

SCHOOL DISTRICT OF THE CITY OF PONTIAC v. SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION

512 F.3d 252 (6th Cir. 2008)

OPINION

R. GUY COLE, Jr., Circuit Judge. This case requires us to decide a fundamental question of federal versus state funding under the No Child Left Behind Act of 2001 ("NCLB" or "the Act"), 20 U.S.C. §§ 6301-7941. Plaintiffs-Appellants are school districts and education associations that receive federal funding under NCLB in exchange for complying with the Act's various educational requirements and accountability measures. Based on the so-called "Unfunded Mandates Provision," which provides that "[n]othing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act," 20 U.S.C. § 7907(a), Plaintiffs filed suit in district court against the Secretary of Education seeking, among other relief, a judgment declaring that they need not comply with the Act's requirements where federal funds do not cover the increased costs of compliance. The district court concluded, however, that Plaintiffs must comply with the Act's requirements regardless of any federal-funding shortfall and accordingly granted the Secretary's motion to dismiss the complaint for failure to state a claim upon which relief can be granted. Because statutes enacted under the Spending Clause of the United States Constitution must provide clear notice to the States of their liabilities should they decide to accept federal funding under those statutes, and because we conclude that NCLB fails to provide clear notice as to who bears the additional costs of compliance, we **REVERSE** the judgment of the district court and **REMAND** this case for further proceedings consistent with this opinion.

On January 8, 2002, President George W. Bush signed into law the No Child Left Behind Act. The Act amended the Elementary and Secondary Education Act of 1965 ("ESEA"). The ESEA targeted funding to students in low-income schools, and its purposes included overcoming "any effects of past racial discrimination." The ESEA was periodically reauthorized and amended over the next few decades.

In contrast to prior ESEA iterations, NCLB "provides increased flexibility of funds, accountability for student achievement and more options for parents." The Act focuses federal funding more narrowly on the poorest students and demands accountability from schools, with serious consequences for schools that fail to meet academic-achievement requirements. States may choose not to participate in NCLB and forego the federal funds that accompany the Act. If they do accept the funds, they must comply with NCLB requirements.

Title I, Part A, of NCLB, titled "Improving Basic Programs Operated by Local Educational Agencies," continues to pursue the objectives of the original ESEA and imposes the most extensive educational requirements on participating States and school districts, and likewise provides the largest amount of federal appropriations to participating States. Title I, Part A's stated purposes include meeting "the educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance." 20 U.S.C. § 6301(2).

In addition to Title I, Part A, NCLB establishes numerous other programs, including a literacy initiative for young children and poor families (Title I, Part B); special services for the education of children of migrant workers (Title I, Part C); requirements that all teachers be "highly qualified" (Title II, Part A); and instruction in English for children with limited English ability (Title III). Plaintiffs' complaint focuses on the educational requirements and funding provisions of Title I, Part A.

To qualify for federal funding under Title I, Part A, States must first submit to the Secretary a "State plan." A State plan must "demonstrate that the State has adopted challenging academic content standards and challenging student academic achievement standards" against which to measure the academic achievement of the State's students. The standards in the plan must be uniformly applicable to students in all the State's public schools, and must at least cover reading, math, and science skills.

States must also develop, and school districts must administer, assessments to determine students' levels of achievement under plan standards. These assessments must be able to show the percentage of students achieving proficiency among "economically disadvantaged students," "students from major racial and ethnic groups," "students with disabilities," and "students with limited English proficiency." Schools and districts are responsible for making "adequate yearly progress" ("AYP") on these assessments, meaning that a minimum percentage of students, both overall and in each subgroup, attains proficiency.

NCLB also requires that States use federal funds made available under the Act "only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds." 20 U.S.C. § 6321(b)(1). That is, States and school districts continue to be responsible for the majority of the funding for public education and the funds distributed under Title I should be used only to implement Title I programming, not as a substitute to the funds that are already being used for general programming.

However, while Plaintiffs recognize that the majority of the funding for education continues to come from state and local sources, the Plaintiffs contend that NCLB does not require them to spend the money drawn from state and local sources on the additional programs created as required by NCLB. At the heart of this case is § 7907(a), often referred to as the "Unfunded Mandates Provision," which Plaintiffs argue provides that they need not comply with the Act's requirements where federal funding does not cover the additional costs of complying with those requirements. Section 7907 is entitled "Prohibitions on Federal government and use of Federal funds," and subsection 7907(a) provides as follows:

General prohibition. 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 or local resources, or mandate a State or any subdivision thereof *to spend any funds or incur any costs not paid for under this Act.*

20 U.S.C. § 7907(a) (emphasis added). Plaintiffs note that former Secretary of Education Rod Paige has explained that "[t]here is language in the bill that *prohibits requiring anything that is not paid for.*"

Plaintiffs brought suit in the United States District Court for the Eastern District of Michigan against the Secretary, alleging, based on § 7907(a), that the Act does not require school districts to comply with NCLB educational requirements if doing so would require the expenditure of state and local funds to cover the additional costs of compliance. ("Plaintiffs' position is simply that the Secretary may not require states and school districts to take actions mandated by the NCLB that the states and school districts would not undertake absent the NCLB's mandates, if doing so would require the states or school districts 'to spend any funds or incur any costs not paid for under [the NCLB].'"") The complaint alleged in the alternative that the Act is ambiguous regarding whether school districts are required to spend their own funds, and that imposing such a requirement would therefore violate the Spending Clause of the United States Constitution.

Plaintiffs alleged that in the years following the enactment of NCLB, Congress has not provided States and school districts with sufficient federal funds to comply fully with the Act. For example, for the five years from fiscal year 2002 to fiscal year 2006, Congress appropriated \$ 30.8 billion dollars less for Title I grants to school districts than it authorized in NCLB. Plaintiffs sought a declaratory judgment to the effect that "states and school districts are not required to spend non-NCLB funds to comply with the NCLB mandates."

Congress enacted NCLB under the Spending Clause. U.S. Const. art. I, § 8, cl. 1. "Congress has broad power to set the terms on which it disburses federal money to the States." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (citing *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987)). "[B]ut when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously.'" *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), and *Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 n.26 (1982)). Legislation enacted under "'the spending power is much in the nature of a contract,' and therefore, to be bound by 'federally imposed conditions,' recipients of federal funds must accept them 'voluntarily and knowingly.'" "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" "By insisting that Congress speak with a clear voice," the Supreme Court enables States "to exercise their choice knowingly, cognizant of the consequences of their participation." Moreover, "in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly."

Turning to the present case, *Arlington* instructs that we must view NCLB from the perspective of a state official who is engaged in the process of deciding whether the State should accept NCLB funds and the obligations that accompany those funds. In other words, we must determine whether NCLB furnishes clear notice to the official that her State, if it chooses to participate, will have to pay for whatever additional costs of implementing the Act that are not covered by the federal funding provided for under the Act. Or, as one might phrase the question, whether that state official would clearly understand that one of the State's obligations under the Act is the obligation to incur costs not paid for under the Act. Because § 7907(a) explicitly provides that "[n]othing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act," a state official would

not clearly understand that obligation to exist. To the contrary, based on this text, a state official could plausibly contend that she understood exactly the opposite--that her State need not comply with NCLB requirements for which federal funding falls short.

The Secretary contends that the reference in the final clause of § 7907(a) to a State's costs under the Act simply emphasizes that a State's decision to accept federal funding under NCLB in exchange for complying with requirements under the Act is entirely voluntary. The Secretary notes that this section provides limits on what the Act (or, if one accepts the reading discussed above, on what federal officers and employees) can "mandate" the States to do:

General prohibition. 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 or local resources, or *mandate* a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

20 U.S.C. § 7907(a) (emphasis added). The Secretary explains, "as Congress fully understood, a statute [such as NCLB] that imposes conditions on a receipt of federal funds is not a 'mandate.'" The Secretary here contends that nothing in the Act is a mandate, but that this section simply "ensured that States would not be subject to mandates that formed no part of the conditions set out in the statute."

But Plaintiffs' contention is not that NCLB *as a whole* is an unfunded mandate forced upon the States; they appear willing to concede that it is a voluntary program, and their argument focuses on § 7907(a), not the UMA. Plaintiffs argue that, *now that they are participating* in NCLB, the Secretary is imposing (that is, "mandating") liabilities that they simply did not bargain for--and that were expressly excused by § 7907(a)--when they signed on to NCLB. This view is reasonable, and there are additional reasons why the Act does not provide clear notice that § 7907(a) speaks merely to the voluntariness of the program as opposed to relieving the States of their obligation to comply with unfunded requirements.

Based on the plain language of § 7907(a), it is not apparent that this section speaks to the question of voluntary participation in NCLB as opposed to States' obligations--such as complying with requirements where federal funding falls short-- *after* the States have agreed to participate (whether voluntarily or by coercion or otherwise). It would be one thing if the Act stated that nothing in it shall be construed to mandate a State to "comply with the Act" or that nothing in the Act shall be construed to mandate a State to "incur any costs under this Act"--language like that would indicate that States can simply choose not to comply with the Act altogether. Instead, however, the text provides that nothing in the Act shall be construed to mandate a State to "incur any costs *not paid for under this Act*"--language that a State could reasonably interpret to relate to its obligations after it has agreed to comply with the Act.

We conclude that if NCLB requires States to comply with all NCLB requirements even where States must incur additional costs not paid for through federal funds, there is no clear notice of that obligation. But we pause to emphasize one final point. There is no real dispute that States and school districts participating in NCLB must fulfill the Act's various educational and accountability requirements, such as submitting plans to the Secretary, effectively tracking

student achievement, and so forth. In that respect, the States are on clear notice of these obligations. As *Arlington* instructs, "we must ask whether the [NCLB] furnishes clear notice regarding *the liability at issue in this case*." Faced with § 7907(a), which provides in a catchall phrase that "[n]othing in this Act shall be construed" to require States and localities to "spend any funds or incur any costs not paid for under the Act," we conclude that Plaintiffs' liability in this respect is anything but clear. Accordingly, the Secretary's interpretations of § 7907(a) violate the Spending Clause.

Our conclusion that NCLB fails to provide requisite notice to States of their funding obligations under the Act rests on the plain meaning of the statutory text, as discussed above. We note, moreover, to the extent that legislative history informs this question, that legislative history supports our conclusion. In this way, the Spending Clause violation here is even more apparent than it was in *Arlington*.

We have concluded that a state official would not be on clear notice that her State, once it opts into NCLB, would be required to comply with NCLB requirements that are not paid for under the Act. We note here that even the Defendant's former views on this topic suggest that this conclusion is proper. As Plaintiffs explain, former Secretary of Education Rod Paige (since succeeded by current Secretary Margaret Spellings) stated that the Act "contains language that says *things that are not funded are not required*." Reiterating this point in a later speech, Paige reassured that "if it's not funded, it's not required. There is language in the bill that *prohibits requiring anything that is not paid for*."

The Secretary does not dispute that her predecessor made these statements; she explained at oral argument that they were "stray comments." Stray or not, the comments leave us to wonder how a state official would be on clear notice that her State would have to comply with obligations under the Act that are not funded when the Secretary of Education cited to appropriate text in the Act itself to assure States that there is no such requirement. It comes as no surprise that many state officials do not have this understanding in light of § 7907(a).

NCLB rests on the most laudable of goals: to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education." Nobody challenges that aim. But a state official deciding to participate in NCLB could reasonably read § 7907(a) to mean that her State need not comply with requirements that are "not paid for under the Act" through federal funds. Thus, Congress has not "spoke[n] so clearly that we can fairly say that the State[s] could make an informed choice" to participate in the Act with the knowledge that they would have to comply with the Act's requirements regardless of federal funding. Of course, if that ultimately is what Congress intended, the ball is properly left in its court to make that clear. Accordingly, we **REVERSE** the district court's judgment dismissing Plaintiffs' complaint.

McKEAGUE, Circuit Judge, dissenting.

While the federal government historically has always contributed a relatively small amount to the total funding of local education, increasingly it has become concerned about the decline in the quality of children's education, particularly with respect to the nation's most at-risk children. In an attempt to achieve more accountability in local education, Congress passed the NCLB,

which revised the earlier Elementary and Secondary Education Act of 1965 ("ESEA"). Although participation in the NCLB is voluntary, Congress imposed significant educational reforms for those states that elect to participate and receive federal funds. Today the majority holds, in an opinion contrary to the way our nation's education has been operated and funded for centuries, that Congress could have intended that the federal government now fund the entire cost of various educational reforms for our nation's children. Because there is no support in the text or context of the NCLB for the proposition that Congress intended such a monumental and unprecedented change in our nation's education funding, I respectfully dissent.

Regardless of whether federal funds defray the entire cost of compliance, participating States and school districts must comply with the NCLB's educational requirements. Contrary to the majority's conclusion, § 7907(a) does not render the NCLB ambiguous; thus, Congress did not exceed its authority under the Spending Clause. By creating ambiguity where none exists, the majority largely avoids Plaintiffs' principal argument on appeal. As I find no ambiguity, I must first address Plaintiffs' principal argument.

Plaintiffs contend that a plain reading of 20 U.S.C. § 7907(a) leads to the conclusion that notwithstanding States' acceptance of federal funds intended to defray a portion of the cost of local education, States and local school districts need not comply with the educational requirements set forth in the NCLB if they deem federal funding to be insufficient to cover the entire cost of compliance. Section 7907(a) states in relevant part: "Nothing in this Chapter shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Chapter." Plaintiffs argue that § 7907(a) means that the "NCLB cannot be implemented in a manner that requires states and school districts 'to spend any funds or incur any costs not paid for under th[e NCLB].'" As explained below, the text, operation, and structure of the NCLB undermine Plaintiffs' reading. Instead, § 7907(a) is properly read to mean that federal officers who are charged with implementing and administering the NCLB cannot transform the statutory scheme from a voluntary program to a mandatory one. Plaintiffs' interpretation has the absurd effect of eviscerating with a single provision the entire comprehensive scheme of accountability requirements and financial disbursements set forth in hundreds of pages of statutory text. Without a stronger showing that Congress actually intended that result, I decline to adopt such an untenable interpretation.

Alternatively, Plaintiffs argue that, even if § 7907(a) does not have the meaning they suggest, it creates an ambiguous condition on the receipt of federal funds, in violation of the clear-statement rule. The majority agrees, concluding that "a state official who is engaged in the process of deciding whether the State should accept NCLB funds and the obligations that go with those funds" would not understand that if the State "chooses to participate, [it] will have to pay for whatever additional costs of implementing the Act are not covered by the federal funding provided under the Act." To the contrary--any reasonable State official would understand that there was no guarantee that federal funds would match all of the costs controlled and incurred by States and local school districts.

My statutory analysis consists of two elements: text and context. Beginning with the text of § 7907(a), I focus on the term "mandate," but, unlike the majority, I find that its meaning is unambiguous. In 1995, Congress enacted the Unfunded Mandates Reform Act of 1995 ("UMA"), which provides the following definition:

(5) Federal intergovernmental mandate. The term "Federal intergovernmental mandate" means --

(A) any provision in legislation, statute, or regulation that --

(I) would impose an enforceable duty upon State, local, or tribal governments, *except* --

(I) a *condition of Federal assistance*; or

(II) a duty arising from participation in a *voluntary* Federal program

....

2 U.S.C. § 658(5)(A) (emphasis added). Applying the UMA definition of mandate from § 658(5)(A), the § 7907(a) provision at issue means that a State is free to decide whether or not to participate in the NCLB, with its funding as well as its educational requirements; and, a State can forgo participation in the NCLB if it decides that such participation is not beneficial to its educational system. However, if a State chooses to participate, it must take all of the "bad"--the federal requirements--with the "good"--the federal money. This interpretation is consistent with the NCLB's educational requirements, funding provisions, and overall statutory scheme.

In statutory analysis, context also matters. In determining whether the clear-statement rule is satisfied, a court must not let itself focus myopically on one phrase or provision. Rather, in addition to the "plain language" of the provision, the court must also consider the general and specific purposes and objectives of the legislation and the policies being pursued. Specifically, the court must not divorce one section from the remaining provisions in the statute, but rather read the entire statute as a whole.

Here, if the language in § 7907(a) that "[n]othing in this Chapter shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Chapter" meant what Plaintiffs suggest, § 7907(a) would contradict the NCLB's other requirements that States and school districts maintain fiscal efforts to fund schools that receive the NCLB funds as well as those that do not. In particular, the NCLB requires that a school district "may receive funds under [Title I, Part A] only if State and local funds will be used in schools served under this part to provide services that, taken as a whole, are at least comparable to services in schools that are not receiving funds under this part," 20 U.S.C. § 6321(c)(1)(A); that "either the combined fiscal effort per student or the aggregate expenditures of the agency and the State with respect to the provision of free public education by the agency" must not be "less than 90 percent of the combined fiscal effort or aggregate expenditures" for the preceding year, § 7901(a); and that States and school districts "shall use Federal funds received under [Title I, Part A] only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under [Title I, Part A], and not to supplant such funds," § 6321(b)(1).

Plaintiffs' interpretation of Section 7907(a) eviscerates States' and school districts' obligations under § 6321(b)(1), § 6321(c)(1)(A), and § 7901(a). Alternatively, if "mandate" is

read with the meaning I have suggested above, § 7907(a) does not contradict other provisions of the NCLB, nor does it cause the unreasonable results created by Plaintiffs' interpretation.

In conclusion, let's consider the road that Plaintiffs want to take us down. A State decides to accept NCLB funding. State and local school officials design and implement the education programs required under the NCLB. They decide how federal dollars are to be allocated between various programs. They also apparently get to determine whether one of their education programs is "fully funded" with federal dollars. So, consistent with Plaintiffs' reasoning, if they find their students failing in one program, they can simply divert federal funds *away* from the program, declare the program "under funded," and wipe their hands (but not pay back the federal dollars). Voila, problem solved, at least for the State and local officials, if not for the struggling students. This, of course, is exactly the *opposite* of what Congress intended to accomplish with the NCLB. 20 U.S.C. § 6301(4) (stating that one purpose of the NCLB is "holding schools, [school districts], and States accountable for improving the academic achievement of all students"). No green-tinted glasses can alter this fact.

To its credit, the majority does not accept outright Plaintiffs' interpretation of the NCLB. Yet, in finding § 7907(a) ambiguous, it concludes that Congress might have meant what Plaintiffs' say it did. I cannot agree. Contrary to the majority's opinion, I would hold that the NCLB's requirements apply to participating States regardless of whether federal funding is sufficient to defray the entire cost of compliance. I would further hold that States' and school districts' obligations are consistent with § 7907(a), which simply prevents federal officers from transforming the NCLB from a voluntary program into a mandatory one.

My reading of § 7907(a) is supported by the plain text of the NCLB as well as its overall structure. Under the NCLB, participating States and the school districts within them must comply with extensive educational requirements if the States choose to accept federal funding. The NCLB's funding amount for a school district is dependent on congressional appropriation decisions and the proportion of at-risk students in the school district, *not* on the cost of compliance with the NCLB's educational requirements. My reading also recognizes State and local governments' long-standing responsibility for largely administering and funding our children's education. Because the NCLB's requirements are sufficiently clear, I would hold that requiring compliance with them is an appropriate exercise of congressional authority under the Spending Clause. For all of these reasons, I respectfully dissent.