

# ISSUE BRIEF

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## No Child Left Behind Waivers: Bogus Relief, Genuine Overreach

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Seizing on widespread dissatisfaction with No Child Left Behind (NCLB) and blaming congressional inaction for the need to act unilaterally, the Obama Administration has begun issuing waivers from the law to states willing to accept Department of Education (DOE) conditions that will end up further centralizing education policy.

The NCLB waivers pose serious legal questions, circumvent the normal legislative process, significantly grow federal intervention in local school policy, and fail to offer genuine relief to states suffering from Washington mandates and red tape. As such, governors and state education leaders should reject these waivers and demand genuine relief from federal intervention, including the ability to completely opt out of NCLB.

**NCLB Waiver Requirements.** States that secure waivers are no

longer required to ensure universal student proficiency in math and reading under NCLB's Adequate Yearly Progress provision. NCLB requires that, over time, states raise the bar to achieve 100 percent student proficiency in reading and math.

NCLB also requires that all teachers of core subjects—defined as reading, math, science, foreign language, government, economics, art, geography, and history—be “highly qualified” under the law’s Higher Qualified Teacher mandate. To obtain this status, a teacher must hold a bachelor’s degree, hold state certification, and demonstrate subject matter mastery.<sup>1</sup>

In order to secure waivers from these and other provisions of NCLB, states must agree to the Obama Administration’s policy preferences, which include basing teacher evaluations in part on student performance and adopting national standards and tests for what every child will be taught in school.

**A Pattern of Executive Overreach.** The waivers are part of a long line of executive overreach that is not limited to education, compounding a pattern of disregard for the normal legislative process.<sup>2</sup> Education researcher Andy Rotherham notes that policymaking

through the regulatory process has been especially pronounced in education:

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.<sup>3</sup>

The Administration’s willingness to bypass Congress to enact its education agenda is especially troubling because the waivers came in the midst of congressional deliberations about the future of NCLB. The House Education and the Workforce Committee has passed several proposals as part of a piecemeal approach to rewriting NCLB. In the Senate, a comprehensive NCLB reauthorization proposal likewise made

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its way out of the Senate Health, Education, Labor, and Pensions Committee. While the House and Senate versions differ considerably, they are legislative proposals dealing with the future of NCLB and have the approval of their respective committees.

By issuing waivers from the law, the Administration has signaled to Congress that legislators have met the end of the Administration's arbitrary timeline for regular reauthorization, despite movement on the many congressionally generated proposals. The waivers, along with other instances of executive indifference toward legislative process, show a "disregard for the powers of the legislative branch in favor of administrative decision making without—and often in spite of—congressional action."<sup>4</sup>

**Serious Separation of Powers Concerns.** The job of the executive branch is to faithfully execute the laws passed by the legislature. The President's powers "do not include the authority to make laws or to decide which laws to enforce and which to ignore."<sup>5</sup> The Secretary of Education is a cabinet head in a department of the executive branch

and, as such, is duly obligated to carry out the laws passed by Congress.

NCLB, last reauthorized in 2001, is the K-12 education law of the land. Although Education Secretary Arne Duncan has waiver authority under NCLB, it is a dubious and abusive exercise of this authority to circumvent Congress by conditioning access to waivers on a state adopting executive branch policies that have yet to be approved by Congress.

Yet this is precisely what the waiver process has been: a pact between states suffering under the mandates and bureaucratic compliance burden of NCLB and an overreaching executive branch, the latter granting temporary relief from the law to the former in exchange for adopting the Obama Administration's policy priorities. This pact creates an effective re-write of NCLB from the executive branch and includes new requirements "lacking a basis in law."<sup>6</sup>

The Congressional Research Service concedes that the Secretary has broad waiver authority, but it did not provide clear guidance to a House committee request on the question of whether waivers could be conditional. "Given the novelty of the question, it is unclear how a

reviewing court would rule on such an issue."<sup>7</sup>

**Growing Federal Control of Education.** The DOE has made it clear that waivers from the law will be granted only in exchange for implementing new executive branch priorities.

For example, New Mexico's waiver request was initially denied because the state had been too slow to implement Common Core national standards and tests. New Mexico quickly moved to fully implement the standards and was granted a waiver shortly thereafter.<sup>8</sup> Iowa's request was denied because the state school board—in deference to local control—does not have the authority absent legislation to require individual school districts to implement the policies required by the Administration to secure a waiver.

**Creating a Two-Tiered System.** The waivers also raise another question: Is NCLB effectively dead now that more than half of states have secured waivers from the law?

The Obama Administration has created a system of favoritism where states that fail to secure a waiver must adhere to existing law. California declined to apply for a

1. Frederick M. Hess and Michael J. Petrilli, *No Child Left Behind Primer* (New York: Peter Lang Publishing, Inc., 2006), p. 65.
2. The DREAM Act, cap-and-trade legislation, and "card check" legislation were all rejected by Congress but partially "enacted" by President Obama through regulatory and executive overreach. Further circumventing Congress, Obama's Federal Communications Commission established Internet regulations after "net neutrality" was rejected, and the President recently gutted work requirements attached to the Temporary Assistance to Needy Families program independent of legislative approval.
3. Martha Derthick and Andy Rotherham, "Obama's NCLB Waivers: Are They Necessary Or Illegal?," *Education Next*, Vol. 12, No. 2 (Spring 2012), <http://educationnext.org/obamas-nclb-waivers-are-they-necessary-or-illegal/> (accessed September 4, 2012).
4. Matthew Spalding, "Morning Bell: Imperial Presidency," The Heritage Foundation, The Foundry, June 22, 2012, <http://blog.heritage.org/2012/06/22/morning-bell-imperial-presidency/>.
5. *Ibid.* A "President may engage in constitutional interpretation by choosing not to enforce [a law] if he believes it to be unconstitutional," but no such claim is at issue here. See Robert Alt, "What Is the Proper Role of the Courts?" Heritage Foundation *Understanding America* Report No. 14, January 20, 2012, <http://www.heritage.org/research/reports/2012/01/what-is-the-proper-role-of-the-courts>.
6. Derthick and Rotherham, "Obama's NCLB Waivers."
7. *Ibid.*
8. Sean Cavanagh and Alyson Klein, "Broad Changes Ahead as NCLB Waivers Roll Out," *Education Week*, February 9, 2012, <http://www.edweek.org/ew/articles/2012/02/09/21waivers.h31.html?qs=waivers> (accessed September 4, 2012).

waiver because state schools chief Tom Torlakson estimated that the conditions would cost California taxpayers in excess of \$2 billion. Moreover, Torlakson noted, “We object to switching out one set of onerous standards, known as No Child Left Behind, for another set of burdensome standards.”<sup>9</sup>

Despite 33 states and Washington, D.C., having secured NCLB waivers, the law on the books remains the law. The Obama Administration’s end-run around Congress does not change that fact; instead, NCLB waivers create a two-tiered system in which half of the country must abide by the law while the other half, willing to embrace new executive branch regulations, now operates functionally outside of the law and by a different set of rules.

### **A Better Course Forward.**

NCLB’s blunt attempt to drive accountability from Washington has resulted in many schools being labeled failing while doing little to improve results. However, waivers from selected provisions of the law create a bad precedent that provides neither long-term relief for states nor solves the underlying problem with NCLB: an accountability system directed toward bureaucrats, not parents.

The Obama Administration does not need to abrogate proper legislative process in order to provide relief from NCLB. Proposals such as the Academic Partnerships Lead Us to Success (A-PLUS) would allow states to completely opt out of NCLB and direct dollars and decisions to the state’s most pressing priorities. It

would do so by giving power to those closest to the child: state and local leaders, and ultimately, parents. The A-PLUS approach comes without the many strings attached to NCLB waivers and is a legislative branch proposal with strong support in Congress.

State leaders should reject these waivers and demand genuine relief from NCLB. Options exist to provide that relief and create a path toward fundamentally reducing federal intervention in education.

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9. Sean Cavanagh, “Some States Skeptical of NCLB Waivers: Big Strings Attached to Bid for Flexibility,” *Education Week*, January 11, 2012, <http://www.edweek.org/ew/articles/2012/01/11/17waivers.h31.html?qs=waivers> (accessed September 4, 2012).