The Road to a National Curriculum: The Legal Aspects of the Common Core Standards, Race to the Top, and Conditional Waivers

By Robert S. Eitel and Kent D. Talbert***
with contributions from Williamson S. Evers

Note from the Editor:

This paper examines the U.S. Department of Education's administration of the Race to the Top Fund, Race to the Top Assessment Program, and other programs. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the Department's regulations. To this end, we offer links below to different sides of this issue and invite responses from our audience. To join the debate, you can e-mail us at info@fed-soc.org.

Related Links:

- No Child Left Behind Act of 2001: http://www2.ed.gov/policy/elsec/leg/esea02/beginning.html#sec1
- Race to the Top Fund, Purpose: http://www2.ed.gov/programs/racetothetop/index.html
- Race to the Top Assessment Program, Purpose: http://www2.ed.gov/programs/racetothetop-assessment/index.html
- Elementary and Secondary Education Act (ESEA) Flexibility: http://www.ed.gov/esea/flexibility
- Press Release, U.S. Department of Education, Obama Administration Releases Final Application for Race to the Top-Early Learning Challenge (Aug. 23, 2011): http://www.ed.gov/news/press-releases/obama-administration-releases-final-application-race-top-early-learning-challeng
- Post of Anita Kumar to Virginia Politics Blog on WashingtonPost.com: McDonnell on MSNBC: Race to the Top Too Burdensome (June 1, 2010, 07:52 EDT): http://voices.washingtonpost.com/virginiapolitics/2010/06/mcdonnell_explains_decision_to.html
- Seyward Darby, The New Republic: Defending Obama's Education Plan, NPR.org, July 29, 2010: http://www.npr.org/templates/story/story.php?storyId=128843021

Late in the afternoon on April 11, 1965, President Lyndon B. Johnson sat with his childhood school teacher, Mrs. Kate Deadrich Loney, on the lawn of the former Junction Elementary School in Johnson City, Texas. The reason for the meeting of a bespectacled retired teacher and her famous former pupil was the signing of the Elementary and Secondary School Act of 1965 ("ESEA"). With the President's signature, the federal government's role in elementary and secondary education began to increase rapidly, with Congress establishing the U.S. Department of Education ("Department") in 1979. Today, the ESEA authorizes funding for key portions of school district budgets across the country. Despite this leverage, the Department has generally adhered to statutory limitations disallowing federal agency involvement in K-12 curriculum, courses, or instruction, focusing instead on issues such as aid for disadvantaged students, accountability, civil rights, and evaluation. Since 2009, this has changed: Actions taken by the Obama Administration signal an important policy shift in the nation's education policy, with the Department placing the nation on the road to federal direction over elementary and secondary school curriculum and instruction.

With only minor exceptions, the General Education Provisions Act ("GEPA"), the Department of Education Organization Act ("DEOA"), and the ESEA, as amended by the No Child Left Behind Act of 2001 ("NCLB"), ban federal departments and agencies from directing, supervising, or controlling elementary and secondary school curriculum, programs of instruction, and instructional materials.[1] The ESEA also protects state prerogatives on Title I content and achievement standards.[2] At the direction of the present Administration, however, the Department has begun to slight these statutory constraints. Since 2009, through three major initiatives—the Race to the Top Fund,[3] the Race to the Top Assessment Program,[4] and conditional NCLB waiver guidance (the "Conditional NCLB Waiver Plan")[5]—the Department has created a system of discretionary grants and waivers that herds state education authorities into accepting elementary

** Robert S. Eitel is a founding member of Talbert & Eitel, PLLC, an education and employment law firm in Washington, D.C. He advises clients on education-related legislation, regulations, guidance, and cases. His clients include institutions of higher education, charter school organizations, accrediting agencies, professional and trade associations, advocacy groups, and non-profit entities. From 2006 to 2009, Mr. Eitel served as Deputy General Counsel of the U.S. Department of Education.*

*** Kent D. Talbert is a co-founder of Talbert & Eitel, PLLC. He advises clients on education-related legal matters. He served as General Counsel of the U.S. Department of Education from 2006-2009. As General Counsel, Mr. Talbert served as the chief legal adviser to Secretary of Education Margaret Spellings, providing advice on a broad range of legal and policy matters, including the reauthorization of the Higher Education Act of 1965 (HEA), and the drafting and implementation of regulations under the No Child Left Behind Act of 2001 (NCLB).*

This paper was originally published by Pioneer Institute and is republished here with permission.

and secondary school standards and assessments favored by the Department.[6] Left unchallenged by Congress, these standards and assessments will ultimately direct the course of elementary and secondary study in most states across the nation, running the risk that states will become little more than administrative agents for a nationalized K-12 program of instruction and raising a fundamental question about whether the Department is exceeding its statutory boundaries. This road to a national curriculum has been winding and highly nuanced—and, as we will see below, full of irony.

Five parts compose this paper. Part I analyzes the limitations that GEPA, the DEOA, and the ESEA place on the Department. Part II provides background on the rise of the Common Core State Standards Initiative (CCSSI). Part III gives an overview of the Race to the Top Fund and illustrates how the Race to the Top Fund has encouraged states to adopt Common Core standards. Part IV reviews the components of the two awardees under the Department's Race to the Top Assessment Program that are working to develop assessments and align them with the Common Core standards. These assessments are critical, as they are designed to link the Common Core standards to a common (that is, national) content for curricula and instructional materials. Part V discusses how the Department is using ESEA waiver authority to consolidate the nationalizing effects of the CCSSI and the Partnership for Assessment of Readiness for College and Careers ("PARCC") and SMARTER Balanced Assessment Consortium ("SBAC") assessments. The final part provides conclusions and recommendations for policymakers and interested observers.

I. Limitations Imposed on the Department by Congress

Historically, legislative prohibitions on federal direction, control, or supervision of curricula, programs of instruction, and instructional materials have limited the influence of the federal government in the elementary and secondary school arena. This paper discusses each authority below.

A. General Education Provisions Act

A long-standing law governing the administration of federal education programs, GEPA includes one of the first limitations upon federal involvement in curriculum.[7] Though the law has changed over the years from its earliest version, the substance remains the same. In its current form, the prohibition is a broad-sweeping rule of construction—

> No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.[8]

An "applicable program" is "any program for which the Secretary [of Education] or the Department has administrative responsibility as provided by law" but excludes Higher Education Act programs.[9] Under the prohibition, one must construe federal education programs not to grant authority to any "department, agency, officer, or employee of the United States" to exercise any "direction, supervision, or control over the curriculum, [or] program of instruction . . . of any educational institution, school, or school system."[10] The rule of construction against direction, supervision, or control also applies to the "selection of library resources, textbooks, or other printed or published instructional materials"[11] and reaches federal departments and agencies other than the Department.[12]

B. Department of Education Organization Act

Enacted in 1979, the DEOA established the Department of Education as an executive branch department administered under the supervision and direction of the Secretary of Education.[13] Similar but not identical to the curriculum prohibition in GEPA, the DEOA prohibits the Secretary and other officers of the Department from exercising direction, supervision, or control over curriculum, as well as over the selection and content of library resources, textbooks, and other instructional materials.[14] The one exception to the general prohibition is if such activities are "authorized by law."[15] Framed as a rule of construction, the prohibition states,

> No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.[16]

In addition to the direct language limiting the Secretary's and officers' authority in curriculum, Congress included clear statements in the law that the creation of a new Department of Education does not displace the role of state and local governments in education. Primary authority for education continues with state and local governments, as evidenced by Finding 4 of the DEOA: "[I]n our Federal system, the primary public responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the States."[17] In addition, when it created the Department, Congress reaffirmed the limitations placed upon federal involvement in education:

> It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States.[18]

The legislative history of the DEOA confirms the primary role of state and local governments in education. In testimony before the Senate Governmental Affairs Committee, Mary Berry, the Assistant Secretary for Education of the Department of Health, Education, and Welfare, warned that the federal presence in education "has and must continue to be a secondary role—one that assists, not one that directs local and State governments, which have historically shouldered the primary responsibility for . . . public education."[19] In like manner, Senator David Durenberger stressed the importance of Congressional oversight so as to preserve the diversity of state and local approaches to education:

> The States have a rich mixture of programs to respond to their citizens' educational needs. A centralized approach to education would be fatal to this diversity . . . If Congress does not exercise proper oversight, State and local jurisdiction over education will be threatened by the federal government regardless of whether education is in a new department or remains a division of an existing department.[20]

Members of the U.S. House of Representatives also expressed reservations. Representative Leo J. Ryan described the enabling legislation as "the worst bill I have seen . . . . It is a massive shift in the emphasis by the Federal Government from supporting the local efforts of school districts and State departments of education to establishing and implementing a national policy in the education of our children."[21] One can find a strong statement of concern in the Dissenting Views of Representatives John N. Erlenborn, John W. Wydler, Clarence J. Brown, Paul N. McCloskey, Jr., Dan Quayle, Robert S. Walker, Arlan Stangeland, and John E. (Jack) Cunningham: "[T]his reorganization . . . will result in the domination of education by the Federal Government . . . . [The legislation is] a major redirection of education policymaking in the guise of an administrative reorganization—a signal of the intention of the Federal government to exercise an ever-expanding and deepening role in educational decision-making."[22] These members concluded by raising the possibility of the Department becoming a national school board: "If we create this Department, more educational [decision-making] as to course content, textbook content, and curriculum will be made in Washington at the expense of local diversity. The tentacles will be stronger and reach further. The Department of Education will end up being the Nation's super [school board]."[23] With these criticisms in the record, the Department opened its doors on May 4, 1980.

C. Elementary and Secondary Education Act of 1965

Congress had set limits on federal involvement in elementary and secondary education well before the establishment of the Department. With language comparable to GEPA and DEOA, the ESEA includes a rule of construction limiting the ability of federal officers and employees to mandate, direct, or control curriculum:

> Nothing in this Act 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 and local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.[24]

Accordingly, the ESEA denies authority to officers or employees of the federal government to mandate, direct or control curriculum or programs of instruction.[25] Additionally, the ESEA goes further than GEPA and DEOA to limit directly the use of federal funds for a curriculum. Under 20 U.S.C. § 7907 (b), "no funds provided to the Department under this Act may be used . . . to endorse, approve or sanction any curriculum designed to be used in an elementary school or secondary school."[26]

The intent of Congress is clear: The federal government cannot mandate, direct, supervise, or control curriculum or programs of instruction.[27] Indeed, the legislative history of the DEOA underscores this, as does its statement of intent "to protect the rights of State and local governments . . . in the areas of educational policy[]" and to "not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and local school systems."[28] Yet, as explained below, the Department is evading these prohibitions and using proxies to cement national standards and assessments that will inevitably direct the content of K-12 curriculum, programs of instruction, and instructional materials across the nation.

II. Rise of the Common Core Standards

To appreciate the authors' concerns about the Department's incremental march down the road to a national curriculum, one must first understand the Common Core State Standards Initiative ("CCSSI"), a creature not of state legislatures but rather of two Washington, D.C.-based organizations, the National Governors Association's Center for Best Practices ("NGA Center") and the Council of Chief State School Officers ("CCSSO"), which coordinated the CCSSI to establish voluntary, national elementary and secondary school education standards in mathematics and English language arts.[29] Other organizations provided advice and guidance concerning the direction and shape of the CCSSI; they include Achieve, Inc., ACT, Inc., the College Board, the National Association of State Boards of Education, and the State Higher Education Executive Officers.[30] In addition, the Bill & Melinda Gates Foundation and the Charles Stewart Mott Foundation provided financial backing, as did others.[31]

The standards define the knowledge and skills students should have in their K-12 education in order to graduate from high school and to succeed in entry-level, credit-bearing college courses and in workforce training programs.[32] Advocates of the Common Core standards argue that they are: (1) aligned with college and work expectations; (2) clear, understandable and consistent; (3) built upon strengths and lessons of current state standards; (4) informed by other top performing countries;[33] and (5) evidence-based.[34] In addition, CCSSI supporters contend that the standards include rigorous content and application of knowledge through high-order skills.[35]

In developing the standards, the NGA Center and CCSSO consulted with representatives from participating states, a wide

range of educators, content experts, researchers, national organizations, and community groups.[36] For purposes of development and receipt of public comments, the writers of the standards divided the standards into two categories: (1) college- and career-ready standards (which address what students are expected to have learned when they have graduated from high school); and (2) K-12 standards (which address expectations for elementary school through high school).[37] Common Core supporters released draft college- and career-ready graduation standards for public comment in September of 2009 and draft K-12 standards in March of 2010.[38] Announced on June 2, 2010, the final K-12 Common Core State Standards ("CCSS") incorporated the college- and career-ready standards.[39] This marked the final step in the development of the Common Core standards. After development, states began to adopt the standards. Currently, forty-five states, the District of Columbia, and two territories have adopted the CCSS in English language arts and mathematics.[40]

The Common Core standards have generated intense debate and controversy. Proponents of the CCSS argue the standards will provide multiple benefits to students:

> The standards will provide more clarity about and consistency in what is expected of student learning across the country . . . . This initiative will allow states to share information effectively and help provide all students with an equal opportunity for an education that will prepare them to go to college or enter the workforce, regardless of where they live. . . . [Common standards] will ensure more consistent exposure to materials and learning experiences through curriculum, instruction, and teacher preparation among other supports for student learning.[41]

Other supporters argue that the Common Core standards "will ensure that we maintain America's competitive edge, so that all of our students are well prepared with the skills and knowledge necessary to compete with not only their peers here at home, but with students from around the world."[42]

Critics vigorously dispute the rigor of the Common Core standards and contend that they will not produce better results among students.[43] Recent testimony by Professor Jay P. Greene in the U.S. House of Representatives before the Subcommittee on Early Childhood, Elementary, and Secondary Education illustrates this criticism:

> [T]here is no evidence that the Common Core standards are rigorous or will help produce better results. The only evidence in support of Common Core consists of projects funded directly or indirectly by the Gates Foundation in which panels of selected experts are asked to offer their opinion on the quality of Common Core standards. Not surprisingly, panels organized by the backers of Common Core believe that Common Core is good. This is not research; this is just advocates of Common Core re-stating their support. The few independent evaluations of Common Core that exist suggest that its standards are mediocre and represent little change from what most states already have.[44]

Similarly, two other experts, Professor Sandra Stotsky and Ze'ev Wurman, found that by grade 8 the mathematics standards were "a year or two behind the National Mathematics Advisory Panel's recommendations, leading states, and . . . international competition."[45] They also concluded that the Common Core's mathematics and English language arts standards do not support the conclusion that the standards "provide a stronger and more challenging framework for the mathematics and English language arts curriculum than . . . California's current standards and Massachusetts' current (2001) and revised draft (2010) standards do."[46] Of significant note, Dr. Stotsky and Mr. Wurman view the Common Core project as a "laudable effort to shape a national curriculum."[47] Still, other critics worry about the expense of implementing the Common Core standards.[48]

III. The Common Core Standards and the Race to the Top Fund

In early 2009, President Obama signed into law the American Recovery and Reinvestment Act (ARRA),[49] which provided funds for the Department's Race to the Top program, consisting largely of the Race to the Top Fund and the Race to the Top Assessment Program.[50] The Race to the Top Fund is a competitive grant program designed with the hope to spur innovation in elementary and secondary education. With $4 billion to disburse, the program attracted applications from forty-six states.[51] Supporters of the Race to the Top Fund contend that it requires states to create conditions for reform by improving student achievement, narrowing achievement gaps, increasing graduation rates, and ensuring students are prepared for success in college and careers. The Race to the Top Fund attempts reform in four areas: (1) adopting internationally benchmarked standards and assessments that prepare students for success in college and the workplace; (2) building data systems that measure student success and inform teachers and principals about how they can improve their practices; (3) increasing teacher and principal effectiveness and achieving equity in their distribution; and (4) turning around the lowest-achieving schools.[52]

The Race to the Top Fund also includes several "priorities."[53] Priority 1 is an "absolute priority" for a Comprehensive Approach to Education Reform.[54] Priority 2 is a "competitive preference priority" for Emphasis on Science, Technology, Engineering, and Mathematics (STEM).[55] Priorities 3-6 are "invitational priorities," respectively, relating to innovations in early learning, the expansion and use of longitudinal data systems, coordination of elementary and secondary education with postsecondary learning, and school-level reform efforts.[56] With respect to implementation of the ARRA, the Department first published its Notice of Proposed Priorities, Requirements, Definitions, and Selection Criteria for the Race to the Top Fund on July 29, 2009.[57] Thereafter, it received comments from over 1,000 individuals and organizations, including teachers, principals, governors, chief state school officers, and others.[58] The Department invited applications for Phase 1 of the competition on November 18, 2009,[59] and for Phase 2 on April 14, 2010.[60] Announced on March 29, 2010, Delaware and Tennessee won the Phase 1 competition.[61] Phase 2 winners, announced on August 24, 2010, were the District of Columbia, Florida, Georgia, Hawaii, Maryland, Massachusetts, New York, North Carolina, Ohio, and Rhode Island.[62]

In order to participate in the Race to the Top Fund, the Department required each state to adopt common K-12 standards.[63] The State Reform Conditions Criteria of the Race to the Top Fund required each state to demonstrate work toward jointly developing and adopting a common set of evidence-based, internationally benchmarked K-12 standards.[64] Indeed, the guidance to the peer reviewers of the Race to the Top applications points to an effort to compel a single set of standards: A state earns "high" points if it is part of a standards consortium consisting of a *majority* of states that jointly develop and adopt common standards.[65] Conversely, a state receives "medium" or "low" points "if the consortium includes one-half of the States in the country or less."[66] Importantly, the "internationally benchmarked standards" refer to a "common set of K-12 standards" that the Department defines as "a set of content standards that define what students must know and be able to do and that are substantially identical across all states in a [standards] consortium. A State may supplement the common standards with additional standards, provided that the additional standards do not exceed 15 percent of the State's total standards for that content area."[67] As their applications show, the twelve winners of the Race to the Top Fund competition adopted or indicated their intent to adopt the CCSS for purposes of meeting the requirement of "adopting internationally benchmarked standards."[68] Although the Department did not expressly mandate states to adopt the CCSS in order to participate in the Race to the Top Fund competition, it did not have to do so, as nearly every state had adopted, or was about to adopt, the CCSS—many induced to do so by the prospect of Race to the Top grants. While remaining facially neutral, the Department could rest easy in the knowledge that most states would come to the competition having already signaled intent to adopt or having adopted the CCSS.[69]

Standards drive curriculum, programs of instruction, and the selection of instructional materials. A change to common K-12 standards will inevitably result in changes in curriculum, programs of instruction, and instructional materials to align with the standards. This is critical to understanding the importance of the road that the Department has taken. As Dr. Greene has stated, "To make standards meaningful they have to be integrated with changes in curriculum, assessment and pedagogy."[70] Secretary Duncan has echoed this view, noting the linkage between standards, curriculum, and assessments: "[C]urriculum can only be as good as the academic standards to which the assessments and curriculum are pegged."[71]

School districts, too, believe that new common standards require a change in curriculum. In September 2011, the Center on Education Policy published survey results finding that 64% of the school districts in states adopting the CCSS agreed or strongly agreed that those standards would require new or substantially revised curriculum materials in math; 56% similarly agreed for English language arts.[72] These survey results further show that 55% of districts in CCSS-adopting states have already begun to develop or purchase (or will shortly do so) new math curriculum materials aligned with the CCSS.[73] For English language arts, 53% have done so or will do so.[74]

The Department understands that the adoption of the Common Core standards requires changes in curriculum. Perhaps more importantly, it also knows that these standards will displace existing state standards—"replace the existing patchwork of State standards"[75]—and effectively nationalize not only state standards but also curricular content. The Department published this exchange between the Department and members of the public responding to the Department's Notice of Final Priorities for the Race to the Top Fund:

> *Comment*: Several commenters recommended that we clarify the meaning of a "significant number of States" within a consortium [that develops and adopts a common set of K-12 standards]. One recommended that the number of States be set at a minimum of three if the quality of their common standards is comparable to the common standards developed by members of the National Governor's Association and the Council of Chief State School Officers. Others suggested that instead of a minimum number, the criterion should focus on the importance or potential impact of the proposed work.
>
> *Discussion*: The *goal of common K-12 standards is to replace the existing patchwork of State standards* that results in unequal expectations based on geography alone. *Some of the major benefits of common standards will be* the shared understanding of teaching and learning goals; consistency of data permitting research on effective practices in staffing and instruction; and *the coordination of information that could inform the development and implementation of curriculum, instructional resources,* and professional development. The Department believes that the cost savings and efficiency resulting from collaboration in a consortium should be rewarded through the Race to the Top program when the impact on educational practices is pronounced. *And generally, we believe that the larger the number of States within a consortium, the greater the benefits and potential impact.*[76]

The Department's concerns about "a patchwork of State standards" and unequal geographic expectations do not reflect a proper understanding of America's federal system, the role of the states in setting education policy, or the statutory prohibitions limiting the Department's involvement in curriculum matters. This view—that "the larger the number of States" in setting standards, the better[77]—underscores the Department's desire to herd the states into accepting the CCSS, which was arguably the only standards-based consortium with a number of states large enough to please the Department during the Race to the Top competition.

Several education leaders have severely criticized the Department for using the Race to the Top Fund to drive states toward the Common Core standards without regard to the thoughtful initiatives that may have been taken by individual states not participating in a consortium. For example, Texas Education Commissioner Robert Scott has expressed concerns about the CCSS leading to national standards and the eventual nationalization of schools.[78] In a November 25, 2009, letter to Senator John Cornyn of Texas, Commissioner Scott wrote,

> I believe that the true intention of this effort [Common Core Standards Initiative] is to establish one set of national

education standards and national tests across the country. Originally sold to states as voluntary, states have now been told that participation in national standards and national testing would be required as a condition of receiving federal discretionary grant funding under the American Recovery and Reinvestment Act (ARRA) administered by the [Department]. The effort has now become a cornerstone of the Administration's education policy through the [Department's] prioritization of adoption of national standards and aligned national tests in receiving funds.[79]

Commissioner Scott continued in that vein:

With the release of the RTTT [Race to the Top Fund] application, it is clear that the first step toward nationalization of our schools has been put into place. I do not believe that the requirements will end with the RTTT; I believe that USDE will utilize the reauthorization of the Elementary and Secondary Education Act (ESEA) to further the administration's takeover of public schools . . . .[80]

Within four months of Commissioner Scott's letter to Senator Cornyn, the Department wrote that "[i]t is the expectation of the Department that States that adopt assessment systems developed with Comprehensive Assessment Systems grants [Race to the Top Assessment Program] will use assessments in these systems *to meet the assessment requirements in Title I of the ESEA*."[81] Like the requirement that a state participate in a Common Core standards consortium composed of a large number of states, the Race to the Top Assessment Program has also served to "grease" the nationalizing influence of these initiatives.

IV. Race to the Top Assessment Program

Also authorized by the ARRA, the Race to the Top Assessment Program provides $362 million in funding "to consortia of states to develop assessments . . . and measure student achievement against standards designed to ensure that all students gain the knowledge and skills needed to succeed in college and the workplace."[82] The new assessments seek to measure student knowledge and skills against a common set of college-and career-ready standards[83] in mathematics and English language arts.[84] The assessments also must measure student achievement and student growth over a full academic year, as well as include "summative assessment components" in mathematics and English language arts administered at least annually in grades 3 through 8 and at least once in high school.[85] The assessments must evaluate all students, including English learners and students with disabilities, and produce data (including student achievement and student growth data) for use in evaluating: (1) school effectiveness; (2) individual principal and teacher effectiveness; (3) principal and teacher professional development and support needs; and (4) teaching, learning, and program improvement.[86] As with the Race to the Top Fund, the Race to the Top Assessment Program effectively promotes the Common Core standards. More importantly, this program funds the consortia that are developing assessments that will, in turn, inform and animate K-12 curriculum and instructional materials based on Common Core standards.

The Race to the Top Assessment Program is not the federal government's first effort to establish nationwide testing. In his State of the Union Address on February 4, 1997, President Clinton proposed to "lead an effort over the next two years to develop national tests of student achievement in reading and math."[87] This evoked a strong congressional response. Congress prohibited the use of Fiscal Year 1998 funds to "field test, pilot test, implement, administer or distribute in any way, any national tests,"[88] required a detailed review of the Department's test development contract, directed a study and report by the National Academy of Sciences, and, most significantly, prohibited the federal government from "requir[ing] any State or local educational agency or school to administer or implement any pilot or field test in any subject or grade" or "requir[ing] any student to take any national test in any subject or grade."[89] Congress also included similar prohibitions on testing in the ESEA and GEPA, with limited exceptions.[90] As carried out by the consortia, the Race to the Top Assessment Program should raise similar concerns for Congress.

As a part of the Race to the Top Assessment Program competition, each state within the applying consortium must provide assurances that it will adopt common college- and career- ready standards and remain in the consortium.[91] Thus, rather than permitting state and local authorities to use standards and assessments that uniquely fit a given state as required by the ESEA, the Race to the Top Assessment Program requires each state in the consortium to use common standards across the respective states of the consortium. The result is that the Race to the Top Assessment Program moves states away from standards and assessments unique to a given state and into a new system of common standards and assessments across the consortia states. With this major shift (and so as to continue to curry favor with the Department), participating (that is, most) states will now be compelled to change curriculum and instruction to align with the common standards and assessments.

On September 2, 2010, Secretary Duncan announced the winners of the Race to the Top Assessment Program.[92] Two large state consortia won initial awards totaling $330 million—the Partnership for Assessment of Readiness for College and Careers Consortium ("PARCC") and the SMARTER Balanced Assessment Consortium ("SBAC").[93] With these federal funds, the consortia have begun to design and implement comprehensive assessment systems in mathematics and English language arts for use in the 2014-2015 school year.[94] Both PARCC and SBAC also received supplemental awards in the amounts of $15.9 million each "to help participating States successfully transition to common standards and assessments."[95]

Through the Race to the Top Assessment Program, the Department displaces state assessment autonomy with new common assessments for all states in the consortia, directed and influenced by $362 million in federal funds and program requirements.[96] As the Secretary stated, "[t]he Common Core standards developed by the states, coupled with the new generation of assessments, will help put an end to the insidious practice of establishing 50 different goalposts for educational

success."[97] Further, other remarks from the Secretary underscore the far-reaching impact that the assessment consortia will have on curricula and instructional materials:

> And both consortia will help their member states provide the tools and professional development needed to assist teachers' transitions to the new assessments. PARCC, for example, will be *developing curriculum frameworks* and ways to share great lesson plans. The SMARTER Balanced Assessment coalition will *develop instructional modules* . . . to support teachers in understanding and using assessment results.[98]

Describing the work of PARCC and SBAC to include "developing curriculum frameworks" and "instructional modules,"[99] the senior leadership of the Department clearly understands that the assessment consortia will drive curriculum and instruction.

Significantly, in the Department's formal award notice to PARCC, it also announced a supplemental award of $15.9 million "to help participating States successfully transition to common standards and assessments."[100] PARCC's top priority for this award is "to help its member states make a successful transition from current state standards and assessments to the implementation of Common Core State Standards (CCSS) and PARCC assessments by the 2014-2015 school year."[101] In supporting the priority, PARCC's strategy includes "[c]ollaborative efforts to develop the highest priority curricular and instructional tools . . . ."[102] Among other things, PARCC intends to use the funds awarded by the Department for instructional tools, model instructional units, model 12th grade bridge courses, and a digital library of tools[103]:

- "The supplemental funds provide an important opportunity to . . . strengthen PARCC's plans by developing a robust set of high quality instructional tools that will support good teaching, help teachers develop a deeper understanding of the CCSS and their instructional implications, and provide early signals about the types of student performance and instruction demanded by the PARCC assessments."[104]
- "[The supplemental funds will be used to] [d]evelop a framework that will define the priority tool set most important for improving teaching and learning and for supporting implementation of the CCSS and PARCC assessments. This priority tool set may include a mix of instructional, formative assessment, professional development and communication tools, for use by teachers, students and administrators."[105]
- "[The PARCC will] [f]ocus the development of tools on a set of robust, high-quality model instructional units that highlight the most significant advances in the CCSS and PARCC assessments."[106]
- "PARCC plans to use some of the supplemental resources to develop college readiness tools aligned to the CCSS and PARCC assessments, such as model 12th grade bridge courses for students who don't score college ready on the high school assessments, or online tools to help diagnose students' gaps in college-ready skills."[107]
- "PARCC's initial proposal calls for the development of a digital library of tools . . . . The broader set of tools in the library will provide choices and supplemental materials (beyond the instructional units) for teachers to use. The development of the library also will identify materials that can be used to inform the development of the instructional units or even become the instructional units, perhaps with minor modification."[108]

In its November 22, 2011, webinar entitled *Model Content Frameworks for ELA/Literacy*, PARCC goes a step further, suggesting possible uses of model content frameworks to "[h]elp inform curriculum, instruction, and assessment" as member states transition to the CCSS.[109] Through its use of federal funding, PARCC also provides direct "Guidance for Curriculum Developers" to "us[e] the module chart with the standards to sketch out potential model instructional unit plans," and to "recogniz[e] the shifts in the standards from grade to grade and us[e] these shifts as grade-level curricula are developed and as materials are purchased to align with the curricula."[110]

As with PARCC, SBAC received a supplemental award of $15.9 million to "help" states move to common standards and assessments.[111] SBAC notes that it will use the extra federal funding "to carry out activities that support its member states as they begin to implement the Common Core State Standards, including . . . curriculum materials . . . ."[112] In its *Supplemental Funding Scope Overview Table* dated January 16, 2011, SBAC directly mentions the use of federal funds to support curriculum materials, as well as a digital library.[113] Under the supplemental award, SBAC intends to allocate federal funds—

- "to develop curriculum materials, identify which efforts are aligned to the SBAC learning progressions, and define key approaches to teaching and learning"[114]
- "[to] contract[] with professional organizations, universities, and non-profit groups . . . to adapt their curriculum materials to SBAC specifications to upload to the digital library"[115]
- "[to upload] SBAC-approved curriculum materials . . . to the digital library."[116]

Additionally, with these federal funds, SBAC expects to create a "model curriculum" and instructional materials "aligned with the CCSS."[117] SBAC will also require its member states to implement systematically the CCSS by fully integrating assessment with curriculum and instruction.[118]

Through these awards, which use assessments to link the Common Core standards of CCSSI with the development of curricula and instructional materials, PARCC and SBAC (as grantees of the Department) enable the Department to do indirectly that which federal law forbids. The assessment systems that PARCC and SBAC develop and leverage with federal funds, together with their hands-on assistance in implementing the CCSS in substantially all the states, will direct large swaths of state K-12 curricula, programs of instruction, and instructional materials, as well as heavily influence the remainder.

The language used by both consortia in their supplemental funding materials leaves no question about their intentions

to use federal funds to develop curricular and instructional materials based on the CCSS. PARCC's strategy is to "develop the highest priority curricular and instructional tools . . . ."[119] to "help teachers develop a deeper understanding of the CCSS and their instructional implications, and provide early signals about the types of . . . instruction demanded by PARCC assessments"[120] and to develop "model 12th grade bridge courses."[121] SBAC is similarly direct: It intends to allocate federal funds to "develop curriculum materials . . . and define key approaches to teaching and learning"[122] and "[to] contract[] with professional organizations, universities, and non-profit groups . . . to adapt their curriculum materials to SBAC specifications to upload to the digital library."[123] These PARCC and SBAC supplemental funding materials, together with recent actions taken by the Department concerning ESEA waiver requirements, have placed the agency on a road that will certainly cause it to cross the line of statutory prohibitions against federal direction, supervision or control of curriculum and instructional materials, upsetting the historic structure of federalism.[124]

V. Conditional NCLB Waiver Plan

In 2011, state agitation about NCLB's accountability requirements and the slow pace of Congress in reauthorizing the ESEA created a policy vacuum that the Obama Administration is quickly filling through executive action. Building on its Race to the Top initiatives, this effort will serve to cement the Common Core standards and PARCC-SBAC assessments in most states, setting the table for a national curriculum, programs of instruction, and instructional materials. With conditions that mimic important elements of Race to the Top's ingredients, the Conditional NCLB Waiver Plan will result in the Department leveraging the states into a de facto long-term national system of curriculum, programs of instruction, and instructional materials, notwithstanding the absence of legal authority in the ESEA.[125]

By way of background, on September 23, 2011, the Department announced the Conditional NCLB Waiver Plan, which allows states to waive several major accountability requirements of the ESEA "in exchange for rigorous and comprehensive State-developed plans designed to improved educational outcomes for all students, close achievement gaps, increase equity, and improve the quality of education."[126] The ESEA lists specific items that a state must include in a waiver request to the Secretary of Education.[127] Those items are: (1) identification of the federal programs affected by the proposed waiver; (2) a description of which federal statutory or regulatory requirements are to be waived and how the waiver of those requirements will increase the quality of instruction for students and improve the academic achievement of students; (3) for each school year, identification of specific measurable educational goals for the state educational agency ("SEA") and each local educational agency ("LEA"), Indian tribe, or school affected by the potential waiver; (4) a description of the methods used to measure annually the progress for meeting these goals and outcomes; (5) an explanation of how the waiver will assist the SEA and each affected LEA, Indian tribe, or school in reaching those goals; and (6) a description of how a school will continue to provide assistance to the same population served by the ESEA program for which a waiver is requested.[128] The Conditional NCLB Waiver Plan does all this and much more.

Critically, in exchange for receiving a waiver, the Department requires states to agree to four conditions: (1) adopt college- and career-ready standards[129] in at least reading/language arts and mathematics and develop and administer annual, statewide, aligned assessments that measure student growth in at least grades 3 through 8 and at least once in high school; (2) develop and implement differentiated accountability systems that recognize student growth and provide interventions for the lowest-performing schools and those with the largest achievement gaps; (3) develop and implement new systems for evaluating principal and teacher performance, based in part on student academic growth; and (4) remove burdensome reporting requirements that have little impact on student outcomes.[130] Each state must meet these conditions in order for the Secretary to grant the waiver application—a decision completely within the discretion of the Secretary under the ESEA.[131]

The Department requires SEAs seeking waivers to make several decisions, two of which are especially relevant to those concerned about the Department's legislative limitations. First, the state must declare whether it has "adopted college- and career-ready standards" in reading/language arts and mathematics "that are common to a significant number of States" consistent with the Department's definition of such standards—in effect, the CCSS.[132] Alternatively, states may adopt such standards certified by its state network of institutions of higher education, as long as they are consistent with the Department's definition of such standards—the Common Core standards.[133] Second, in its application, the state must declare whether it is "participating in one of the two State consortia [PARCC or SBAC] that received a grant under the Race to the Top Assessment competition."[134] If not, the state must represent that it is planning to adopt, or has already adopted and administered, "statewide aligned, high-quality assessments that measure student growth in reading/language arts and in mathematics in at least grades 3-8 and at least once in high school in all LEAs."[135]

The Conditional NCLB Waiver Plan provides two opportunities for states to apply for waivers on November 14, 2011, and February 21, 2012. On November 14, eleven states filed requests for waivers.[136] With few exceptions, each state declared that it has "adopted college- and career-ready standards in at least reading language arts and mathematics that are common to a significant number of states"—the CCSS.[137] (Minnesota adopted the CCSS for reading/language arts but not for mathematics, and Kentucky, the first state to adopt the CCSS in 2010, has adopted Common Core standards approved by its state network of higher education institutions.)[138] Ten of the initial eleven states filing requests for waivers participate in at least "one of two State consortia that received a grant under the Race to the Top Assessment competition"—PARCC or SBAC.[139] Another twenty-eight states and Puerto Rico have informed the Department that they intend to apply for waivers by the second deadline of February 21, 2012.[140] If the initial filings are any indication, most states seeking waivers in February will also commit to the Common Core standards and

PARCC-SBAC assessments in exchange for waivers of NCLB's accountability requirements.[141]

Given the states' near universal acceptance of CCSS and the common assessment consortia, the Department's announcement of the Conditional NCLB Waiver Plan is not surprising. Indeed, to obtain a waiver, states must adopt and implement common standards and assessments. The Department set the table in 2009 and 2010, using the Race to the Top Fund and the Race to the Top Assessment Program to entice competing states into accepting the Common Core standards and the assessment consortia. With an eye on the 2014-15 academic year, the consortia are using the Common Core standards to develop their assessments with the goal of writing content for curriculum, programs of instruction, and instructional materials. The Conditional NCLB Waiver Plan will ensure that nearly every state seeking a waiver remains forever committed to the Common Core standards of CCSSI, PARCC-SBAC assessments, and the curriculum, program, and instructional changes that they inspire. Any state effort to untether from the conditions imposed by the Department in exchange for having received an ESEA waiver will certainly result in the Department revoking the waiver. Moreover, given the extensive costs imposed by complying with the waiver (California has refused to seek waivers on cost grounds), the likelihood of any state doing so after having spent significant funds required by the waiver conditions is minimal. Like the dazed traveler in the popular Eagles' song *Hotel California*, states can check out any time they want, but they can never leave.

VI. Conclusions and Recommendations

Joseph A. Califano, Jr., former Secretary of Health, Education, and Welfare once wrote, "In its most extreme form, national control of curriculum is a form of national control of ideas."[142] Unfortunately, in three short years, the present Administration has placed the nation on the road to a national curriculum. By leveraging funds through its Race to the Top Fund and the Race to the Top Assessment Program, the Department has accelerated the implementation of common standards in English language arts and mathematics and the development of common assessments based on those standards. By PARCC's and SBAC's admission, these standards and assessments will create content for state K-12 curriculum and instructional materials. The Department has simply paid others to do that which it is forbidden to do. This tactic should not inoculate the Department against the curriculum prohibitions imposed by Congress.

The authors understand that the Common Core standards started as an initiative—of the NGA Center and the CCSSO, but the Department's decision to cement the use of the standards and assessment consortia through ESEA waiver conditions—a power that Congress has not granted in the waiver statute—changes matters considerably. Given the intense desire of most states to escape the strict accountability requirements of the ESEA, most states will agree to the Department's conditions in order to obtain waivers. By accepting the Department's conditions, these states will be bound indefinitely to the Common Core standards, PARCC-SBAC assessments, and the curriculum and instructional modules that arise from those assessments. As already evidenced by the eleven states that have already applied for waivers, most states will accept the Common Core standards and the PARCC-SBAC assessment consortia conditions. Once this consummation occurs, the Department will not permit a state to walk away from that commitment without the state losing its coveted waivers. It is also highly doubtful that states will turn away from the Common Core standards and assessments after making the heavy investment that these initiatives require. In the view of the authors, these efforts will necessarily result in a *de facto* national curriculum and instructional materials effectively supervised, directed, or controlled by the Department through the NCLB waiver process.

In light of these conclusions, this paper makes seven recommendations:

- First, Congress should immediately pass legislation clarifying that the Department cannot impose conditions on waivers requested by states under the ESEA.
- Second, the appropriate committees of Congress should conduct hearings on the Department's implementation of the Race to the Top Fund, the Race to the Top Assessment Program, and the Conditional NCLB Waiver Plan to ascertain the Department's compliance with GEPA, the DEOA, and the ESEA.
- Third, Congress should review the curriculum and related prohibitions in GEPA, the DEOA, and the ESEA to determine whether legislation should be introduced to strengthen the ban on federal involvement in elementary and secondary curriculum, programs of instruction, and instructional materials.
- Fourth, Congress should request the U.S. Government Accountability Office (GAO) to conduct a comprehensive review of the elementary and secondary education programs of the Department, including programs implemented under the ARRA and ESEA, to identify those that fail to comply with the GEPA, the DEOA, and the ESEA prohibitions, with the GAO submitting to the chairmen and ranking members of the appropriate committees a written report with specific findings by no later than September 30, 2012.
- Fifth, the Congress should require the Secretary to undertake a review of the Department's regulations appearing at Title 34 of the Code of Federal Regulations, as well as guidance relating to elementary and secondary programs to identify those that fail to comply with GEPA, the DEOA, and the ESEA, with the Secretary submitting to the chairmen and ranking members of the appropriate committees a written report with specific findings by no later than September 30, 2012.
- Sixth, Governors, State Superintendents of Education, State Boards of Education, and State Legislators should reconsider their respective states' decisions to participate in the CCSSI, the Race to the Top Fund, and the Race to the Top Assessment Program.
- Seventh, the eleven states that have applied for waivers under the Department's Conditional NCLB Waiver Plan should

amend their waiver applications to delete the Department's four non-statutory conditions; states that apply in round two should omit the four conditions from their applications and include only the statutory requirements of 20 U.S.C. § 7861.

Endnotes

1 20 U.S.C. § 1232a (the General Education Provisions Act limitation on federal involvement in curriculum); 20 U.S.C. § 3403(b) (the Department of Education Organization Act limitation); 20 U.S.C. § 7907(a) (the Elementary and Secondary Education Act limitation).

2 Though the American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 115 (2009), and not the ESEA authorized the Race to the Top Fund and the Race to the Top Assessment Program, Congress has repeatedly stated in the ESEA that standards and assessments are the authority of states, not the federal government. *See* 20 U.S.C. § 6311(b)(1)(A) ("[A] State shall not be required to submit such standards [Title I content and achievement standards] to the Secretary."); 20 U.S.C. § 6311(e)(1)(F) ("The Secretary shall . . . not have the authority to require a State, as a condition of approval of the State [Title I] plan, to include in, or delete from, such plan one or more specific elements of the State's academic content standards or to use specific academic assessment instruments or items."); 20 U.S.C. § 6575 ("Nothing in this title [Title I of ESEA] 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 specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction."). ARRA did not change this language.

3 The authority for the Race to the Top Fund is §§ 14005 and 14006(a)(2) of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 282-283 (2009). *See also* Race to the Top Fund, Purpose, http://www2.ed.gov/programs/racetothetop/index.html (last visited Jan. 13, 2012).

4 The authority for the Race to the Top Assessment Program is §§ 14005 and 14006(a)(2) of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 282-283 (2009). *See also* Race to the Top Assessment Program, Purpose, http://www2.ed.gov/programs/racetothetop-assessment/index.html (last visited Jan. 13, 2012).

5 The Department's ESEA Flexibility guidance is referred to throughout as a "Conditional NCLB Waiver Plan," given that the four "principles" that must be met to be eligible for a waiver are functionally "conditions." The four conditions, discussed in Part V are: (1) adopt college and career-ready standards in at least reading/language arts and mathematics, and develop and administer annual, statewide, aligned high quality assessments that measure student growth in at least grades 3-8 and at least once in high school; (2) develop and implement differentiated accountability systems that recognize student growth, and provide interventions for the lowest-performing schools and those with the largest achievement gaps; (3) develop and implement new systems for evaluating principal and teacher performance, based on student academic growth; and (4) remove burdensome reporting requirements that have little impact on student outcomes. U.S. Dep't of Educ., ESEA Flexibility 3-5 (2011), *available at* http://www.ed.gov/esea/flexibility.

6 *See supra* notes 3-5.

7 Elementary, Secondary, and Other Education Amendments of 1969 § 422, Pub. L. No. 91-230, 84 Stat. 121, 169 (1970), amending Title IV of Pub. L. No. 90-247. The corresponding current law provision is 20 U.S.C. § 1232a.

8 20 U.S.C. § 1232a.

9 20 U.S.C. §§ 1221(c)(1), 1234i(2).

10 20 U.S.C. § 1232a.

11 *Id.*

12 *Id.*

13 20 U.S.C. § 3411.

14 20 U.S.C. § 3403(b).

15 *Id.*

16 *Id.*

17 20 U.S.C. § 3401(4).

18 20 U.S.C. § 3403(a).

19 S. Rep. No. 96-49, at 10 (1979).

20 S. Rep. No. 96-49, at 95 (1979).

21 H.R. Rep. No. 95-1531, at 41 (1978).

22 H.R. Rep. No. 95-1531, at 45-46 (1978).

23 H.R. Rep. No. 95-1531, at 47 (1978).

24 20 U.S.C. § 7907(a).

25 Though the last clause of this section of law was at issue in *School District of the City of Pontiac v. Secretary of the United States Department of Education*, 584 F.3d 253, 274 (6th Cir. 2009), in dicta, the United States Court of Appeals for the Sixth Circuit noted the first part of the text "prevents federal officers from controlling school curricula."

26 20 U.S.C. § 7907(b).

27 20 U.S.C. §§ 1232a, 3403(b), 7907(a). The authority for the Race to the Top Fund and Race to the Top Assessment Program is §§ 14005 and 14006(a)(2) of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 282-283 (2009), and not the ESEA. Accordingly, only GEPA and the DEOA are discussed in the analysis of the Race to the Top Fund and Race to the Top Assessment Program.

28 20 U.S.C. § 3403(a).

29 *See* About the Standards, http://www.corestandards.org/about-the-standards (last visited Jan. 13, 2012); Frequently Asked Questions, http://www.corestandards.org/frequently-asked-questions (last visited Jan. 13, 2012).

30 *See* Process, http://www.corestandards.org/about-the-standards/process (last visited Jan. 13, 2012).

31 Nick Anderson, *Common Set of School Standards to be Proposed*, Wash. Post, Mar. 10, 2010, at A1.

32 *See* About the Standards, http://www.corestandards.org/about-the-standards (last visited Jan. 13, 2012).

33 A controversy exists about the extent to which the Common Core standards are internationally benchmarked. The Common Core standards website (http://www.corestandards.org) refers to the standards as internationally benchmarked in some places but merely "informed by" international standards at others. *See* Myths v. Facts, http://www.corestandards.org/about-the-standards/myths-vs-facts (last visited Jan. 13, 2012) ("International benchmarking played a significant role in both sets of standards. In fact, the college and career ready standards include an appendix listing the evidence that was consulted in drafting the standards and the international data consulted in the benchmarking process is included in the appendix.") ("The *Standards* were informed by . . . the highest international standards."); *see also* Frequently Asked Questions, http://www.corestandards.org/frequently-asked-questions (last visited Jan. 13, 2012) ("The standards are being developed by the following criteria: . . . [i]nformed by other top performing countries, so that all students are prepared to succeed in our global economy and society."); National Governors Association and State Education Chiefs Launch Common State Academic Standards, http://www.corestandards.org/articles/8-national-governors-association-and-state-education-chiefs-launch-common-state-academic-standards (last visited Jan. 13, 2012) ("The final standards were informed by nearly 10,000 public comments and by standards in other top performing countries so that all students are prepared to succeed in our global economy."). Some experts dispute whether the Common Core standards have truly undergone formal international benchmarking. *See* Catherine Gewertz, *Common-Core Standards Drew on Ideas from Abroad*, Educ. Wk., Jan. 9, 2012 (quoting Professor Sandra Stotsky), *available at* http://www.edweek.org/ew/articles/2012/01/12/16curriculum.h31.html.

34 *See supra* note 32.

35 *Id.*

36 While forty-eight states, the District of Columbia, and two territories (U.S. Virgin Islands and Northern Mariana Islands) participated in the process to develop the Common Core State Standards, the current number of states that have adopted English language arts and mathematics standards is forty-five, along with the District of Columbia and two territories (U.S. Virgin Islands and Northern Mariana Islands). *See* Introduction to the Common Core State Standards (2010), *available at* http://www.corestandards.org/assets/ccssi-introduction.pdf; In the States, http://www.corestandards.org/in-the-states (last visited Jan. 13, 2012).

37 *See* Process, http://www.corestandards.org/about-the-standards/process (last visited Jan. 13, 2012).

38 *Id.*

39 *See* Introduction to the Common Core State Standards (2010), *available at* http://www.corestandards.org/assets/ccssi-introduction.pdf.

40 *See* In the States, http://www.corestandards.org/in-the-states (last visited Jan. 13, 2012) (showing states that have adopted the Common Core Standards); s*ee also supra* note 36.

41 *See* Frequently Asked Questions, http://www.corestandards.org/frequently-asked-questions (last visited Jan. 13, 2012).

42 *Id.*

43 *See Education Reforms: Ensuring the Education System Is Accountable to Parents and Communities: Hearing Before the Subcomm. on Early Childhood, Elementary, and Secondary Education of the H. Comm. on Educ. and the Workforce*, 112th Cong. 1-2 (2011) (testimony of Jay P. Green, University of Arkansas), *available at* http://edworkforce.house.gov/UploadedFiles/09.21.11_greene.pdf (last visited Jan. 13, 2012).

44 *Id.*

45 Sandra Stotsky & Ze'ev Wurman, Common Core's Standards Still Don't Make the Grade: Why Massachusetts and California Must Regain Control Over Their Academic Destinies 27 (2010).

46 *Id.*

47 *Id.*

48 *See* Rachel Sheffield, *Implementing Common Core Could Cost States $30 Billion*, heartlander.org, Nov. 28, 2011, *available at* http://news.heartland.org/newspaper-article/2011/11/28/implementing-common-core-could-cost-states-30-billion. In the article, the Director of the Washington Policy Institute's education center estimates the nationwide implementation costs of the Common Core standards "would be $30 billion" based on a range of state estimates. Other estimates are $300 million for Washington state and $760 million for California. *Id.*

49 Pub. L. No. 111-5, 123 Stat. 115 (2009).

50 *See supra* notes 3-4; *see also* 74 Fed. Reg. 59,688 (Nov. 18, 2009); 75 Fed. Reg. 18,171 (April 9, 2010). This article discusses Phases 1 and 2 of the Race to the Top Fund, as well as the Race to the Top Assessment Program. The article does not discuss Phase 3 of the Race to the Top Fund, which distributed $200 million from Public 112-10, the Department of Defense and Full-Year Continuing Appropriations Act, 2011 ("FY2011 Appropriations Act"), to nine state finalists who did not prevail in Phase 1 or 2 of the competition. Nor does the article discuss the recently-awarded Race to the Top Fund grants for improving early childhood care and learning, authorized in the FY2011 Appropriations Act.

51 Alaska, North Dakota, Texas, and Vermont did not submit applications for either Phase 1 or 2 of the Race to the Top Fund competition.

52 74 Fed. Reg. 59,688 (Nov. 18, 2009).

53 See 74 Fed. Reg. 59,836-59,837 (Nov. 18, 2009) for a discussion of the Race to the Top Fund priorities. Funding priorities are a "means of focusing a competition on the areas in which the Secretary is particularly interested in receiving applications. Generally priorities take the form of specific kinds of activities that applicants are asked to include in an application. There are *absolute priorities*, which the applicant must address in order to be considered for funding; *competitive preferences*, which the applicant has the option of choosing whether or not to address and for which they may receive additional points; and invitational priorities, which the applicant is encouraged but not required to address. Applications addressing *invitational priorities* receive no preference over applications that do not meet the priority." U.S. Dep't of Educ., *Handbook for the Discretionary Grant Process* 154 (2009)(emphasis added), *available at* http://www2.ed.gov/policy/gen/leg/foia/foia-hb-01.pdf; 34 C.F.R. § 75.105(c)(1)-(3).

54 74 Fed. Reg. 59,836 (Nov. 18, 2009); see *supra* note 53 for discussion of an "absolute priority."

55 74 Fed. Reg. 59,836 (Nov. 18, 2009); see *supra* note 53 for discussion of a "competitive preference priority."

56 74 Fed. Reg. 59,836-59,837 (Nov. 18, 2009); see *supra* note 53 for discussion of an "invitational priority."

57 74 Fed. Reg. 37,804 (July 29, 2009).

58 74 Fed. Reg. 59,688 (Nov. 18, 2009).

59 74 Fed. Reg. 59,836 (Nov. 18, 2009).

60 74 Fed. Reg. 19,496 (April 14, 2010).

61 Press Release, U.S. Department of Education, Delaware and Tennessee Win First Race to the Top Grants (Mar. 29, 2010), *available at* http://www2.ed.gov/news/pressreleases/2010/03/03292010.html.

62 Press Release, U.S. Department of Education, Nine States and the District of Columbia Win Second Round Race to the Top Grants (Aug. 24, 2010), *available at* http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants.

63 74 Fed. Reg. 59,843 (Nov. 18, 2009).

64 See the discussion of State Reform Conditions Criteria at 74 Fed. Reg. 59,843 (Nov. 18, 2009) and the definition of "common set of K-12 standards" at 74 Fed. Reg. 59,838 (Nov. 18, 2009) ("a set of content standards that define what students must know and be able to do and that are substantially identical across all States in a consortium. A State may supplement the common standards with additional standards, provided that the additional standards do not exceed 15 percent of the State's total standards for that content area.").

65 74 Fed. Reg. 59,855-59,856 (Nov. 18, 2009); *see also* 75 Fed. Reg. 19,515-19,516 (Apr. 14, 2010) (emphasis added).

66 74 Fed. Reg. 59,855 (Nov. 18, 2009); *see also* 75 Fed. Reg. 19,516 (Apr. 14, 2010).

67 *See supra* note 64.

68 Application of Delaware at B-3 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase1-applications/delaware.pdf; Application of Tennessee at 48 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase1-applications/tennessee.pdf; Application of District of Columbia, at 53 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/district-of-columbia.pdf; Application of Florida at 73 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/florida.pdf; Application of Georgia at 62 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/georgia.pdf; Application of Hawaii at 45 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/hawaii.pdf; Application of Maryland at 75 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/maryland.pdf; Application of Massachusetts at 52 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/massachusetts.pdf; Application of New York at 24 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/new-york.pdf; Application of North Carolina at 58 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/north-carolina.pdf; Application of Ohio at B1-1 and B1-2 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/ohio.pdf; Application of Rhode Island at A-8 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/rhode-island.pdf; *see also* Letter from Dr. Kerri L. Briggs, State Superintendent of Education, District of Columbia, to Arne Duncan, Secretary, U.S. Department of Education, at 1 (July 29, 2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/district-of-columbia.pdf; Letter from Eric J. Smith, Commissioner, Florida Department of Education, to Arne Duncan, Secretary, U.S. Department of Education, at 1 (July 29, 2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/florida.pdf; Letter from William Bradley Bryant, State Superintendent of Schools, Georgia, and Wanda Barrs, Chair, State Board of Education, Georgia, to Arne Duncan,

Secretary, U.S. Department of Education, at 1 (July 26, 2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/georgia.pdf; Amendment of July 27, 2010, at 6, *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/hawaii.pdf; Letter from Nancy Grasmick, State Superintendent of Schools, Maryland, to Arne Duncan, Secretary, U.S. Department of Education, at 1 (July 30, 2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/maryland.pdf; Letter from Mitchell Chester, Commissioner, Elementary and Secondary Education, Massachusetts, to Arne Duncan, Secretary, U.S. Department of Education, at 1 (July 26, 2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/massachusetts.pdf; Letter from David Steiner, Commissioner of Education, New York, to Arne Duncan, Secretary, U.S. Department of Education, at 1 (July 27, 2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/new-york.pdf; Letter from June St. Clair Atkinson, State Superintendent, Department of Public Instruction, North Carolina, to Arne Duncan, Secretary, U.S. Department of Education, at 1 (June 10, 2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/north-carolina.pdf; Amendment of July 27, 2010, at 1, *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/ohio.pdf; Amendment of August 2, 2010, at 17 (at 10 in Minutes of Board of Regents for Elementary and Secondary Education), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/rhode-island.pdf.

69 74 Fed. Reg. 59,733 (Nov. 18, 2009) ("In [the Race to the Top Fund], the phrase "common standards" does not refer to any specific set of common standards, such as the common core standards currently under development by members of the National Governors Association and the Council of Chief State School Officers. The Department declines to make changes in order to endorse any particular standards-development consortium.").

70 Lindsey Burke, *Publicizing the Hidden Costs of the National Standards Push*, Educ. Notebook, Sept. 12, 2011, at 1, *available at* http://links.heritage.org/hostedemail/email.htm?h=ec4d3bd2a208dbd824288c7fa9ecb9c4&CID=9795639416&ch=2E03C8C87B70F318B54BE93A9A394F60.

71 *See* Remarks of Secretary of Education Arne Duncan delivered to State Leaders at Achieve's American Diploma Project Leadership Team: Beyond the Bubble Tests: The Next Generation of Assessments 4 (Sept. 2, 2010), *available at* http://www.ed.gov/news/speeches/beyond-bubble-tests-next-generation-assessments-secretary-arne-duncans-remarks-state-l.

72 *See* Nancy Kober & Diane Stark Rentner, Ctr. on Educ. Pol'y, Common Core State Standards: Progress and Challenges in School Districts' Implementation 4 (2011), *available at* http://www.cep-dc.org/displayDocument.cfm?DocumentID=374.

73 *Id*. at 6.

74 *Id*.

75 See 74 Fed. Reg. 59,733 (Nov. 18, 2009) for the Department's response to commenters' recommendations on the number of states within a consortium; *see infra* note 76.

76 74 Fed. Reg. 59,733 (Nov. 18, 2009) (emphasis added).

77 See *supra* note 65 for the award of high points to states that are a part of a standards consortium that includes a majority of the states.

78 Letter from Robert Scott, Commissioner, Texas Education Agency, to United States Senator John Cornyn (Nov. 25, 2009), *available at* http://www.edweek.org/media/common_core_standards_letter.pdf.

79 *Id*.

80 *Id*.

81 75 Fed. Reg. 18,171-18,172 (Apr. 9, 2010) (emphasis added).

82 75 Fed. Reg. 18,171 (Apr. 9, 2010); *see also* Cooperative Agreement Between the U.S. Department of Education and the Partnership for Assessment of Readiness of College and Careers 5 (2011), *available at* http://www2.ed.gov/programs/racetothetop-assessment/parcc-cooperative-agreement.pdf (award of $169,990,272 and supplemental award of $15,872,560); Cooperative Agreement Between the U.S. Department of Education and the SMARTER Balanced Assessment Consortium and the State of Washington (fiscal agent) 5 (2011) *available at* http://www2.ed.gov/programs/racetothetop-assessment/sbac-cooperative-agreement.pdf (award of $159,976,843 and supplemental award of $15,872,696).

83 75 Fed. Reg. 18,177 (Apr. 9, 2010) ("Common set of college- and career-ready standards" means "a set of academic content standards for grades K-12 that (a) define what a student must know and be able to do at each grade level; (b) if mastered, would ensure that the student is college- and career-ready . . . by the time of high school graduation; and (c) are substantially identical across all States in a consortium. A State may supplement the common set of college- and career-ready standards with additional content standards, provided that the additional standards do not comprise more than 15 percent of the State's total standards for that content area.").

84 75 Fed. Reg. 18,171 (April 9, 2010).

85 *Id*.

86 *Id.*

87 Address Before a Joint Session of the Congress on the State of the Union, 33 Weekly Comp. Pres. Doc. 136 (Feb. 4, 1997).

88 Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1998 § 305(a), Pub. L. No. 105-78, 111 Stat. 1467, 1505 (1997).

89 Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1998 §§ 306-310, Pub. L. No. 105-78, 111 Stat. 1467, 1505-1507 (1997).

90 *See* 20 U.S.C. § 7909(a) ("[N]o funds provided under this Act [ESEA] to the Secretary or to the recipient of any award may be used to develop, pilot test, field test, implement, administer, or distribute any federally sponsored test in reading, mathematics, or any other subject, unless specifically and explicitly authorized by law."). Congress provided a limited exception for international comparative assessments administered to a representative sample of pupils under the Third International Mathematics and Science Study (TIMSS). 20 U.S.C. § 7909(b)); *see also* 20 U.S.C. § 1232j(a) ("[N]o funds provided to the Department of Education or to an applicable program, may be used to pilot test, field test, implement, administer or distribute in any way any federally sponsored national test in reading, mathematics, or any other subject that is not specifically and explicitly provided for in authorizing legislation enacted into law."). Here, Congress also provided a limited exception for TIMSS and other international comparative assessments administered to a representative sample of pupils. 20 U.S.C. § 1232j(b).

91 75 Fed. Reg. 18,174 (Apr. 9, 2010).

92 *See* Remarks of Secretary Arne Duncan, *supra* note 71, at 1-11.

93 *See id.* at 1. The PARCC Consortium consists of twenty-three states (AL, AZ, AR, CO, FL, GA, IL, IN, KY, LA, MD, MA, MS, NJ, NM, NY, ND, OH, OK, PA, RI, SC, TN) and the District of Columbia, available at http://www.parcconline.org/about-parcc (last visited Jan. 13, 2012). The SBAC consists of twenty-eight member states (AL, CA, CO, CT, DE, HI, ID, IA, KS, KY, ME, MI, MO, MT, NV, NH, NC, ND, OR, PA, SC, SD, UT, VT, WA, WV, WI, WY), available at http://www.k12.wa.us/SMARTER/States.aspx (last visited Jan. 13, 2012).

94 *See* Remarks of Secretary Arne Duncan, *supra* note 71, at 1-2.

95 Grant award notification letter from Joseph Conaty, Director, Academic Improvement and Teacher Quality Programs, Office of Elementary and Secondary Education, U.S. Department of Education, to the Honorable Charlie Crist, Governor, Florida (Sept. 28, 2010), *available at* http://www2.ed.gov/programs/racetothetop-assessment/parcc-award-letter.pdf; *see also* Grant award notification letter from Joseph Conaty, Director, Academic Improvement and Teacher Quality Programs, Office of Elementary and Secondary Education, U.S. Department of Education, to the Honorable Christine Gregoire, Governor, Washington (Sept. 28, 2010), *available at* http://www2.ed.gov/programs/racetothetop-assessment/sbac-award-letter.pdf.

96 75 Fed. Reg. 18,171-18,185 (Apr. 9, 2010).

97 *See* Remarks of Secretary Arne Duncan, *supra* note 71, at 4.

98 *See id.* at 7 (emphasis added).

99 *See id.*

100 Grant award notification letter from Joseph Conaty, Director, Academic Improvement and Teacher Quality Programs, Office of Elementary and Secondary Education, U.S. Department of Education, to the Honorable Charlie Crist, Governor, Florida (Sept. 28, 2010), *available at* http://www2.ed.gov/programs/racetothetop-assessment/parcc-award-letter.pdf.

101 PARCC Proposal for Supplemental Race to the Top Assessment Award 1 (2010), *available at* http://www.edweek.org/media/parccsupplementalproposal12-23achievefinal.pdf.

102 *Id*. at 1.

103 *Id*. at 3-5.

104 *Id*. at 3.

105 *Id*. at 4.

106 *Id*.

107 *Id*. at 5.

108 *Id*.

109 *See* Partnership for Assessment of Readiness for College and Careers, Webinar: Model Content Frameworks for ELA/Literacy, at 14, (Nov. 22, 2011), *available at* http://www.parcconline.org/sites/parcc/files/PARCC%20MCF%20for%20ELA-Literacy%20Webinar_112211.pdf.

110 *Id*. at 17.

111 Grant award notification letter from Joseph Conaty, Director, Academic Improvement and Teacher Quality Programs, Office of Elementary and Secondary Education, U.S. Department of Education, to the Honorable Christine Gregoire, Governor, Washington (Sept. 28, 2010), *available at* http://www2.ed.gov/programs/racetothetop-assessment/sbac-award-letter.pdf.

112 Press Release, SMARTER Balanced Assessment Consortium, SMARTER Balanced Receives Approval for $15.8 Million Supplemental Budget (Jan. 10, 2011), *available at* http://www.k12.wa.us/SMARTER/PressReleases/ApprovalSupplementalBudget.aspx.

113 SMARTER Balanced Assessment Consortium, Supplemental Funding, Scope Overview Table 2-4 (2011), *available at* http://www.k12.wa.us/SMARTER/pubdocs/SBAC_Supplemental_Funds.pdf.

114 *Id*. at 2.

115 *Id*.

116 *Id.*

117 *Id*. at 3.

118 *Id*. at 4.

119 *See* PARCC Proposal for Supplemental Race to the Top Assessment Award, *supra* note 101, at 1.

120 *See id*. at 3.

121 *See id*. at 5.

122 *See* SMARTER Balanced Assessment Consortium, *supra* note 113, at 2.

123 *Id.*

124 See Part V for a discussion of ESEA waiver requirements; see also 20 U.S.C. §§ 1232a, 3403(b) for the prohibitions upon federal involvement in curriculum and instructional materials.

125 *See* 20 U.S.C. § 7861 (legal authority for ESEA waivers).

126 Dear Colleague Letter from Arne Duncan, Secretary, U.S. Department of Education, to the Chief State School Officers (Sept. 23, 2011), *available at* http://www2.ed.gov/print/policy/gen/guid/secletter/110923.html.

127 20 U.S.C. § 7861(b)(1).

128 *Id*.

129 "College-and career-ready standards" are

> content standards for kindergarten through 12th grade that build towards college and career readiness by the time of high school graduation. A State's college- and career-ready standards must be either (1) *standards that are common to a significant number of States*; or (2) standards that are approved by a State network of institutions of higher education, which must certify that students who meet the standards will not need remedial course work at the postsecondary level.

U.S. Dep't of Educ., ESEA Flexibility 7 (2011), *available at* http://www.ed.gov/esea/flexibility.

130 *Id.* at 3-5.

131 20 U.S.C. § 7861(a) ("The Secretary may waive any statutory or regulatory requirement of this Act . . . ."). Noticeably absent from the Department's guidance is any in-depth explanation for its authority to require conditions-based waivers. In adding four conditions to the statutory requirements for a waiver, the Department has ignored Article I, Section 1 of the U.S. Constitution, which vests Congress, not the Executive Branch, with exclusive authority to make laws. The Administration recognized this several months earlier, when the Department took the position that college-and career-ready standards required a legislative change to the ESEA. *See* U.S. Dep't of Educ., A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act 7-8 (2010), *available at* http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf. No authority exists in the ESEA to permit the Secretary to grant waivers to SEAs in exchange for conditions. The Secretary unilaterally issued the Conditional NCLB Waiver Plan because Congress had not yet reauthorized the ESEA. As President Obama stated on September 23, 2011, "Congress hasn't been able to do it, so I will." This statement is no legal justification for the Administration to add conditions to the law through executive action, particularly where, as here, the Department failed to engage in the rulemaking required by the Administrative Procedures Act, 5 U.S.C. § 553.

132 U.S. Dep't of Educ., ESEA Flexibility Request 9 (2011), *available at* http://www.ed.gov/esea/flexibility.

133 *Id.*

134 *Id.* at 10.

135 *Id.*

136 Colorado, Florida, Kentucky, Georgia, Indiana, Massachusetts, Minnesota, New Jersey, New Mexico, Oklahoma, and Tennessee.

137 *See* ESEA Flexibility, http://www.ed.gov/esea/flexibility (last visited on Jan. 15, 2012) (listing ESEA flexibility requests received).

138 *See* Minn. Dep't of Educ., ESEA Flexibility Request of Minnesota (Nov. 14, 2011), *available at* http://www2.ed.gov/policy/eseaflex/mn.pdf; *see also* Kentucky ESEA Flexibility Request (Nov. 14, 2011), *available at* http://www2.ed.gov/policy/eseaflex/ky.pdf.

139 Colorado, Florida, Kentucky, Georgia, Indiana, Massachusetts, New Jersey, New Mexico, Oklahoma, and Tennessee are members of either PARCC or SBAC or both. *See also* U.S. Dep't of Educ., ESEA Flexibility Request 10 (2011), *available at* http://www.ed.gov/esea/flexibility.

140 *See* ESEA Flexibility, http://www.ed.gov/esea/flexibilty (last visited on Jan. 15, 2012) (noting a "Second Submission Window").

141 Significantly, California and Texas have indicated that they do not intend to apply for waivers.

142 Joseph A. Califano, Jr., Governing America: An Insider's Report from the White House and the Cabinet 297 (1981).