The No Child Left Behind Act and "Unfunded Mandates": A Legal Analysis of *School District of the City of Pontiac v. Secretary of the United States Department of Education*

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April 8, 2010

Congressional Research Service
7-....
www.crs.gov
RS22839

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

In 2008, a panel of the Court of Appeals for the Sixth Circuit issued a decision in *School District of the City of Pontiac v. Secretary of the United States Department of Education.* In its decision, the court held that the No Child Left Behind (NCLB) Act failed to provide the required "clear notice" to states and school districts regarding the requirements they must fulfill as a condition of receiving federal funding. The case was subsequently reheard, but the *en banc* Sixth Circuit divided evenly, meaning that the judgment of the district court to dismiss the case was affirmed. This report discusses some of the practical and legal implications of the Sixth Circuit decisions.

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Background

The decision in *School District of the City of Pontiac v. Secretary of the United States Department of Education* arose in response to litigation surrounding § 9527(a) of the Elementary and Secondary Education Act (ESEA), as amended by the No Child Left Behind (NCLB) Act of 2001.[1] Section 9527(a)—the so-called "unfunded mandates" provision—states, "nothing in this Act 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 this Act."

Enacted in 2002, the NCLB Act reauthorized and revised the ESEA, which is the primary federal law that provides financial assistance to state and local school districts for pre-collegiate education. Perhaps the most notable feature of NCLB is the wide array of assessment and accountability measures that seek to improve student achievement and performance, particularly in troubled schools. For example, the act mandates that states administer annual tests in reading and mathematics for students in grades 3-8, requires that schools make adequate yearly progress toward improving student performance, establishes a series of required actions for schools that fail to meet such performance standards, and adds new requirements regarding teacher qualifications. The bulk of the new accountability requirements are tied to the Title I, Part A program for disadvantaged students, which is the largest source of federal funding for elementary and secondary education.[2]

Arguing that the costs of complying with some of the new accountability measures far outweigh what they receive in federal funds, a number of states and school districts have protested what they perceive as a lack of federal assistance for some of the act's more controversial requirements, such as the testing and school choice provisions.[3] Other critics have questioned whether mandating that states pay for the costs associated with some of the act's requirements is even lawful, given the language of § 9527(a). Indeed, in 2005, the National Education Association (NEA), in conjunction with eight school districts in Michigan, Texas, and Vermont, filed a lawsuit claiming that the Secretary of Education was violating both the "unfunded mandates" provision and the Spending Clause of the U.S. Constitution.[4] The NEA

> sought a declaratory judgment to the effect 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 are otherwise entitled under the NCLB. Plaintiffs also sought an injunction prohibiting the Secretary from withholding from states and school districts any federal funds to which they are entitled under the NCLB because of a failure to comply with

[1] P.L. 107-110, 115 Stat. 1425. Section 9527 is codified at 20 U.S.C.A. § 7907.

[2] For more information on NCLB, see CRS Report RL33960, *The Elementary and Secondary Education Act, as Amended by the No Child Left Behind Act: A Primer*, by (name redacted).

[3] For example, "the General Accounting Office estimated that states would have to spend $1.9 billion to $5.3 billion to develop and administer the new tests the law requires. States and federal officials disagree as to whether Congress has appropriated enough money to help states meet those costs." Sam Dillon, *States Are Relaxing Education Standards to Avoid Sanctions From Federal Law*, N.Y. Times, May 22, 2003, at A29.

[4] A similar lawsuit was also filed by the state of Connecticut. A federal court rejected the state's claims, although the court did not reach the merits of the "unfunded mandates" claim. Connecticut v. Spellings, 549 F. Supp. 2d 161 (D. Conn. 2008).

> the mandates of the NCLB that is attributable to a refusal to spend non-NCLB funds to achieve such compliance.[5]

In 2005, the United States District Court for the Eastern District of Michigan dismissed the NEA's lawsuit. In its ruling, the district court concluded that § 9527(a) should be interpreted as a prohibition against the imposition by federal officers and employees of additional, unfunded requirements beyond those provided for in the statute, rather than as an exemption from the statute's requirements when the federal government fails to fully fund the Title I program. As a result, the court dismissed the lawsuit for failing to state a claim upon which relief can be granted.[6] The plaintiffs appealed the dismissal to the Court of Appeals for the Sixth Circuit, which reversed the district court's decision. However, the case was subsequently reheard, and the *en banc* Sixth Circuit divided evenly, meaning that the judgment of the district court to dismiss the case was affirmed.

The Sixth Circuit Decisions

In *School District of the City of Pontiac v. Secretary of the United States Department of Education*, a three-judge panel of the Sixth Circuit, in a 2-1 vote, held that the Spending Clause,[7] which empowers Congress to spend money for the "general Welfare of the United States," requires congressionally enacted statutes to provide "clear notice to the States of their liabilities should they decide to accept federal funding under those statutes" and that the NCLB Act "fails to provide clear notice as to who bears the additional costs of compliance."[8] Because the court found the statute to be ambiguous in this regard, it ruled that the plaintiffs had established a claim upon which relief could be granted and therefore reversed the district court's decision and remanded the case to the district court for further proceedings consistent with the Sixth Circuit's opinion.

In reaching its decision, the two-justice majority emphasized its view that the Spending Clause requires "clear notice" of a state's financial obligations. Under the clause, Congress has frequently promoted its policy goals by conditioning the receipt of federal funds on state compliance with certain requirements. Indeed, the Supreme Court "has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy."[9] Although the Court has articulated several standards that purport to limit Congress's discretion to place conditions on federal grants under the spending clause, these standards generally have had little limiting effect:

> First, the conditions, like the spending itself, must advance the general welfare, but the determination of what constitutes the general welfare rests largely if not wholly with Congress. Second, because a grant is 'much in the nature of a contract' offer that the states may accept or reject, Congress must set out the conditions unambiguously, so that the states may make an informed decision. Third, the Court continues to state that the conditions must be related to the federal interest for which the funds are expended, but it has never found a spending condition deficient under this part of the test. Fourth, the power to condition funds

[5] Sch. Dist. of Pontiac v. Sec'y of the United States Dep't of Educ., 512 F.3d 252, 257-58 (6th Cir. 2008).

[6] Sch. Dist. v. Spellings, 2005 U.S. Dist. LEXIS 29253 (D. Mich. 2005).

[7] U.S. Const. art. I, § 8, cl. 1.

[8] Sch. Dist. of Pontiac v. Sec'y of the United States Dep't of Educ., 512 F.3d 252 (6th Cir. 2008).

[9] Fullilove v. Klutznick, 448 U.S. 448, 474 (1980).

> may not be used to induce the states to engage in activities that would themselves be unconstitutional. Fifth, the Court has suggested that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion,' but again the Court has never found a congressional condition to be coercive in this sense.[10]

Relying on the standard that spending conditions be set forth "unambiguously," the Sixth Circuit cited two Supreme Court precedents: *Pennhurst State School & Hospital v. Halderman* and *Arlington Central School District Board of Education v. Murphy*.[11] The *Pennhurst* decision involved the Developmentally Disabled Assistance and Bill of Rights Act of 1975, which contained a "bill of rights" provision stating that mentally disabled individuals "have a right to appropriate treatment, services, and habilitation for such disabilities."[12] Unlike other requirements of the act, the bill of rights provision appeared to represent a general statement of federal policy and was not conditioned on the receipt of federal funding. As a result, the Court held that the provision did not create enforceable obligations on the state, in part because Congress had failed to provide clear notice to states that accepting federal funds would require compliance with the bill of rights provision. Meanwhile, the *Arlington* case involved the Individuals with Disabilities in Education Act, which authorizes a court to award "reasonable attorneys' fees" to plaintiffs who prevail in lawsuits brought under the act. Denying the plaintiffs' request for reimbursement of fees paid to a non-attorney expert, the Court held that the statute did not provide states with clear notice that their acceptance of federal funds obligated them to compensate prevailing parties for such expert fees.

Applying these precedents, the *Pontiac* court sought to determine whether the NCLB Act provided clear notice to the states regarding their funding obligations. According to the court, because the statute "explicitly provides that '[n]othing in this Act shall be construed ... to mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act,' a state official would not clearly understand that obligation to exist."[13] Although the Sixth Circuit considered alternative interpretations under which the statute could be read to require states to comply with all NCLB requirements regardless of federal funding levels, the court ruled that "the only relevant question here is whether the Act provides clear notice to the States of their obligation." As a result, the court rejected the alternative interpretations advanced in the case, which included (1) the district court's view that the provision prevents officers and employees of the federal government from imposing additional requirements on the states, and (2) the Department of Education's (ED) argument that the provision simply emphasizes that state participation in NCLB is entirely voluntary. Although the Sixth Circuit acknowledged that ED's interpretation of the statute may ultimately be correct, the court held that neither interpretation was sufficiently evident to provide states with clear notice of their obligation to spend additional funds to comply with requirements that are not paid for under the act.

As noted above, the Sixth Circuit's *Pontiac* decision was not unanimous. According to the dissenting judge, § 9527(a) does not render the NCLB Act ambiguous and therefore does not violate the Spending Clause. Specifically, the dissent distinguished the cases cited as precedents

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[10] Congressional Research Service, United States Constitution: Analysis and Interpretation, at http://crs.gov/conan/default.aspx?mode=topic&doc=Article01.xml&t=3|1|2&s=8&c=1 (citations omitted). *See also*, South Dakota v. Dole, 483 U.S. 203 (1987).

[11] 451 U.S. 1 (1981); 548 U.S. 291 (U.S. 2006).

[12] Former 42 U.S.C. § 6010.

[13] Pontiac, 512 F.3d at 265.

and contended that the text, operation, and structure of the act contradict the majority's interpretation. Asserting that state and local school officials "had a crystal clear vision of what Congress was offering them," the dissent characterized the majority opinion as "contrary to the way our nation's education has been operated and funded for centuries" and concluded that "there is no support in the text or context of the NCLB for the proposition that Congress intended such a monumental and unprecedented change in our nation's education funding."[14]

In response to the ruling, ED sought review of the *Pontiac* decision by petitioning the Sixth Circuit for a rehearing *en banc*.[15] Typically, federal appeals are heard by a panel consisting of three judges, but the term "*en banc*," which translates as "full bench," refers to a situation in which a larger number of circuit judges reconsider a decision made by the three-judge panel. Under the Federal Rules of Appellate Procedure, "[a]n en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."[16] Although a court of appeals is not obligated to grant a rehearing, ED's petition for *en banc* review was successful.

In a highly fractured decision, the *en banc* Sixth Circuit ultimately divided evenly, with eight judges voting to affirm the judgment of the district court and eight judges voting to reverse that judgment. In cases in which an evenly divided vote occurs, the usual practice is to affirm the decision of the lower court. As a result, the *en banc* Sixth Circuit issued an order affirming the district court's decision to dismiss the case.[17]

The *en banc Pontiac* decision contains four separate opinions, two of which concurred in the order affirming the district court's judgment and two of which would have reversed the district court's judgment. In the first concurring opinion, Judge Jeffrey Sutton contended that the school districts had failed to demonstrate that the NCLB Act was ambiguous because the alternative interpretation of the statute that they offered "is implausible and fails to account for, and effectively eviscerates, numerous components of the Act."[18] Specifically, Judge Sutton argued that the school districts' interpretation was inconsistent with provisions relating to accountability, flexibility, waivers, and other requirements because excusing states from compliance with these features of the act would effectively gut the statute. Moreover, Judge Sutton noted, even if the states and school districts were uncertain about their financial obligations when they first participated in the NCLB programs, by the time they filed the lawsuit, they were clearly on notice that ED would require compliance with all of the statutory requirements in exchange for federal funds. In a separate opinion, Judge David McKeague concurred in affirming dismissal for procedural reasons.[19]

In the first opinion that would have reversed the district court's judgment, Judge R. Guy Cole argued that the NCLB Act "simply does not include any specific, unambiguous mandate requiring the expenditure of non-NCLB funds," and, as a result, the statute fails to provide clear notice to

[14] Id. at 273.

[15] Petition for Rehearing and Rehearing En Banc, Sch. Dist. of Pontiac v. Sec'y of the United States Dep't of Educ., No. 05-2708 (6th Cir. filed February 5, 2008), at http://www.edweek.org/media/petitionforrehearing.pdf.

[16] USCS Fed. Rules App. Proc. R 35.

[17] Sch. Dist. v. Sec'y of the United States Dep't of Educ., 584 F.3d 253 (6th Cir. 2009).

[18] Id. at 285.

[19] Id. at 297.

the states of their financial obligations.[20] Acknowledging that several other interpretations of the statutory language were plausible, Judge Cole emphasized that the relevant inquiry is whether a recipient's obligations are unambiguous, and Congress failed to provide clear notice on that point. In a separate dissent, Judge Julia Smith Gibbons agreed with Judge Sutton that "NCLB does seem to require states to spend their own funds to comply with the statute's requirements," but also agreed with Judge Cole that "the language of § [9527(a)] is not clear."[21] Judge Gibbons would therefore have focused the inquiry on whether § 9527(a) creates so much ambiguity as to cast doubt on the meaning of the rest of the statute and would have remanded the case for further development on this question.

Because the school districts do not appear to have appealed to the Supreme Court, the litigation in the *Pontiac* case has come to an end.

Implications

The Sixth Circuit's rulings in the *Pontiac* case have several implications. From a practical perspective, had the original ruling of the three-judge panel not been invalidated by the split vote of the *en banc* Sixth Circuit, the case might have significantly undermined the operation and effect of the Title I program, as well as other ESEA programs that are subject to the "unfunded mandates" provision in § 9527(a). Although that prospect did not occur, the fact that the *en banc* judges were evenly divided on the Spending Clause question could potentially create a degree of uncertainty across the landscape of federal funding programs by encouraging legal challenges not only to other federal education programs but also to federal funding programs operated by other federal agencies.

In addition to the practical ramifications, there are several important legal implications of the *Pontiac* decision. First, the decision is effective only in states that fall within the jurisdiction of the Sixth Circuit.[22] Those states are limited to Kentucky, Michigan, Ohio, and Tennessee.[23] Because school districts and educational agencies in other states are not affected by the decision, they may decide to file similar lawsuits in other circuits.

Second, if Congress is concerned that the closely divided vote of the *en banc* Sixth Circuit could encourage future challenges to NCLB requirements, then Congress may wish to clarify its views statutorily. For example, Congress could choose to amend the NCLB Act to clarify that states that accept NCLB funds are obligated to comply with all of the act's requirements, regardless of whether or not the costs of compliance are fully funded by the federal government.

[20] Id. at 271.

[21] Id. at 311.

[22] It is important to note that evenly divided decisions generally do not serve as precedents. Neil v. Biggers, 409 U.S. 188, 192 (1972).

[23] Some of the school districts that were party to the *Pontiac* litigation are located outside the jurisdiction of the Sixth Circuit but are nonetheless covered by the ruling.

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