

NO CHILD LEFT BEHIND WAIVERS: A LESSON IN FEDERAL FLEXIBILITY OR REGULATORY FAILURE?

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INTRODUCTION

On January 8, 2002, President George W. Bush signed the No Child Left Behind Act (NCLB or the Act) into law.¹ NCLB reauthorized and amended federal educational programs under the Elementary and Secondary Education Act of 1965 (ESEA), the main source of federal

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1. 20 U.S.C. § 6301 (2000 & Supp. V 2005).

legislation and funding for public schools.² NCLB brought accountability measures and increased budgets to states and local educational agencies (LEAs), leading to an unprecedented expansion of federal influence over education policy.³

Although Congress passed NCLB with overwhelming bipartisan support, opponents from both parties have since criticized and challenged numerous provisions of the Act.⁴ For example, members of Congress have proposed legislation allowing states to opt out of NCLB, and state legislators have introduced legislation rejecting federal funds.⁵ States and LEAs have also unsuccessfully challenged NCLB in court.⁶ However, states and LEAs have now found a safer and more successful way to cope with NCLB—rather than completely opting out of NCLB, states and LEAs are applying to the Department of Education (ED) for waivers from particular NCLB provisions.⁷

Although waivers appear to provide ED with the flexibility to adapt legislation to the realistic needs of states, and thus help states meet NCLB goals, waivers also pose problems. This Comment argues that granting waivers is a short-sighted procedure that highlights the problems in an already unworkable education policy. Part I focuses on state and local federalism concerns and the growing trend of states and LEAs seeking exemptions from portions of NCLB. Part II examines ED's congressionally authorized ability to grant waivers and the judicial review of such waivers. Part III highlights the trouble with relying on waivers to address the problematic features of NCLB. Finally, Part IV provides recommendations to Congress and ED to reduce reliance on waivers.

2. See DEP'T OF EDUC., 10 FACTS ABOUT K-12 FUNDING (2005), <http://www.ed.gov/print/about/overview/fed/10facts/index.html> (demonstrating that the Elementary and Secondary Education Act, which was reauthorized by No Child Left Behind (NCLB), will contribute over thirteen billion dollars to local districts to improve schools with high poverty rates).

3. See Benjamin Michael Superfine, *Using the Courts to Influence the Implementation of No Child Left Behind*, 28 CARDOZO L. REV. 779, 780 (2006) (arguing that although "statutory provisions regarding standards and assessments are not entirely new at the federal level, the accountability mandates included in NCLB are unprecedented").

4. See Claudia Wallis & Sonja Steptoe, *How to Fix No Child Left Behind*, TIME, June 4, 2007, at 34 (summarizing the areas of controversy over NCLB as whether: (1) math and reading tests are the right tools for measuring achievement, (2) individual states are setting the bar high enough for students, (3) the heavy focus on reading and math distorts education, (4) the requirements for teacher qualifications are effective, (5) the Federal Government is playing an appropriate role in fixing schools, and (6) states receive enough funds to implement the policy).

5. See *infra* notes 14-23 and accompanying text.

6. See *infra* notes 24-26 and accompanying text.

7. See Brandi M. Powell, Comment, *Take the Money or Run?: The Dilemma of the No Child Left Behind Act for State and Local Governments*, 6 LOY. J. PUB. INT. L. 153, 178-79 (2005) (contending that requesting a waiver is one of the few realistic options for states and local educational agencies (LEAs) within an unworkable system).

I. RESISTANCE TO NO CHILD LEFT BEHIND

A. *State and Local Concerns About NCLB*

The United States has traditionally considered education a state and local issue.⁸ NCLB's language appears to protect states' control over education by preventing the federal government from imposing an unfunded mandate.⁹ However, state and LEA officials from both political parties have nonetheless expressed federalism concerns over NCLB requirements.¹⁰ Many conservatives believe that NCLB is a "federal intrusion" into public schools, whereas many liberals believe that NCLB focuses too greatly on standardized tests that states and LEAs must report to ED.¹¹ Furthermore, many states and LEAs claim that NCLB's usurpation of local control over education policy produces rigid federal guidelines that do not fit local needs and are not economically feasible to implement.¹² States and LEAs have raised these federalism concerns since

8. See Michael Heise, *The Political Economy of Educational Federalism*, 56 EMORY L.J. 125, 130-31 (2006) (explaining that people regard education as a local issue because local property tax revenues fund local schools, and because all states, except Hawaii, delegate most policy-making to local school boards); Wallis & Steptoe, *supra* note 4, at 36 (noting that, even today, the federal government only contributes nine cents for every dollar spent on schools). See generally *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-53 (1973) (suggesting that the Supreme Court has recognized that local financing and control over public schools are valuable roles that the Court wishes to respect).

9. 20 U.S.C. § 7907(a) (Supp. V 2005).

Nothing in this chapter 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 chapter.

Id.

10. See Aaron J. Saiger, *Legislating Accountability: Standards, Sanctions, and School District Reform*, 46 WM. & MARY L. REV. 1655, 1721-23 (2005) (explaining that states do not have much control under NCLB because they only have genuine flexibility in making two decisions: deciding whether to completely opt out of the program and defining their standards for AYP); Heise, *supra* note 8, at 127 (asserting that states understood the "education federalism status quo" to mean that the federal government only focused on discrete subpopulations of students; thus states are upset that the federal government has departed from the status quo with a policy that impacts all participating states and schools); Scott Young, *NCLB: Feds Crack the Door*, 31 ST. LEGIS., June 2005, at 24, ("We believe the federal government's role has become excessively intrusive in the day-to-day operations of public education," [New York Senator Saland] says. "States that were once pioneers are now captives of a one-size-fits-all educational accountability system.").

11. See Amit R. Paley, *'No Child' Needs to Expand Beyond Tests, Chair Says*, WASH. POST, July 31, 2007, at A04 [hereinafter Paley, *'No Child' Needs to Expand*] (explaining that although NCLB has support of leading Democrats and Republicans in Congress, there are still federalism concerns by both parties).

12. See Superfine, *supra* note 3, at 781-82 ("[M]ajor problems plaguing the implementation of NCLB stem from the failure to provide states, districts, and schools with the needed capacities, such as financial resources, to comply with NCLB mandates.").

the moment NCLB was introduced, leading some to believe that federal partisan politics stifled debate and led both houses of Congress to pass NCLB over local objection.¹³

B. Legislative and Judicial Challenges to NCLB

Prior to NCLB's expiration on September 30, 2007, members of Congress began introducing and discussing amendments rather than simply reauthorizing the Act.¹⁴ To date, Democratic and Republican members of Congress have introduced over thirty bills to address NCLB's problems.¹⁵ While congressional Democrats have pushed for increased funding,¹⁶ some Republican-backed amendments have proposed legislation allowing states to opt out of NCLB testing provisions.¹⁷ But in general, Congress has resisted large-scale changes of NCLB during the past five years.¹⁸ Unless Representative George Miller, chairman of the House Education and Labor Committee, and Senator Edward Kennedy, chairman of the Senate Health, Education, and Pensions Committee, can rewrite NCLB and gather bipartisan support on a revised version for reauthorization, NCLB will likely remain the law in its current form until a new President takes office.¹⁹

13. See Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 893-906 (2006) [hereinafter *Safeguards of Federalism*] (claiming that members of the Republican-controlled Congress were cognizant of the federalism concerns voiced at local levels, but members of Congress ignored those concerns because they were pressured to support a "major piece of President Bush's domestic reform agenda").

14. See Stephen Langel, *Miller Unveils No Child Left Behind Proposal with Performance Bonuses for Teachers*, ROLL CALL, Sept. 7, 2007 (reporting that NCLB expired on Sept. 30, 2007); David J. Hoff, *Provision on Tutoring Raises Renewal Issues*, 27 EDUC. WK. 7, Oct. 10, 2007, at 1 (explaining that NCLB expired but was automatically extended for another year); Paley, *'No Child' Needs to Expand*, *supra* note 11 (noting that members of Congress are debating proposals to amend NCLB before voting on NCLB reauthorization).

15. See Susan Milligan, *No Child Law's Authors Work on a Revision, Respond to Complaints*, BOSTON GLOBE, July 16, 2007, at A1 (highlighting the criticism of NCLB in its current form and noting that members of Congress had proposed legislation before Congress voted to reauthorize NCLB at the end of 2007).

16. See Jonathan Weisman & Amit R. Paley, *Dozens in GOP Turn Against Bush's Prized 'No Child' Act*, WASH. POST, Mar. 15, 2007, at A01 (reporting that key Democrats strongly support the renewal of NCLB but demand "large increases in funding and more emphasis on teacher training and development").

17. See, e.g., H.R. 1539, 110th Cong. (2007) (giving states the flexibility to improve their educational programs); Weisman & Paley, *supra* note 16 (describing how more than fifty Republican members of the Senate and House, including the House's second ranking Republican, introduced legislation allowing states to opt out of NCLB testing mandates).

18. See Milligan, *supra* note 15 (reporting that several years ago Sen. Dodd "annoyed" members of Congress when he authored "the most sweeping package on Capitol Hill to overhaul [NCLB]" because members of Congress believed that NCLB was too new to be completely rewritten).

19. David J. Hoff, *Bush Presses NCLB Renewal on His Terms*, 27 EDUC. WK. 19, Jan. 16, 2008, at 16-18 [hereinafter Hoff, *Bush Presses NCLB Renewal*] (stating that NCLB will stay in effect in its current form if it is not amended or reauthorized, and pointing out a

State legislatures have also sought ways to repair NCLB and regain control of educational policy. Utah has been at the forefront of the opposition to NCLB and has passed legislation that will allow it to cut NCLB programs if federal funding decreases.²⁰ Additionally, legislators from twenty-one states introduced bills or resolutions within three years of the NCLB's enactment, seeking to amend the implementation of the Act.²¹ Although NCLB contains no provision that allows states to decide how to enact the law, ED has threatened to sever federal funding from states that refuse to comply with NCLB requirements.²² Thus to date, no state has sacrificed federal funds by opting out of NCLB.²³

States and LEAs have also challenged NCLB through the judicial system. Initially, the lawsuits challenging NCLB came from private parties and local school districts.²⁴ Then in 2005, Connecticut became the first state to judicially challenge ED, claiming that NCLB was an unfunded

clause in NCLB that allows Congress to fund NCLB's current programs without formally reauthorizing the law); Public Education Network, No Child Left Behind, http://www.publiceducation.org/nclb_main/Reauth_What_It_Means.asp (last visited Jan. 26, 2008) (speculating that NCLB reauthorization may be delayed until 2009 due to the 2008 congressional calendar, which is shortened for the 2008 election).

20. See 2005 First Spec. Sess. Utah Laws H.B. 1001. Enacted in 2005 after passing overwhelmingly in the state legislature, H.B. 1001 will allow schools to eliminate federal education programs when federal funds for those programs are reduced or eliminated. See also *Nation*, THE YORK DISPATCH, Feb. 17, 2005, at 1 ("The legislation and a companion resolution represent the sharpest denunciation among 35 states taking up measures on No Child mandates," said the sponsor, Republican Rep. Margaret Dayton."). See generally Young, *supra* note 10, at 22 (noting that before Utah passed H.B. 1001, the Utah legislature considered an even more controversial bill that would prohibit the state from participation in NCLB and jeopardize "\$46 million [in] Title I funding and possibly as much as \$107 million of formula funding tied to Title I").

21. See National Education Association, 21 States Seek Changes to "No Child Left Behind," <http://www.nea.org/lawsuit/stateres.html> (last visited Jan. 25, 2008) (listing the pending bills and resolutions states that have introduced to address a diversity of concerns).

22. See *Safeguards of Federalism*, *supra* note 13, at 887-89 (noting that schools may feel compelled to abide by NCLB requirements to avoid losing federal funds). The author points out that Utah avoided losing federal funds by passing a bill "that would have Utah employ U-PASS in place of the NCLBA's progress measures without technically opting out of the federal program." *Id.* at 898. However, Secretary Spellings sent Utah Senator Orrin Hatch a letter warning him that the government will closely monitor Utah's compliance with NCLB and will "yank" most of the state's education funds if it does not "stay in line." *Id.* at 899.

23. See Powell, *supra* note 7, at 178 (providing suggestions about how states can work within the provisions of NCLB since no state has opted out of the Act); *Safeguards of Federalism*, *supra* note 13, at 886 ("All that talk, however, seemed just that—talk. Four years after the Act's passage, and with many states continuing to complain about its stringent requirements, not one state had made good on its threat to walk.").

24. See, e.g., *Ctr. for Law & Educ. v. U.S. Dep't of Educ.*, 315 F. Supp. 2d 15, 17-18 (D.D.C. 2004) (dismissing the plaintiffs' claims challenging testing regulations due to lack of standing); *City of Pontiac v. Spellings*, No. 05-CV-71535-D, 2005 WL 3149545, at *8 (E.D. Mich. 2005) (dismissing the plaintiffs' claims—that ED had not provided sufficient funds to states to enable districts and schools—for lack of standing); *Bd. of Ottawa Twp. v. U.S. Dep't of Educ.*, No. 05 C 00655, 2007 WL 1017808, at *1 (N.D. Ill. 2007) (dismissing the plaintiffs' claims—that portions of NCLB are invalid since they violate the Individuals with Disabilities Education Act—because of lack of standing).

mandate violating the U.S. Constitution's Spending Clause and the Tenth Amendment.²⁵ Despite the different legal strategies parties have used to challenge NCLB, thus far no plaintiffs have been successful.²⁶

C. Increasing Momentum for Waivers

After encountering setbacks through legislation and lawsuits, states and LEAs have increasingly sought flexibility in implementing NCLB by applying for waivers for specific provisions of the law.²⁷ States and LEAs may view waivers as a safer strategy because waivers do not jeopardize federal funding. Instead of forgoing federal funds by abandoning NCLB²⁸ or failing to make adequate yearly progress (AYP),²⁹ states have applied for waivers so they can opt out of particular NCLB provisions and still retain NCLB funds.³⁰ Waivers also appear to be a safer alternative to expensive litigation that has had a low success rate.³¹ Finally, many states and LEAs are turning to waivers because they believe that the current Secretary of

25. See *infra* notes 64-67 and accompanying text; *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 482 (D. Conn. 2006) (dismissing Connecticut's claim for lack of subject matter jurisdiction over a pre-enforcement challenge because Secretary Spellings had yet to take action against Connecticut, such as withholding NCLB funds).

26. See Superfine, *supra* note 3, at 806-19 (highlighting legal hurdles faced by NCLB challenges such as standing issues, judicial deference to administrative decisions, specific statutory language, and the lack of an express private cause of action).

27. See Powell, *supra* note 7, at 178 (suggesting that waivers are state and LEA's most realistic option "to make sure all state and local costs are accounted for . . . and to simply hold ground or push for a change in the law" during George W. Bush's second term).

28. See, e.g., *Safeguards of Federalism*, *supra* note 13, at 897 (describing how ED informed Virginia that it would lose \$330 million per year if it "pulled out or refused to comply with NCLB" after a Virginia delegate introduced a bill that would reject NCLB testing standards).

29. See 20 U.S.C. § 1234(c) (2000) (allowing the Secretary of Education to: (1) withhold funds; (2) obtain compliance through a cease and desist order; (3) enter into a compliance agreement with the recipient; or (4) take any other action authorized by law if a recipient of NCLB funds is substantially failing to comply with any requirement of the law). See generally Lynne Olsen, *Data Shows Schools Making Progress on Federal Goals*, 24 EDUC. WK. 2, Sept. 8, 2004, at 24-25 (highlighting that many people feared "a tidal wave of schools" would not be able to meet adequate yearly progress goals "because schools must meet multiple targets both for their total student populations and for subgroups of students who are poor, show limited skills in English, have disabilities, or come from racial- or ethnic-minority backgrounds").

30. See *infra* Part II.

31. See generally William T. Gormley, Jr., *Money and Mandates: The Politics of Intergovernmental Conflict*, 36 PUBLIUS 523, 539 tbl.7 (2006) (showing that between 1980 and 2004, there were fifty-one challenges made by states and LEAs, and that the Federal Circuit Court of Appeals ruled in favor of the federal government for education policy matters eighty percent of the time).

Education, Margaret Spellings, is more receptive to states than her predecessor, Roderick Paige, and therefore more willing to increase flexibility by granting waivers.³²

Upon taking office, Secretary Spellings announced that there would be a “more workable, common-sense approach”³³ to applying NCLB.³⁴ Fulfilling her promise, she granted her first waivers to four Virginia school districts in 2005.³⁵ States have since sought exemptions from different NCLB provisions, ranging from measuring special education proficiency in Colorado to utilizing alternatives to standardized testing in Minnesota.³⁶ Even smaller LEAs, such as the Anchorage and Hillsborough County school districts in Alaska, received waivers to provide subsidized tutoring.³⁷

32. See *State, Local Efforts Seeking More NCLB Flexibility Are Gaining Momentum*, 35 YOUR SCHOOL & THE LAW 4 (2005) (“The tone out of the White House has definitely changed since Spellings has replaced Paige,’ [Scott Young, a senior policy specialist with the National Council of State Legislatures] said. ‘We’re optimistic because every indication we’re getting from the U.S. Department of Education is the fact that they are willing to work with the states now.’”). *But cf.* Amit R. Paley, *Ex-Aides Break With Bush on ‘No Child,’* WASH. POST, June 26, 2007, at A04 (“But former officials said Education Secretary Margaret Spellings, the top White House education adviser in Bush’s first term, stymied efforts by top department officials to grant states more control over how they carried out the law.”).

33. See Young, *supra* note 10, at 22, 24 (explaining that Secretary Spellings would offer states flexibility if they could prove that they were meeting the general goals of NCLB).

34. See Heise, *supra* note 8, at 127 (contending that the Bush Administration and ED are granting an increasing amount of waiver requests because they are on “the political defensive”).

35. See *Virginia School Districts to Offer SES in Lieu of Choice; ED’s Flexibility May Pave Way for Other States to More Easily Achieve NCLB Goals*, 35 YOUR SCH. & THE LAW 19 (2005) [hereinafter *Virginia School Districts Offer SES*] (describing how ED’s waiver allows the four Virginia school districts to offer free school tutoring instead of school choice, a departure from the order of procedures proscribed by the NCLB); see also *Spellings Announces NCLB Flexibility for Select Districts*, 35 YOUR SCH. & THE LAW 17 (2005) [hereinafter *Spelling Announces NCLB Flexibility*] (“The decision [to grant Virginia districts waivers] is noteworthy because it demonstrates the Education Department’s ability to waive NCLB requirements. Most flexibility so far has been created within the structure of the law through policy and regulations.”).

36. See, e.g., *Spellings Announces NCLB Flexibility*, *supra* note 35 (describing how ED granted Colorado’s wavier request, allowing Colorado to measure some special education students’ AYP against lower academic goals); Charley Shaw, *Debate Continues Over No Child Left Behind Rules*, ST. PAUL L. LEDGER, Sept. 8, 2005, at 1 (reporting that the Minnesota legislature has requested nine waivers to NCLB, including using “multiple measures of student achievement” as opposed to standardized test scores).

37. See *Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act, as Amended*, 72 Fed. Reg. 10,990, 10,992 (Mar. 12, 2007) [hereinafter *Notice of Waivers Granted*] (showing that Anchorage and Hillsborough County School Districts received a waiver allowing them to provide free supplemental educational services (SES), such as math and reading tutoring to low income students outside of class even though the schools are labeled “in need of improvement”).

Furthermore, whereas Secretary Paige primarily granted waivers to individual school districts for specific programs, Secretary Spellings's waivers have been much broader.³⁸ For example, in 2006, Secretary Spellings granted waivers to five states so they could develop and implement their own models to measure their AYP.³⁹ Secretary Spellings has also granted waivers to provide subsidized tutoring in large cities and in states, such as Boston, Chicago, and the state of New York.⁴⁰ Finally, Secretary Spellings has granted many waivers for school districts affected by Hurricane Katrina.⁴¹ Though Secretary Spelling has granted waivers across the country for programs large and small, the only provision she has refused to waive is the requirement that states report yearly testing results.⁴²

II. THE WAIVER PROCESS

A. Statutory Authority to Grant Waivers

NCLB § 7861 authorizes the Secretary of Education to grant waivers.⁴³ Although administrative agencies may generally refuse to grant such requests,⁴⁴ NCLB explicitly allows the Secretary of Education to “waive any statutory or regulatory requirement . . . for a State educational agency, local educational agency, Indian tribe, or school through a local educational agency” that receives NCLB funds and requests a waiver.⁴⁵ The only provisions that NCLB forbids the Secretary to waive are enumerated in § 7861(c).⁴⁶ Most significantly, § 7861(c) forbids the Secretary from

38. See *id.* at 10,992 (explaining that prior to 2005, the only waivers that ED granted dealt with general programming and extending the obligation period of funds).

39. See *id.* (noting that Secretary Spellings granted growth model waivers to Arkansas, Delaware, Florida, North Carolina, and Tennessee in 2006).

40. See Nick Anderson, *Bush Administration Grants Leeway on 'No Child' Rules*, WASH. POST, Nov. 22, 2005, at A1, A11 (reporting that ordinarily, NCLB would not allow subsidized tutoring in areas that have schools that are deemed “in need of improvement,” but exemptions were made for New York, Boston, and Chicago).

41. See Notice of Waivers Granted, *supra* note 37, at 10,990-91 (showing that Secretary Spellings granted eighteen waivers to states affected by Hurricane Katrina and states accommodating students displaced by the hurricane).

42. See Lois Romano & Shankar Vedantam, *'No Child' Rules to be Eased for a Year*, WASH. POST, Sept. 30, 2005, at A10 (explaining that Secretary Spellings relaxed standards for five states affected by Hurricane Katrina for a year, but denied waiving the student progress requirements because she believes the requirements are the “linchpin” of NCLB).

43. 20 U.S.C. § 7861 (Supp. V 2005).

44. See *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985) (holding that FDA's decision not to enforce actions requested by the respondents was not judicially reviewable under the Administrative Procedure Act).

45. 20 U.S.C. § 7861(a).

46. See *id.* § 7861(c) (listing the restrictions on the Secretary of Education's power to grant waivers of NCLB requirements).

waiving requirements relating to the allocation of funds,⁴⁷ the “use of Federal funds to supplement, not supplant, non-Federal funds,”⁴⁸ and “applicable civil rights requirements.”⁴⁹

To apply for a waiver, states and LEAs must submit a proposal that describes how the waiver will increase the quality of instruction and improve the students’ academic achievement.⁵⁰ State and LEA waiver proposals must also include “specific, measurable educational goals . . . and the methods to be used to measure annually such progress for meeting such goals and outcomes.”⁵¹ State and local officials must provide notice of the proposal and allow time for public comment before submitting the waiver proposal.⁵² Although NCLB specifies minimum elements that must be included in the proposal and steps that must be taken, the Act does not require the Secretary to grant a waiver if these elements have been fulfilled.⁵³

If the Secretary approves a proposal, the Secretary may grant a waiver for up to four years,⁵⁴ and the decision must be published in the Federal Register.⁵⁵ Throughout the duration of the waiver, states and LEAs must submit reports describing the waiver’s use and evaluating its progress.⁵⁶ In turn, ED must submit a report to Congress summarizing the waiver’s uses and describing any state or LEA improvements.⁵⁷ These reporting measures may help ED decide whether to extend the waivers it previously granted.⁵⁸ However, the Secretary may terminate a waiver if there has been poor performance or if a waiver is no longer needed to achieve its intended purposes.⁵⁹

47. *Id.* § 7861(c)(1).

48. *Id.* § 7861(c)(4).

49. *Id.* § 7861(c)(7).

50. *Id.* § 7861(b)(1)(B)(i)-(ii).

51. *Id.* § 7861(b)(1)(C).

52. *Id.* § 7861(b)(3)(A)-(B).

53. *See Connecticut v. Spellings*, 453 F. Supp. 2d 459, 496 (D. Conn. 2006) (asserting that without guidance or restrictions regarding the denial of waivers, Congress intended the Secretary to have “broad and unfettered discretion” when deciding which states should receive waivers).

54. *See* 20 U.S.C. § 7861(d)(1).

55. *Id.* § 7861(g).

56. *See id.* § 7861(e)(1)-(2) (noting that LEAs must submit reports to the state at the end of the second year and each subsequent year, and that states must report information they receive from LEAs to the Secretary).

57. *Id.* § 7861(e)(4).

58. *See id.* § 7861(d)(2) (allowing the Secretary to renew the waiver if it has been effective and if renewal is in the public interest).

59. *See id.* § 7861(f)

The Secretary shall terminate a waiver under this section if the Secretary determines, after notice and an opportunity for a hearing, that the performance of the State or other recipient affected by the waiver has been inadequate to justify a continuation of the waiver or if the waiver is no longer necessary to achieve its original purposes.

Although states and LEAs see the “substantive and administrative requirements” for NCLB waivers as a burden,⁶⁰ Secretary Spellings claims that obtaining information from states and LEAs through the waiver process helps other states improve the quality of educational services.⁶¹ Therefore, it is unlikely that the waiver process will be eased for states and LEAs given that ED finds the process valuable to the implementation of NCLB.

B. Judicial Review of Waivers

ED’s decisions to grant NCLB waivers are subject to judicial review under the Administrative Procedure Act (APA),⁶² and thus are protected by a procedural safeguard to agency action.⁶³ However, when the State of Connecticut sued Secretary Spellings, the district court held that not only did the court lack subject matter jurisdiction because Secretary Spellings had never withheld NCLB funds from Connecticut, the court also noted that the Secretary’s denial of waivers was not judicially reviewable.⁶⁴ The

Id.

60. See Powell, *supra* note 7, at 179 (arguing that states and LEAs should “weigh the cost of compliance with the time, effort and paperwork required to apply for a waiver” because waivers are burdensome and difficult to obtain).

61. *Virginia School Districts Offer SES*, *supra* note 35 (quoting Secretary Margaret Spellings after approving Virginia’s request: “I hope to gain valuable information about SES from these pilot programs—information that can be shared with other States and districts to help them improve the quality of these services”).

62. See 5 U.S.C. § 706(2)(A) (2000) (allowing a reviewing court to “hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”); see also *Beno v. Shalala*, 30 F.3d 1057, 1066, 1076 (9th Cir. 1994) (holding that the Secretary of Health and Human Services’ waiver to California from provisions of the Aid to Families With Dependent Children Act was subject to judicial review, subsequently invalidating the waivers granted to California).

63. See generally Recent Case, *Ninth Circuit Holds Statutory Waivers for Welfare Experiments Subject to Judicial Review*, 108 HARV. L. REV. 1208 (1995) [hereinafter *Waivers for Welfare Experiments*] (arguing that although judicial review provides necessary oversight to the waiver process, a systematic and central federal oversight process is also needed to ensure that waivers are in the public interest).

64. *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 482 (D. Conn. 2006). The court dismissed Connecticut’s claims challenging the implementation of NCLB under the Spending Clause and the Tenth Amendment. The court found that it lacked subject matter jurisdiction to review Connecticut’s claim because Secretary Spellings had not taken any action against the state. The court also dismissed Connecticut’s claim that Secretary Spellings “violated the Administrative Procedure Act (the APA) by denying the State’s requests for waiver from the Act’s requirements and also by denying certain plan amendments submitted by the State.” *Id.* at 464. Finally, the court noted that:

Case law also supports the Court’s conclusion that the Secretary’s decision to deny a waiver request is committed to agency discretion and thus not reviewable [T]here is no judicial review in circumstances that are similar to that presented by the Secretary’s denial of waiver requests under the Act.

Id. at 497. See, e.g., *Schneider v. Feinberg*, 345 F.3d 135, 149 (2d Cir. 2003) (dismissing the plaintiffs’ challenge to the Special Master’s decision because the court held that Congress intended for the Special Master to have a great deal of discretion administering the September 11th Victim Compensation Fund); *Dina v. U.S. Att’y Gen.*, 793 F.2d 473, 476 (2d Cir. 1986) (holding that the denial of a waiver request made by a foreign exchange

court reasoned that the statutory language giving the Secretary discretion to deny waiver requests did not provide “any standard—let alone a meaningful one” that a court could use to evaluate a denial of a waiver request.⁶⁵ Thus, courts may review the issuance of waivers, but cannot review the denial of waivers unless a statute provides a clear standard of review.⁶⁶

III. PROBLEMS WITH WAIVERS

Although waivers may provide agencies with a way to adapt generalized rules to special cases and promote administrative equity, they are not viable long-term solutions.⁶⁷ Because of the problems that waivers create—such as decreasing participation in NCLB and ignoring systematic problems—ED should not depend on waivers as a way to salvage NCLB.

A. *Decreasing Participation by Increasing Frustration*

One of the main problems with waivers is that states and LEAs cannot rely on receiving waivers to address problems associated with NCLB’s implementation.⁶⁸ Even though Secretary Spellings promised more flexibility, she has only issued twenty-three non-Katrina-related waivers.⁶⁹ Congress gave a great deal of discretion to the Secretary to determine

student to stay in the United States was not judicially reviewable because the U.S. Information Agency has discretion to deny waivers, and there was no criteria established by Congress to review waiver denials).

65. *Connecticut v. Spellings*, 453 F. Supp. 2d at 495.

66. *See id.* at 499 (“To construct a standard by which a court could meaningfully review the Secretary’s decision to deny a waiver of the Act’s requirements, the Court would be required to rewrite the waiver provision of the Act for Congress and guess at the precise contours of such a standard.”).

67. *See generally* Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 278 (arguing that agencies at all levels promote fairness and equity for particular cases by granting exceptions to regulations and agency rules, particularly for unforeseen economic situations); Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through An Exceptions Process*, 1984 DUKE L.J. 163, 283-89 (acknowledging that granting exceptions for hardships and unforeseen situations can be a “safety valve,” and thus, have become an important regulatory device for the Department of Energy); Jeffrey M. Sellers, Note, *Regulatory Values and the Exceptions Process*, 93 YALE L.J. 938 (1984) (reasoning that granting formal regulatory exceptions through waivers and variances is a better way to promote predictability, efficiency, and equal treatment for special cases than simply choosing not to enforce statutory provisions).

68. *See generally* Tim Conlan & John Dinan, *Federalism, the Bush Administration, and the Transformation of American Conservatism*, 37 PUBLIUS 279, 288 (2007) (stating that “the number of waivers approved by [Secretary] Spellings [has been] far outpaced by the waiver requests that she denied”).

69. *See* Notice of Waivers Granted, *supra* note 37, at 10,990 (listing all of the waivers ED has granted).

whether to issue waivers.⁷⁰ Although this level of discretion has led to allegations that ED grants waivers arbitrarily and treats states unequally,⁷¹ these allegations are difficult both to prove and to remedy when courts cannot review denied waiver requests.⁷² Furthermore, many states and LEAs cannot rely on receiving waivers because they may not have the time or money to successfully navigate the waiver process.⁷³

Although policymakers often view exemptions as methods that preserve accountability and retain parties by presenting states and LEAs with an alternative to opting out completely,⁷⁴ NCLB waivers may lead to the opposite result. Even ED stated that waivers “undermine the progress being made toward accountability.”⁷⁵ The exceptions to NCLB could become the norm when agencies weaken the rule of law by relying on waivers.⁷⁶ Furthermore, in the same way that students have less incentive to follow classroom rules if a teacher does not apply them equally to all students, states and LEAs may become frustrated and violate NCLB rules that ED has exempted other parties from following.⁷⁷ States and LEAs that are struggling with NCLB guidelines and cannot find relief through legislation, the courts, or waivers may ultimately abandon NCLB if Congress reauthorizes the Act in its current form.

70. See *Connecticut v. Spellings*, 453 F. Supp. 2d at 495-96 (finding the Act’s lack of guidance indicative of the Secretary’s broad discretion).

71. See *Utah Lawmaker: ED Plays Favorites*, 35 YOUR SCH. & THE LAW 11 (2005) [hereinafter *ED Plays Favorites*] (reporting that a Utah legislator did not believe that ED was not treating states equally when granting flexibility to NCLB because Utah has been waiting while ED approved “significant changes” to accountability plans for Florida and Massachusetts).

72. See *supra* Part II.B.

73. See *supra* note 60 and accompanying text.

74. See *Sellers*, *supra* note 67, at 948 (insisting that a formalized exceptions process with notice and comment for affected parties, published criteria for decision-making, and written decisions promotes greater and more effective participation).

75. See *Powell*, *supra* note 7, at 179 (quoting Comm. of Educ. and the Workforce, Fact Sheet: No Child Left Behind Is Flexible, <http://republicans.edlaborhouse.gov/archive/issues/108th/recess/nclbflex.htm> (last visited Jan. 5, 2008)).

76. See Harold Leventhal, *Principled Fairness and Regulatory Urgency*, 25 CASE W. RES. L. REV. 66, 78 (1974) (“Care must be taken that the rule be proved and not swallowed by the exception A safety valve is one thing, a dissipation of all force another.”).

77. See *ED Plays Favorites*, *supra* note 71 (“The relationship between Utah and ED grew tense after the state legislature approved a bill in April to give Utah’s accountability system—known as U-Pass—precedence over NCLB. The bill was passed after ED repeatedly rejected Utah’s plan to use U-Pass for NCLB.”).

B. Providing Only a Temporary Remedy

By addressing NCLB's problems on a case-by-case basis through waivers that can only extend up to four years, ED is providing only a temporary remedy to broader problems with NCLB. Unlike most agency waivers that are granted for unforeseen and temporary situations,⁷⁸ ED grants waivers for larger and systemic problems of NCLB. For example, Secretary Spellings granted a waiver to five states for one of the most contentious provisions of NCLB: measuring AYP.⁷⁹ However, many states who have not received a waiver for AYP, such as California, still struggle to meet AYP despite achieving significant gains in testing.⁸⁰ In other states, NCLB requirements have led teachers and administrators to cheat in order to meet AYP.⁸¹ Instead of fixing the AYP requirement, which has been controversial since NCLB's inception,⁸² ED has merely decided to give waivers to some states. As a result, states that did not apply for or receive AYP waivers must continue to deal with AYP requirements and penalties.⁸³ If ED continues to issue waivers to states for NCLB's larger problems, states and LEAs will have less incentive to challenge NCLB's provisions.⁸⁴

78. See, e.g., Schuck, *supra* note 67, at 283 ("Exceptions for hardship and unforeseen circumstances constitute the 'bread and butter' of the [Department of Energy] exceptions process, surely accounting for the vast majority of the [Office of Hearings and Appeals] decisions.").

79. See *supra* note 39 and accompanying text; see also Gershon M. Ratner, *Why the No Child Left Behind Act Needs to be Restructured to Accomplish Its Goals and How To Do It*, 9 D.C. L. REV. 1, 14 (2007) (claiming that "twenty states have greatly reduced the portion of students needed to be brought to proficiency," such as Michigan which "reduced the percentage of students needed to pass a test for a school to satisfy AYP from 75% to 42%"); Heise, *supra* note 8, at 143-44 (asserting that one major problem of NCLB is that sanctions for failure to achieve AYP create incentives for states to dilute their academic proficiency standards in order to avoid future sanctions).

80. See Anderson, *supra* note 40, at A11 (reporting that 56% of the 9,200 schools in California failed to make AYP even though 80% of "schools made significant gains").

81. See Brian Grow, *A Spate of Cheating—by Teachers: No Child Left Behind Link Test Results to School Funding. Is That a Recipe for Deceit?*, BUS. WK., July 5, 2004, at 94, for a description of how NCLB has led to a widespread cheating, not only by students, but by "hundreds of teachers, principals, and administrators. . . doing anything they can to boost their schools' test scores." According to Grow, "[t]ransgressions include changing students' answers on tests, handing out exams—and even answers—in advance, tutoring students with real tests, blocking weak students from taking exams, and giving students extra time to finish." *Id.* at 94-95.

82. See *Safeguards of Federalism*, *supra* note 13, at 889 ("Experts criticize [AYP] testing for teaching children to be hyper-competitive and focusing teachers only on particular aspects of performance and aptitude.") (citations omitted).

83. See Schuck, *supra* note 67, at 289 (asserting that the more effectively agencies use exceptions, the more it encourages policymakers to rely upon exceptions rather than make necessary improvements).

84. See *id.* at 283 ("By reducing the hardships and the sense of injustice suffered by those to whom a rule applies, exceptions diminish the pressure to challenge the rule itself.").

In turn, Congress will have less motivation to reform NCLB's widespread problems through legislation, which is detrimental to education policy in the long run.⁸⁵

IV. REDUCING RELIANCE ON WAIVERS

A. Legislative Remedies

Although Secretary Spellings announced that NCLB is working and "is here to stay,"⁸⁶ Congress must vote to reauthorize NCLB.⁸⁷ If Congress decides to reauthorize NCLB, it should adopt the recommendations suggested by Representative Miller and Senator Kennedy.⁸⁸ In particular, Miller and Kennedy have stressed that some of the most problematic measures of NCLB can be resolved by increasing the flexibility of NCLB itself,⁸⁹ rather than forcing states and LEAs to gain flexibility through waivers. The problems with measuring AYP, for instance, can be alleviated by amending NCLB and allowing states to find their own ways to report student achievement.⁹⁰ Miller, Kennedy, and other members of Congress have proposed amendments that would allow states to incorporate graduation and Advanced Placement Test passage rates into AYP, and

85. See *id.* at 286 ("[T]he exceptions process became a fig leaf concealing the incompetence, indecision, and political weakness of the [Department of Education's] regulatory apparatus.").

86. Dan Liston, Jennie Whitcomb & Hilda Borko, *NCLB and Scientifically-based Research: Opportunities Lost and Found*, 58 J. OF TCHR. EDUC. 99 (2007) (arguing that Secretary Spellings's claims about NCLB's effectiveness are premature).

87. See Milligan, *supra* note 15 (noting that everything in NCLB is up for review, and Congress must decide whether to extend NCLB); see also President George W. Bush, State of the Union 2007 (Jan. 23, 2007) (calling on Congress to reauthorize NCLB "without watering down standards, without taking control from local communities, and without backsliding and calling it reform").

88. See Rep. George Miller, Remarks on the Future of No Child Left Behind Education Law (July 30, 2007) (transcript available at http://www.house.gov/apps/list/speech/edlabor_dem/RelJul30NCLBSpeech.html) (outlining six features that should be the focus of NCLB reauthorization: provide more flexibility, encourage innovation, support teachers and principals, continue to hold schools accountable, improve high schools, and invest in schools); Senator Edward M. Kennedy, *How to Fix 'No Child,'* WASH. POST, Jan. 7, 2008, at A17 (suggesting that NCLB has produced noticeable improvements, but needs to be more flexible, support teachers more effectively, and provide schools with greater resources).

89. See Miller, *supra* note 88 (contending that flexibility is necessary for educators and administrators to achieve NCLB's high standards); Kennedy, *supra* note 88 (claiming that NCLB's current "one-size-fits-all approach" discourages innovation in the classroom).

90. See Miller, *supra* note 88 ("[M]any Americans do not believe that the success of our students or our schools can be measured by one test administered on one day. . . . We will allow the use of additional valid and reliable measures to assess student learning and school performance more fairly, comprehensively, and accurately.").

permit states to measure growth.⁹¹ Congress should be careful, however, not to sacrifice accountability for flexibility.⁹² By incorporating suggestions to increase state and LEAs flexibility and increasing NCLB funding,⁹³ ED can reduce state and LEAs' reliance on waivers.

Congress should also look at those provisions that states and LEAs have asked ED to waive if Congress decides to amend and reauthorize NCLB. For example, Congress should allow more subsidized tutoring given that ED granted twelve waivers to LEAs requesting the use of subsidized tutoring.⁹⁴ In addition to providing a temporary fix for NCLB provisions, waiver requests highlight some of the most common and pressing problems with having rigorous proficiency standards in a national policy for education.⁹⁵ Finally, Congress should also evaluate the process that ED uses to examine waiver proposals. Congress does not need to go as far as prescribing guidelines that dictate when ED must accept or deny a waiver proposal—ED works with NCLB daily and is thus better suited to determine how to issue waivers. However, by looking at the reports that ED provides to Congress⁹⁶

91. See, e.g., Paley, *'No Child' Needs to Expand*, *supra* note 11 (explaining that Congressman George Miller believes that schools should also be measured by "graduation rates or the number of students passing Advanced Placement exams"); Wallis & Steptoe, *supra* note 4, at 37-38 (suggesting that states should be able to measure AYP using growth models, a system which measures success by tracking student progress which is defined by how much students improve rather than whether students are all testing at a specific grade level); Milligan, *supra* note 15 (highlighting a bill introduced by two Republican members of Congress that would amend NCLB and allow schools to have more time to achieve test standards for children learning English, and not punish schools with "small populations of low-achieving students" as harshly as schools with "widespread problems").

92. See Hoff, *Bush Presses NCLB Renewal*, *supra* note 19, at 16 (revealing that President Bush threatened to veto any bill that weakens NCLB's accountability system); Paley, *'No Child' Needs to Expand*, *supra* note 11 (reporting that many Republican members of Congress, as well as civil rights groups such as Citizens' Commission for Civil Rights and the Education Trust, are concerned that adding too much flexibility to NCLB will "undermine transparency for parents and the ability to hold schools accountable for student performance"); Saiger, *supra* note 10, at 1722 (arguing that suburban schools districts who are "at little risk of disestablishment under state accountability programs," have a larger incentive under NCLB's national accountability system to "reform their treatment of difficult-to-educate students").

93. See Milligan, *supra* note 15, at A1 (noting that Sen. Kennedy believes that "states are still not getting the money they need to develop appropriate tests and provide the extra help students need to make the test-score improvements demanded in the law").

94. See Notice of Waivers Granted, *supra* note 37, at 10,990 (showing that ED granted waivers allowing six LEAs to use subsidized tutoring instead of public school choice in the first year of school improvement and granted waivers allowing six more LEAs to use subsidized tutoring even though the district was identified for improvement).

95. See *supra* Part III.B.

96. See *supra* note 57 and accompanying text.

and examining the proposals that ED has granted and denied, Congress can provide oversight that will complement the judicial review of the waiver process.⁹⁷

B. Agency Remedies

ED can also reduce reliance on NCLB waivers by exercising more prudence. Although Secretary Spellings should not stop granting waivers, ED should ensure that the waiver approval process is transparent and fair to all regulated bodies.⁹⁸ Currently, there is no public record describing why ED granted or denied waiver applications.⁹⁹ Thus, many states cannot comprehend why ED denied their waiver requests while granting other states' waivers based on similar requests.¹⁰⁰

Because Congress gave the Secretary broad discretion to review waiver applications, ED could achieve transparency by articulating more clearly how it reviews waiver applications.¹⁰¹ For example, ED could promulgate guidelines describing that it is more likely to grant waivers to states with financial hardships. ED could also clarify whether it prefers granting waivers to small or large populations, and whether it prefers short or long term proposals. ED should then give feedback to states regarding their proposals, explaining its final decision based on these guidelines. Although guidelines and feedback would not help states challenge waivers that ED has denied,¹⁰² they could reduce frustration with the waiver process. States and LEAs would be able to make more informed choices about whether to use their time and resources to apply for a waiver.¹⁰³ Additionally, applicants who did not receive waivers would know why ED had rejected their proposals.

97. See *Waivers for Welfare Experiments*, *supra* note 63 at 1211 (“Judicial oversight alone . . . cannot remedy the dissatisfaction with the existing waiver process.”).

98. See *Aman*, *supra* note 67, at 302 (“[R]andom, unprincipled granting of exceptions could easily undermine a regulatory scheme.”).

99. See 20 U.S.C. § 7861(g) (requiring that the Secretary must give notice, but not an explanation, when granting a waiver); *Notice of Waivers Granted*, *supra* note 37, at 10,990 (listing the waivers and descriptions of waivers ED granted from the date of NCLB’s enactment through 2006, but not providing information as to why the Secretary chose to waive those requests).

100. See, e.g., *ED Plays Favorites*, *supra* note 71 (contrasting ED’s unjustified months-long delay in reviewing Utah’s proposal while approving proposals from Florida and Massachusetts).

101. See *supra* note 53 and accompanying text.

102. See *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 496 (D. Conn. 2006) (holding that without a specific statutory requirement stating that the Secretary must grant a waiver if particular elements are met, the court cannot review waiver denials because there is no standard governing waiver denials).

103. See *supra* note 60 and accompanying text (recognizing the burdens of the waiver application process).

ED should grant waivers only for special cases and treat similar special cases equally.¹⁰⁴ Although waivers are necessary in emergency circumstances, such as Hurricane Katrina,¹⁰⁵ ED should not grant a limited number of waivers for problems that face the vast majority of states and LEAs. Instead, ED should decide whether to exempt all parties regulated from problematic provisions or determine whether to work with Congress to revise the provision. By limiting individual waivers to special cases, ED can reduce frustration and allegations of unequal treatment.¹⁰⁶

CONCLUSION

NCLB's implementation problems demonstrate the tension between a broad national policy and its application to states and LEAs who have individual circumstances.¹⁰⁷ As Congress decides whether to reauthorize NCLB, members of Congress have a prime opportunity to address NCLB's problems. One of the many revisions necessary to improve NCLB is increasing flexibility. Although flexibility can help states and LEAs raise their schools to national standards,¹⁰⁸ the flexibility needs to come from NCLB itself rather than waivers. In particular, Congress should amend NCLB to allow all states to use alternative methods to measure AYP.¹⁰⁹ Permitting states to use different ways to measure AYP is a reasonable way to increase flexibility and retain accountability, and therefore should not be limited to states who apply and receive waivers. Even though states and LEAs may now see waivers as a more viable approach to increase flexibility than legislative action and judicial challenges, waivers are an unreliable and temporary way to alleviate problems. In the same way that members of Congress came together to overwhelmingly pass NCLB, Congress now has the responsibility to address the problems that have arisen since NCLB's implementation.

104. See Sellers, *supra* note 67, at 939, 944-46. The author explains that special cases are "isolated hardships" and conflicts that rule-makers failed to anticipate. *Id.* The author emphasizes that agencies should be required to write down reasoned decisions to make sure that exceptions are thought through and used as precedent for similar special cases.

105. See *supra* note 41 and accompanying text.

106. See *supra* Part III.A.

107. See Sellers, *supra* note 67, at 938 (contending that special exceptions for special cases can reduce the tension between general rules and individualized application that is characteristic of all legal systems).

108. See Wallis & Steptoe, *supra* note 4, at 41 (reasoning that local officials who work more closely with students are better equipped to effect "school turnaround").

109. See *supra* notes 91-92 and accompanying text.