craft new conditions—in effect, to attempt making law itself—even if the new conditions are not called law or rules or conditions or standards, but merely "principles."

Forty years ago, in regard to public assistance rather than education, I wrote as follows of intergovernmental relations in the United States:

> Federal enforcement is a diplomatic process. It is as if the terms of a treaty, an agreement of mutual interest to the two governmental parties, were more or less continuously being negotiated.... The function of intergovernmental diplomacy in

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> a federal system, like that of international diplomacy, is to facilitate communication and amicable relations between governments that are pretending to be equals by obscuring the question of whether one is more equal than the other.... That this be done is important primarily to the federal government, for it is the aggressive, the states the defensive, actor in intergovernmental relations. It has the greater interest in seeing that change is facilitated. But perhaps the principal advantage of a diplomatic style to federal administrators ... is that this mode of behavior makes the best possible use of the technique of withholding funds. It enables federal officials to exploit, without actually using, this basic resource.
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> —from *The influence of federal grants: public assistance in Massachusetts* (Harvard University Press, 1970)

Much of what I wrote about federalism 40 years ago needs revision, but I think there is still truth in this passage. And what strikes me in reviewing intergovernmental relations in education is that the federal government has had a very hard time getting the hang of it. It has wavered (that is not meant to be a pun) between administrative passivity, as with the Clinton administration's prolific granting of waivers following the Improving America's Schools Act (IASA, the 1994 version of the Elementary and Second Education Act), and the deeply intrusive, get-tough, and grant-no-waivers initial approach adopted by Congress and the Bush administration in 2001–02.

The Clinton-era approach perhaps made due recognition of the fact that the origins of the accountability movement lay in the states. Federal law, after all, typically builds, as the IASA did, on state precedents. But the successor regime of Bush, in an overcorrection, reacted sharply against the perceived fecklessness of federal education policy, was indifferent to what the states had in place, and demanded impossibilities. Just how this happened has always puzzled me. How could an elected legislature, traditionally thought to be locally oriented, err so grievously by attempting to improve the public schools by punishing their teachers and administrators? The short answer lies, I think, in the hubris typical of a freshly elected president, the passionate commitment of the liberal lions Kennedy and Miller to social justice (that is, closing the achievement gap), and the pride that John Boehner took in collaborating with these titans. Others who should have known better went along in ignorance of the consequences. Eugene Hickok's account in *Schoolhouse of Cards* mentions Senator Judd Gregg, "who harbored serious misgivings about the whole enterprise, having for years argued for local control in education ..." but who wanted to help a new Republican president and presumed that the new federal initiative would not have much of an impact in his state of New Hampshire, which he believed to have very good schools. Little did he know.

Now the Obama administration is on the rebound from its predecessor, attempting its own correction and searching for what I take to be a diplomatic middle ground. State intergovernmental cooperation is made the foundation for the promise of flexibility and better federal-state cooperation. But after one gets beyond the lofty principles, which begin with "college- and career-ready expectations for all students," there is a lot of prescription woven in among the principles.

In announcing the new plan to chief state school officers (CSSOs), Secretary Arne Duncan points out that 44 states and the District of Columbia have adopted the Common Core standards prepared under the auspices of the National Governors Association with financial support from the Gates Foundation. Forty-six states and the District of Columbia are "developing high-quality assessments aligned with these standards." According to Duncan, "Over 40 states are developing next-generation accountability and support systems," guided by the CSSOs, and "many states are moving forward with reforms in teacher and principal evaluation and support, turning around low-performing schools, and expanding access to high-quality schools." As happened early in the Progressive Era, the expansion of national government activity has prompted states to work more closely together, but that effort is not all embracing. Six states, including Virginia and Texas, have yet to adopt the Common Core standards.

Given the uncertain legal ground on which its new regime of not-quite-regulation rests, the department could face some unusual dilemmas if it attempts to bring federal power to bear against dissenters. Most states will undoubtedly apply for waivers, but what if some just stop complying with NCLB and drag their feet on the waivers? If some of the half dozen or so "outliers" apply but offer much less in the way of conforming principles than ED would like, what then? Withholding funds is never easy, and the legal ambiguities present in this new démarche will not make it any easier. Yet in the absence of a penalty against a state, withholding presumably, no court is likely to be engaged in a legal resolution. The Congressional Research Service (CRS), asked by a House committee for a legal analysis, replied that the secretary of education has broad authority to grant waivers, but hedged on the question of whether these waivers could be made conditional. "Given the novelty of the question," it said, "it is unclear how a reviewing court would rule on such an issue." Courts have been applying a "clear statement" rule for federal grant-in-aid conditions: a federal agency cannot withhold funds unless states have been told their obligations in plain language. If that were the test, the Department of Education would be heading into court with a weak hand.

The case raises a concern that extends well beyond the field of education. Just how far is the United States going to take government-by-waiver? Waivers began to make a significant appearance in public policymaking in the 1980s and 1990s, when they were the precursors of welfare reform and the instruments for major revisions of Medicaid. These waivers had a foundation in law, and after a great deal of experimentation and intergovernmental negotiation conducted by executive officials in the two levels of government, they resulted in new law. The CRS memo cites court cases involving waiver provisions in the Real ID Act of 2005 and the Age Discrimination in Employment Act. Undoubtedly, there are many others. Perhaps to its credit, Congress recognizes with waiver provisions the limitations of its own ability to tailor national laws to the needs of a huge, diverse, and constantly changing society. For it to include waiver authority in law is just a realistic acknowledgment that it is in over its head.

But waivers threaten to get out of hand, and to undermine the rule of law. What the Obama administration just did with education would be a mild case, in which waivers are combined with new requirements lacking a basis in law, but the more serious case is the Affordable Care Act, under which, without any warrant that I have been able to find in the law itself, the administration granted more than 1,400 waivers to labor unions and small businesses that were offering less insurance coverage than the law requires. If Mitt Romney is to be believed and is elected, he will abolish the whole law by waiver, as if a president has the right to do any such thing.

Andy Rotherham: It is impossible to discuss the Obama administration's waiver plan without also discussing and understanding the general political and governmental dysfunction plaguing Washington. The administration is proposing to use waivers to give states, school districts, and schools flexibility under the Elementary and Secondary Education Act, not because waivers are President Obama's or Secretary of Education Arne Duncan's favored way to make policy, but rather because they are the policymaking tool of last resort.

Even casual observers of government have probably noticed that little gets done in Washington these days. The budget process has become an ongoing game of political brinkmanship, with government shutdowns regularly threatened. Legislation moves in fits and starts and often only under special expedited rules. In education, the flurry of policymaking since 2009 has come exclusively under special circumstances and not through the regular legislative process. Race to the Top, i3 (Investing in Innovation fund), and School Improvement Grants, for example, were all folded into the 2009 American Recovery and Reinvestment Act. The administration's victory on student loans came courtesy of special legislative rules related to the health-care bill. Its "gainful employment" rule for for-profit colleges and universities came through the regulatory process.

This dysfunction matters because when NCLB was passed in 2001, no one involved

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imagined the law would run for at least a decade without a congressional overhaul. On the contrary, longtime Washington hands were surprised that it took until 2001 to reauthorize the 1994 version of the law. And the 1994 law was not as complex or timetable-laden as the current version. Notwithstanding a few waiver programs and some clever waivers states managed to secure for themselves, the core of the law remains intact almost 10 years after President George W. Bush, Senator Ted Kennedy, and Congressmen George Miller and John Boehner barnstormed the country to celebrate its overwhelmingly bipartisan passage in the House and Senate.

That's why hardly anyone argues with Secretary Duncan's decision to grant waivers as a way of modifying the policies. Congress tried—and failed—to overhaul the law in 2007, and current efforts to do so still seem a long shot. Yet revisions are long overdue, and the secretary of education's authority to grant waivers is clearly spelled out in the law. Previous secretaries have issued a variety of waivers. The criticism of the secretary's plan, which he and the president rolled out September 23 at the White House, stems from two issues: 1) the secretary's strategy of making receipt of the waivers *conditional* on states agreeing to maintain or adopt a series of reforms, and 2) the *effect* of the waivers on efforts to hold schools accountable for results.

Let's take the two concerns in order.

Waivers are a common strategy for policymaking. After all, with 50 states and urban, suburban, and rural communities covered by the same laws, it is almost impossible to craft laws that fit every situation without some mechanism for modification. We see waivers on a variety of policy issues to accommodate implementation challenges, state-specific statutes or constitutional requirements, or to encourage innovation and new ideas.

Yet in September in its regular monthly survey, consulting firm Whiteboard Advisors asked a bipartisan group of policy and political insiders whether they thought Secretary Duncan's waiver plan would be challenged in court, and 63 percent said yes. I am copublisher of that survey, and the figure reflects the substantial discontent on the political right and left with Secretary Duncan's specific strategy in this case. On the left, groups like the United Farm Workers challenged the secretary's authority to issue waivers that would curtail parental rights. Other special-interest groups felt the waivers should be unconditional and not predicated on any specific reforms or commitments. On the right, conservatives complained that the administration was not merely waiving aspects of the law but rewriting it unilaterally.

Actually, waivers with conditions attached are also a common practice. A cabinet agency can require that a state be in compliance with various laws and regulations to be eligible for a waiver. Or an agency can sponsor pilots and let states propose their own ideas and conditions. The Department of Education has issued waivers under both of these scenarios in recent years.

Secretary of Education Margaret Spellings, for instance, conditioned waivers in her "growth model" pilot on state plans to ensure student growth to proficiency on state tests within three years. Such a requirement did not exist in federal law, and many of the same individuals and organizations now apoplectic about Secretary Duncan's waiver plan raised no objections to Spellings's approach at the time.

Where Secretary Duncan's waivers get complicated is the hodgepodge of laws, regulations, and initiatives that comprise federal education policy today, again because of congressional inaction. The federal goals of improving teacher evaluations, adopting college- and career-ready standards, and turning around low-performing schools trace their legislative provenance to congressional authorizations permitting the secretary of education to allocate federal funds based on priorities he determines rather than specific laws passed by Congress.

Politically, the secretary is on firm ground citing the precedent of his predecessors' waivers, and his critics' temporal concerns about executive power and federalism seem to owe more to which party controls the Oval Office than any underlying theory of government. But the courts will care less about political precedent than statutory precedent, and could read the law and the secretary's authority more narrowly.

Unfortunately, all the attention to the legality of these waivers (as well as a lot of questionable rhetoric about NCLB itself) has obscured the

second question: While the need for revisions to the law and its timetables is inarguable, are these specific waivers a good idea?

There are a number of sensible (and often broadly supported) provisions in the administration's waiver package, but there are problems, too. Who could argue with getting rid of NCLB's "highly qualified teacher" rules? States have gamed them to the point of meaninglessness. Flexibility for rural local education agencies is sensible policy as well. However, the lead-up to the announcement of the waivers was unsettling to supporters of a strong federal role in school accountability. In spring 2011, the president visited a suburban school (with notable achievement gaps) to argue that without substantial changes more than 80 percent of the nation's schools would not meet NCLB performance targets this year. In fact, the actual figures are much lower. But more to the point, given our dismal educational outcomes, why should we be surprised that an accountability system would find a lot of schools underperforming?

Meanwhile, some states proposed, and in some cases were approved for, wholesale departures from efforts to hold schools accountable. Virginia, for instance, sought to retroactively set its accountability targets, and until the proposal became public the administration seemed to be onboard. Idaho and Montana demanded flexibility while announcing that they would not enforce the law, and the administration acquiesced to some changes.

The waiver proposal itself opens the door for suburban schools with achievement gaps to evade accountability. The plan commits states to concentrate on the poorest-performing 15 percent of schools in exchange for flexibility in setting school accountability targets. Yet data clearly show that some groups of students, poor and minority students in particular, do not fare appreciably better in schools that are higher performing overall. In those schools, such challenges are often lost in seemingly respectable averages. Whether the administration can maintain real accountability for all schools remains to be seen. In that same Whiteboard Advisors survey, 75 percent of policy insiders did not think that the administration could maintain a high degree of accountability throughout the process.

The No Child Left Behind law changed the unit of analysis for educational performance and accountability from schools to students. What happens to students within schools, not only differences between schools, became the focal point. This was a major policy shift and reflected the obvious truth that different students can have very different educational experiences in the same school. Laying that reality bare discomfited comfortable suburban communities and upset the traditional education establishment. Complaints about "labeling" schools drowned out hard conversations about the reality of educational performance today.

So while the law clearly needs fixes and updates to a variety of its policies, it does not need a rollback of this bright and often uncomfortable light. The 1994 predecessor to No Child Left Behind had a muted effect in most states precisely because of this issue. Data and transparency alone do not move public policy in a sector like education, which has powerful special interests and unclear outcome goals.

That's why, assuming that Congress fails to act to reauthorize the law, in the end the same problem that has vexed the law since 2001 seems likely to plague the waiver process as it grinds on over time: how to give states flexibility yet ensure that they hold schools accountable for results. The federal government is not good at the former, and despite a few compelling state examples to the contrary, there is plenty of history to make one worry about the latter. Forget the first few states that have a solid commitment to reform, strong leadership, and will be approved while everyone is watching the peer review process. It's the ones that come onboard later where a rollback is most likely.

Bottom line: As with No Child Left Behind (and most broad federal legislation), execution and implementation matter as much as the letter of law and regulations. The administration is betting that the education conversation and education politics have changed enough that rollback is politically untenable. Given the track record and the way the past decade unfolded in terms of the conversation about NCLB, that seems like a bad bet, whether a judge ultimately upholds or strikes down this waiver plan. ❖

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