USING FEDERAL LAW TO PRESCRIBE PEDAGOGY: LESSONS LEARNED FROM THE SCIENTIFICALLY-BASED RESEARCH REQUIREMENTS OF NO CHILD LEFT BEHIND

Kamina A Pinder, John Marshall Law School

Available at: https://works.bepress.com/kamina_pinder/1/
Using Federal Law to Prescribe Pedagogy: Lessons Learned from the Scientifically-Based Research Requirements of No Child Left Behind

Kamina Aliya Pinder

Abstract

Recent data on national student achievement under the Reading First program has tentatively established it as the most successful federal academic program in the existence of federal education law. Reading First is an early reading intervention program with rigid curricular and accountability provisions and is the centerpiece of the No Child Left Behind Act—the most far-reaching federal encroachment on state and local control of education in our nation’s history. In implementing the Reading First statute, U.S. Department of Education officials are alleged to have violated statutory provisions that prohibit Department officials from influencing state and local choice of curricular programs. These allegations have ignited a heated political battle over the Department’s appropriate role in administering grants. When the No Child Left Behind statute comes up for reauthorization in September 2007, Congress will face a turning point in federal education law and policy as it determines the extent to which the Department will be able to enforce increasingly prescriptive curricular statutory requirements.

Introduction

In September 2006, the U.S. Department of Education’s Office of the Inspector General (OIG) released a damning report on the federal Reading First program alleging that the U.S. Department of Education (“Department”): improperly selected the grant application review panel, created an ineffective screening process for conflicts of interest; did not follow its own guidance for the peer review guidance; awarded grants to States without documentation that the subpanels approved all the criteria; created evaluative criteria for State grant applications that went beyond the parameters of the statute; and improperly influenced state and district selection
of reading programs.\textsuperscript{1} At the heart of this report is the overarching premise that the Department’s actions “call into question”\textsuperscript{2} whether the Department violated the Department of Education Organization Act and the general provisions of the No Child Left Behind Amendment (NCLB) to the Elementary and Secondary Education Act of 1965 (ESEA) by influencing state and local choice of reading programs in violation of federal law.\textsuperscript{3} A firestorm of controversy followed the release of the OIG report, and the educational community was in an uproar; ultimately, the administration pointed fingers and the federal director of the Reading First program resigned.\textsuperscript{4} At least one member of Congress has called for a criminal investigation of the Reading First program and its officials,\textsuperscript{5} the OIG has referred its findings to the Department of Justice,\textsuperscript{6} and in the spring of 2007 Congress held hearings on the program.\textsuperscript{7}

The Elementary and Secondary Education Act of 1965 (“ESEA”) as amended by No Child Left Behind comes up for re-authorization in September 2007. Sometime thereafter, Congress will modify Reading First-- one of the largest educational initiatives ever taken by the federal government. On the heels of increased congressional demand for educational

\textsuperscript{1} U.S. Dep’t of Educ. Office of Inspector Gen., The Reading First Program’s Grant Application Process at 6 (2006) (summary of official findings of investigation of Reading First’s grant process).

\textsuperscript{2} Id. at 2.

\textsuperscript{3} References to the statutory provisions in the NCLB Act will be to the Public Act sections and page citations with cross references to the codified statute.


\textsuperscript{6} See Rock, OIG Refers to U.S. Justice Dep’t, supra note 3.

\textsuperscript{7} Hicks, Director Draws Fire, supra note 4.
accountability through academic standards and testing, the language of the ESEA has become increasingly specific and directive with regard to its curricular requirements. On the other hand, the Department of Education Organization Act (DEOA), and the general provisions section of the ESEA as amended by No Child Left Behind, include language that expressly prohibits the federal government from exercising control over state and district curricula. The result is an inherent tension between these statutory provisions and the combination of prescriptive academic requirements and the accompanying political pressure of Reading First--a federal reading statute that has been described as the most “heavy handed program in the history of federal education policy.”

The significance and parameters of the prohibition have never been explored, yet there is growing conflict between the NCLB statutory provisions that prohibit the Department of Education from endorsing or directing state and district choice of curricula and the ability of Department officials to enforce statutory requirements that mandate the use of scientifically based research. Scientifically based research is a fundamental part of NCLB; there are several provisions throughout the NCLB statute that require districts to implement programs steeped in it. These statutory requirements significantly limit State and district choice of instructional materials; and depending on how narrowly the definition of curriculum is interpreted, enforcing

---

8 See Elizabeth Adams St. Pierre, *Scientifically Based Research in Education: Epistemology and Ethics*, 56 Adult Educ. Q. 239 (2006)(describes the concept of scientifically based reading research and when it was defined in federal legislation).

9 DEOA §3403(b), 20 U.S.C. 1232(a) (Lexis through 2006 legislation); see also NCLB § 9527, 20 U.S.C 7907(b)(Lexis through 2006 legislation)(stating that Dep’t officials are prohibited from exercising any direction, supervision, or control over the curriculum or program of instruction of any educational institution, school or system).

10 Michael J. Petrilli, *Reading Last*, (September 28, 2006), http://article.nationalreview.com/?q=YTZjZGQ3NGMwNjU1YWMyOTQyZDAwYzAxNDcyZTg3MGI=.

the requirements surrounding scientifically based reading research may violate the prohibition against federal direction in the selection of instructional materials.

The article will specifically explore this conflict through an account of the rise, fall and future of the federal Reading First program, with a focus on the legal tightrope that Congress has forced the program’s administrators to walk by increasing its demand for academic accountability in curricular choice and grant implementation, while simultaneously attempting to preserve states’ autonomy in their selection of academic programs. Preliminary data reveal that NCLB has resulted in increased academic achievement and a narrowing of the achievement gaps between minority and non-minority students. While evaluators are not yet able to determine whether these positive results are a direct result of the prescriptive curricular requirements of NCLB, it does not make sense to disempower Reading First-- arguably the most academically successful program in the history of federal education. Now is the time for Congress and the Department to draw the line between the federal agency’s responsibility to enforce grant conditions and illegal federal intrusion into state control of curriculum. This article will examine the potential impact of the proposed Congressional changes to the Reading First statute, along with the legislative and administrative changes that would most effectively maintain the integrity and impact of the Reading First program without violating the letter or spirit of the prohibition against endorsing curricula.


13 Id. at 56.

14 Charlotte Allen, Read It and Weep (Why does Congress hate the part of No Child left Behind that works?), 12 The Weekly Standard 22, 26 (July 16, 2007).

15 H.R. Res. 1939, 110th Cong. (2007) (provides for the creation of a Reading First Advisory Committee, governed by the Federal Advisory Committee Act, prohibits committee majority from being selected by one person or entity, and focuses on conflicts of interest between reviews and reading programs. It does not attempt to define curriculum
This article contends that while the NCLB statutory provisions surrounding scientifically based research effectively limit state and local choice of curricula, they are not in conflict with the prohibitions against directing curricula, and to the extent that there is a conflict, the statutory curricular requirements serve as exceptions to them. Moreover, in implementing increasingly prescriptive statutory requirements, the Department has a responsibility to provide grantees with guidance in implementing curricular grant conditions, and within parameters, must be afforded the deference to do so without fear of reprisal. That includes the ability of federal officers to identify by name specific curricular programs that meet scientifically based reading research requirements. The upcoming re-authorization of the NCLB represents a historic turning point in the future of education policy, and will demonstrate just how far Congress is willing to go in enacting and enforcing prescriptive curricular requirements.

THE RISE OF READING FIRST

**Background**

Reading First was preceded by the Reading Excellence Act (REA), which was enacted under the Clinton administration’s Improving America’s Schools Act (IASA) amendment to the ESEA. At the time of its 1994 enactment, the REA was a pioneer in federal education legislation; it was the first statute in the ESEA to require a specific educational approach – scientifically based reading research (SBRR) -- as part of a Congressional move towards the increased educational accountability of federal grant recipients. The statutory scientifically based reading research provisions required grantees to implement reading materials and

---


17 St. Pierre, supra note 8, at 243-244.
approaches that had undergone independent, rigorous, objective and scientific review. The REA even went so far as to define reading—a definition that was later adopted by Reading First.

While the REA’s SBRR requirements included a specific notion of acceptable academic rigor, the Act did not identify commercial reading programs that met that level of rigor. On the contrary, the program specifically noted on its website that the choice of reading programs was a decision left to the states, stating that the REA does not require selection of specific program models. In fact, most funded grantees in FY 1999 did not proposed to select comprehensive models developed by others. Instead, funded states, districts, and schools will assess the reading research and identify specific content and instructional strategies to implement in grades K-3, with supporting family literacy activities for preschool and early elementary grades.

Critics of the Reading Excellence Act claimed that the statute did not go far enough to clarify and enforce the level of rigor that Congress expected when it enacted the statute. Even supporters of the program were unable to point to significant evidence of its success. The Department’s Institute for Education Sciences conducted an evaluation of the REA that

---


19 The REA defined reading (and Reading First adopted this definition) as “a complex system of deriving meaning from print that requires all of the following: (A) The skills and knowledge to understand how phonemes, or speech sounds, are connected to print. (B) the ability to decode unfamiliar words. (C) The ability to read fluently. (D) Sufficiently background information and vocabulary to foster reading comprehension. (E) The development of appropriate active strategies to construct meaning from print. (F) The development and maintenance of a motivation to read. Id. at § 2252(4).


21 See e.g. Kathleen Kennedy Manzo, Dept. of Education to Hike Oversight of Reading Grants, Education Week November 13, 2002, available at http://www.edweek.org/ew/articles/2002/11/13/11read.h22.html?print=1 (Discussing that the failings of Reading First’s predecessor, the Reading Excellence Act, could potentially hurt successful implementation of Reading First).

22 Interview with Senior Dep’t of Educ. Official in Washington D.C. (June 11, 2007)
evidenced minimal academic results—that evaluation was never released.23

Evidently, Congress saw in the REA statute the potential for significant academic achievement, because as part of the No Child Left Behind Act’s reauthorization of the ESEA, President Bush proposed a major reading initiative that adopted much of the statutory language of the Reading Excellence Act—including the requirement that instructional activities be based on scientifically based reading research—and increased its enforcement, monitoring, and rigorous implementation.24 The program was entitled “Reading First” and the new initiative was to be appropriated $5 billion over five years; Reading First adopted several of the academic requirements of the Reading Excellence Act, including the requirement that instructional activities be based on scientifically based reading research.25

The major components of the President’s proposal were that grantees were to:

- Conduct diagnostic testing of children (k-2) to determine those who need reading help
- Require reading curriculum funded under this initiative to use scientifically based reading instruction; in particular by drawing on the research on reading conducted by the National Reading Panel
- Fund training for teachers of grades K-2 in how to teach reading
- Provide extra help in reading to those children in grades k2 who are not reading at grade level
- Conduct ongoing reading assessments for students in grades 3-8 and link them to an accountability system for states.26

Reading First was signed into law in January 2002 as part of No Child Left Behind Amendment to the Elementary and Secondary Schools Act of 1965.27 It became Title I part B of the “Student Reading Skills Improvement Grants and is part of the same title as the more well-known Title I

23 Id.
25 Gail McCallion, Cong. Research Serv., Reading First and Early Reading First: Background and Funding (2005).
26 Id. at 1; § 1201, 20 U.S.C. § 6301.
part A of NCLB; its appropriation second only to Title I part A of the NCLB act. Reading First is an approximately six-billion (instead of the originally proposed five-billion) dollar early reading grant program that provides money to promote early reading in grades k-3.

The final version of the Reading First statute incorporates much of the Bush administration’s initial proposal. In its final form, grants awarded under the Reading First statute:

- Provide assistance to state educational agencies (SEAs) and local educational agencies (LEAs) in establishing scientifically based reading programs for children in kindergarten through grade three
- Provide assistance to SEAs and LEAs in providing reading related professional training for teachers, including special education teachers.
- Provide assistance to SEAs and LEAs in selecting or administering screening, diagnostic, and classroom-based instructional reading assessments
- Provide assistance to SEAs and LEAs in selecting or developing effective instructional materials, programs, learning systems, and strategies
- To strengthen coordination among schools, early literacy programs, and family literacy programs, in order to improve reading achievement for all children.

Reading First is a classroom-focused federal education program that requires that instructional materials and methodology be steeped in scientifically based reading research. It is a six-year grant formula grant program as opposed to REA’s three-year competitive grant, and the Reading First statute included more prescriptive requirements than the REA. The intent

---

28 Title I part A has been in existence in one form or another since the 1965 enactment of the Elementary and Secondary Education Act. The general public has made Title I part A synonymous with the No Child Left Behind Amendment to the ESEA because it is the chief source of academic standards, annual testing, adequate yearly progress and highly qualified teachers requirements in NCLB. Title I is also the most controversial part of NCLB.

29 U.S. Dep’t of Educ., Reading First Funding Status, http://www.ed.gov/programs/readingfirst/funding.html. (Appropriation for 2006 is quoted at $1,029,234,000.)


31 Classroom focused as opposed to a “pull-out” program where specialized teachers remove a number students from the classroom to provide remedial assistance.

32 REA, like Reading First, states that local educational agencies are required to use funds to implement SBRR programs but the REA does not address how non-compliance with the statute will be handled. 20 U.S.C. § 6661.
was that districts receiving Reading First funds would not water down the strict accountability measures of Reading First requirements by combining it with reading programs that were less rigorous.\textsuperscript{33} The program requires states to work with districts to ensure that teachers receive professional development in reading instruction and reading assessments with SBRR at their core.\textsuperscript{34} Additionally, the Reading First guidance encourages grantees to devote an uninterrupted block of more than ninety minutes per day of small group reading instruction; student placement in reading groups was to be flexible and change according to student progress.\textsuperscript{35} Grantees were also to develop assessment strategies to diagnose student needs and to measure their progress.\textsuperscript{36}

Significantly, Reading First differed greatly from the REA in terms of its enforcement mechanisms. Though the Department has the general statutory authority to enforce grant conditions\textsuperscript{37}, the REA did not include any specific language about federal enforcement of its provisions. Reading First, on the other hand, included a statutory provision entitled “Consequences of Insufficient Progress” that reinforced the Department’s ability to withhold funds and to provide technical assistance should the State not make sufficient progress in

\textsuperscript{33} U.S. Dep’t of Educ., Office of Elementary and Secondary Educ., \textit{Guidance for the Reading First Program} (April 2002) (Section H-12 of the guidance requires local district to demonstrate that the Reading First activities “will not be layered on top on non-research based programs already in use”); \textit{see also supra} note 8, at 6 (stating that “the intent is that Reading First will be the reading program for children benefiting from Reading First funding”).


\textsuperscript{35} \textit{Id.} at C-1, C-2.

\textsuperscript{36} \textit{Id.}

implementing the program.\textsuperscript{38}

\textbf{Grant Process}

The predominant two types of grants that the Department awards under the ESEA are discretionary and formula.\textsuperscript{39} Discretionary grants --sometimes called direct or competitive grants--are grants that are awarded directly and on a competitive basis to grantees from the Department.\textsuperscript{40} The Department selects, hires, and trains peer reviewers to score applications, and the applications are scored on the extent to which they meet selection criteria that are based on statutory requirements and applicable regulations.\textsuperscript{41} Those peer reviewers assign each criterion a numerical score and the Department uses the cumulative score to fund the grant applicant with the highest score down the funding slate until the program appropriation is spent. The grantee is directly accountable to the Department for the implementation of the grant.\textsuperscript{42}

When a grant program is appropriated a larger amount of money, the administration of the program is usually left to the states rather than to the Department; the grant is a formula grant.\textsuperscript{43} The funds are distributed to states and eligible U.S. territories based on a formula that includes census and poverty-related data; a percentage of the state grant is reserved for a

\textsuperscript{38} § 1202(e)(3), 20 U.S.C. § 6302(e)(3) “. . .if the Secretary determines that the State educational agency is not making significant progress in meeting the purposes of this subpart, the Secretary may withhold from the state educational agency, in whole or in part, further payments under this section 455 of the General Education Provisions Act or take such other action authorized by law as the Secretary determines necessary, including providing technical assistance upon request of the State educational agency.”

\textsuperscript{39} U.S. Dep’t of Educ., Reading First Budget Process, http://www.ed.gov/about/overview/budget/process.html#what

\textsuperscript{40} Id.

\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} There is no specific monetary amount that triggers a formula grant designation; the decision to make a program formula or discretionary is a congressional one. However, formula grant programs tend to have appropriations greater than $100 million. Kamina Pinder, former Reading First Program Attorney, U.S. Dept. of Educ.
subgrant competition and the administration of the grant.\textsuperscript{44} Subsequent to receiving its award, the state holds a competition to subgrant the funds to eligible entities; as the grantee, the state is accountable to the Department for the proper implementation of the grant.\textsuperscript{45}

The Reading Excellence Act was a one-time only competitive grant to states. Reading First, on the other hand, was the first major ESEA program to combine the peer review process of a discretionary grant competition with the formulaic allocation of funds.\textsuperscript{46} Reading First’s $1 billion-dollar appropriation would ordinarily result in Congress designating it a formula grant program, and as such grant applications would have simply been checked to ensure that they included the appropriate data and assurances.\textsuperscript{47} However, the Reading First statute takes an extra step in the name of increased accountability. According to the then Assistant Secretary for Elementary and Secondary Education, this was not going to be a “typical entitlement program”.\textsuperscript{48} Unlike Title I part A and other ESEA programs with high appropriations, Reading First grants were not awarded to states strictly by formula. Instead, the Reading First statute created a unique hybrid grant-selection process that combined elements of both the formula and discretionary award process. Rather than receive grants that were awarded strictly by formula, state applicants for Reading First funds had to undergo a rigorous approval process that included assuring the


\textsuperscript{45} \textit{Id}.

\textsuperscript{46} \textit{Id}.

\textsuperscript{47} Supra note 39.

\textsuperscript{48} Susan Neuman, Assistant Secretary for Elementary and Second Education, Remarks during Dep’t of Educ. Meetings Regarding Reading First (January 2002- April 2002).
reviewers that they would meet twenty-five academic criteria.\textsuperscript{49} Then, just as with any other formula grant, states then awarded subgrants to eligible local educational agencies (LEAs) on a competitive basis, funding the grant proposals that showed “the most promise for raising student achievement and for successful implementation of reading instruction, particularly at the classroom level.”\textsuperscript{50}

Unlike competitive grant applicants, states were not competing against each other for funding; instead, they had to meet certain standards and be recommended to the Secretary for approval by an expert review panel before receiving their grants.\textsuperscript{51} While, discretionary (competitive) grant reviewers scored the applications they reviewed, Reading First reviewers recommended applications for approval or disapproval. The Department would provide a summary of the reviewers’ comments to the state applicant so that the state applicant could modify its application as needed.\textsuperscript{52} This process was iterative, states would submit and re-submit their applications to the expert review panel until they were approved.\textsuperscript{53} States could resubmit

\begin{itemize}
\item \textsuperscript{49} The twenty-five criteria were: 1) current reading initiatives and identified gaps, 2) state outline and rationale for using scientifically based reading research, 3) state definition of subgrant eligibility, 4) schools to be served, 5) instructional assessments, 6) instructional strategies and programs, 7) instructional materials, 8) instructional leadership, 9) district and school based professional development, 10) district based technical assistance, 11) evaluation strategies, 12) access to print materials, 13) additional criteria, competitive priorities, 14) competitive priorities, 15) process for awarding subgrants, 16) state professional development plan, 17) integration of proposed reading first activities with REA, 18) state technical assistance plan, 19) building statewide infrastructure, 20) state management plan, evaluation strategies, 22) state reporting, 23) participation in national evaluation, 24) key Reading First classroom characteristics, and 25) coherence. U.S. Dep’t of Educ., Applicant Information. http://www.ed.gov/programs/readingfirst/applicant.html.
\item \textsuperscript{50} Dep’t of Educ., Reading First- Purposes of the program, http://www.ed.gov/programs/readingfirst/index.html (last visited June 20, 2007).
\item \textsuperscript{51} § 1203(c)(2)(A-C), 20 U.S.C. § 6303(c)(2)(A-C).
\item \textsuperscript{52} Supra note 34, at E-4.
\item \textsuperscript{53} Only Utah and Colorado were approved the first time they submitted their applications; The average number of submissions was three. There were states that submitted their applications two, three and four times, but three and four were the most common number of submissions. A few states submitted there applications five times; Rhode Island submitted its applications the most times—seven. Most applications were approved within two years.
\end{itemize}
their applications as many times as it took to be approved, so long as the period of obligation did not run out.\textsuperscript{54} When a panel reviewed a state’s application, it would provide comments for improvement; the Department would then provide a summary of the panel’s comments to the state.\textsuperscript{55} Not surprisingly, of critical concern in this process was who comprised the expert review panel and how the panel determined whether states created criteria and selected programs that were based on scientifically based reading research.\textsuperscript{56}

**Expert selection**

The Reading First statute requires that the Secretary, in consultation with the National Institute for Literacy (NIFL) an expert panel that included three individuals selected by the Secretary, three individuals selected by NIFL, three individuals selected by the National Research Council of the National Academy of Sciences (NAS) and three individuals selected by the National Institute of Child Health and Human Development (NICHD).\textsuperscript{57}

While the combined expert review panels included the representatives required by the statute, none of the individual subpanels included a representative from each of the nominating organizations identified in the statute.\textsuperscript{58} There was mention of creating an opportunity for the

---

\textsuperscript{54} The Tydings amendment to the General Education Provisions Act, §421(b), 20 U.S.C. 1225(b), grants that are forward-funded can have up to twenty-seven months to obligate appropriated funds beginning as early as July 1 of the Federal fiscal year. *Supra* note 37.

\textsuperscript{55} The panel’s written comments were often spotty and difficult to follow. The federal program officials provided summaries of the panelists’ written and oral comments, so that the states would more easily be able to ascertain the changes they needed to make. Unfortunately, that the Department provided summaries rather than original notes to the applicants was also part of OIG’s report of alleged wrongdoings. See *supra* note 1 and accompanying text.

\textsuperscript{56} *Supra* note 53.

\textsuperscript{57} § 1203(c), 20 USCA § 6103(c) (describes process by which applications are to be reviewed); § 1203(c)(2)(C), § 6103(c)(2)(C) states that “panel shall recommended grant applications…to the Secretary for funding or for disapproval.”

\textsuperscript{58} *Supra* note 1, at 6.
members of all of the subpanels to meet to provide their cumulative recommendations, but given the iterative, long-term nature of the process, and the numerous time conflicts of the panelists, the idea was quickly dismissed as a logistical impossibility.59

There was also a recommendation from the Office of the General Counsel that was approved by high-level Department officials to create an oversight panel of twelve members that would include all of the representatives listed in the statute; this “Advisory and Oversight Panel” would consist of the three individuals selected by the Department, three individuals selected by NIFL, three individuals selected by NAS, and three individuals selected by NICHD, as required by the Act.60 Presumably, this oversight panel would have examined the progress of the subpanels, and based its recommendations for approval or disapproval of an application on the subpanel’s comments, but the recommendation to create this superpanel was never adopted.61 This may be because the oversight panel would have been subject to requirement of the Federal Advisory Committee Act (FACA); the additional requirements that FACA would impose would slow down the review process,62 and the Department was under tremendous pressure from the White House, Congress and the states themselves to award the applications as quickly as possible.63

Realistically, the Department recognized that it would be logistically impossible to create a single panel that would commit to reviewing every state application for as many times as

59 Supra note 43.

60 Id.

61 Hearings, supra note 5, at 18 (testimony of former Reading First Director Chris Doherty).


63 No one has identified when, by whom, and at what administrative level this recommendation was dropped. Supra note 43.
necessary to approve it. 64 Expert reviewers had full-time jobs, were sometimes in different time zones, and often had other obligations that would have resulted in time-conflicts impossible to overcome. 65 Additionally, the job required that each reviewer commit to being available for over a year to review applications that were on average over 200 pages, and provide feedback on the applications as many times as the states (re)submitted them. 66 The pay for this tremendous undertaking was very low—subpanel chairs were paid $1,500 for their eighteen-month commitment, while non-chairs were paid $1,250. 67

No single panel could provide the fifty-plus applications the depth of review required by the Reading First statute. Consequently, the Reading First program, in conjunction with the Office of the General Counsel, decided to create subpanels that would review a more manageable number of applications. 68 Ultimately, the program created sixteen subpanels that would review a more manageable number of the fifty-four state educational agency applications. 69 The panels brought diverse areas of reading expertise to the process including: “acquisition of reading skills; the cognitive science of language and reading process; prevention of reading failure; scientifically based reading research; professional development; school leadership; classroom teaching; curriculum development; early intervention; psychology; assessment, measurement, and evaluation; reading and learning disabilities; special education; 64 Supra note 22.

65 Id.

66 The expert panel review process began on May 1, 2002 and the last date that the Department could award funds was September 30, 2003. Dep’t of Educ., Reading First- Applicant Info., http://www.ed.gov/programs/readingfirst/applicant.html (last visited June 20, 2007).

67 Telephone interview with former Dep’t of Educ. Official (June 17, 2007).

68 Supra note 43.

69 There is no record of how many applications each subpanel reviewed. See supra note 22 and accompanying text.
management and accountability."  

One of the allegations in the OIG report is that Department officials improperly influenced state selection of reading programs by stacking the expert review panel with panelists who had predilections toward or biases against certain reading programs (or at the very least conflicts of interest), and would either pressure states to adopt or not to adopt specific reading programs. Certainly, those who are experts or have an understanding of the definition of SBRR also have a sense of whether existing reading curricula meet that definition. The expert review panels were responsible for determining whether state applications met the demands of the Reading First statute; as such, selecting panels of experts in the field of reading and scientifically based reading research was a critical part of the Reading First application review. Virtually by definition, it is impossible to find an expert in reading without any preference for, or affiliation with, specific reading programs. In order to become experts in the field, reading specialists must have experience with various reading programs, and to be considered experts in the field of scientifically based reading research they would certainly have to have had enough exposure to the science in order to be able to identify reading programs that meet its requirements. To seek panelists without prior experience or affiliation with any reading programs would be to intentionally eschew the use of experts in favor of novices in the field. The inevitable result would be to sacrifice the rigorous SBRR curricula selection that the Reading First statute mandates.

---


71 See supra note 1, at 7-11.

72 See supra note 33, at E-4.

73 See Hicks, Director Draws Fire, supra note 4; See also supra note 1, attachment to OIG report, Dep’t of Educ. response to OIG findings.
There are always more screens for conflict that can be created, and certainly there may have been additional screens that the Reading First program could have created to further minimize conflicts of interest, but the program was the first of its kind and magnitude. The program was enacted in January 2002, and the federal program was expected to get the state applications and accompanying guidance to states by April 2002. The timeline for the Department to release the state application and accompanying guidance was an incredibly short four months, and no one anticipated the controversy that would later surround the application process. In the meantime, there was no prototype for a conflict of interest form for this program, nor was there even a statutory or regulatory requirement to create a conflict of interest form. Despite the fact that there was no formal requirement to do so, program officials recognized the need to create such a screen and consulted with an OGC ethics attorney to develop a conflict of interest form that was adapted from the form used to screen for conflicts as part of the discretionary grant process. With perfect hindsight, the OIG found the process used to create the screen to be ineffective. Notably, only one state complained about the review process

---

74 See Hearings supra note 5, at 8, 58 (testimony of former Reading First Advisor and former Commissioner of Special Education Research at the Institute of Education Sciences Edward Kame’enui and former Reading First Director Chris Doherty) (Both Kame’enui and Doherty testified that they employed the standards used in the educational community to screen for conflicts of interests but indicated that because of the perceived conflicts of interest highlighted in the OIG report that additional screening should have been implemented).


76 U.S. Dept. of Educ., Reading First: Awards, http://www.ed.gov/programs/readingfirst/awards.html (All fifty states and the District of Columbia were awarded Reading First grants by the end of October 2003); Cent. For Educ. Policy, supra note 13 (According to the Reading First database maintained by the Southwest Education Development Laboratory, a total of 1, 1415 districts and 4,774 schools in those districts participate in the Reading First website).

77 The OIG report did note that the role of the ethics attorney in OGC was to “provide guidance rather than decisions”. See supra note 1, at 7.

78 Supra note 1.
during the period of review.\textsuperscript{79}

Though there existed an expert review panel to review these applications, the Department may have had greater influence on the process than it should have. In January and February of 2002, the Department and the National Institute of Literacy sponsored Secretary’s Reading Leadership Academies to assist states in their preparation of Reading First applications.\textsuperscript{80} Some of the presenters and materials included articles or mentioned specific commercial reading and assessment products.\textsuperscript{81} It is certainly likely that the members of the expert review panel and Reading First ED officials had ideas of which programs were based in scientifically based reading research, yet given the prohibitions on the endorsement of curricula, they were unable to provide a list of programs that met the definition. On the other hand, the pressure to provide information to states eager to get their grant awards as quickly as possible, may have resulted in a blurred line between guidance and directive.\textsuperscript{82} Given the demand for information and the initial confusion surrounding curricular SBRR requirements, there was no clear understanding as what that line was, so it was an easy one to cross.

\textbf{The Federal Definition of Scientifically Based Research and Its Increasing Role in Directing Curricula}

Scientifically Based Research (SBR) is the academic foundation of NCLB; the

\textsuperscript{79} That state was Kentucky. \textit{Supra} note 22.


\textsuperscript{81} \textit{Hearings supra} note 5, at 6 (testimony of Jack Higgins, Inspector General, Dept. of Educ.).

\textsuperscript{82} See \textit{supra} note 1, at 19.
term appears 111 times throughout the statute. The Scientifically Based Reading Research (SBRR) is the SBR approach as it specifically applies to reading; the Reading First statute requires grantees to implement programs that are based in scientifically based reading research (SBRR). The SBRR approach is a phonics-based approach to reading, and is a relatively recent addition to the arsenal in the long-fought “reading wars”—the ongoing political and educational battle between proponents of whole language versus phonics as the best way to teach reading.

Notably, the definition of scientifically based research was not created by an expert in scientifically based research or even in reading. The definition was created for the Reading Excellence Act by Robert Sweet, a professional staff member for the majority members of the House education and workforce committee; Sweet allegedly created the definition after talking with researchers and searching numerous websites. Since the definition of scientifically based research in NCLB is derived from the statutory predecessor to Reading First, it is not surprising that Reading First is the linchpin of the SBR approach in NCLB.

SBR as defined in NCLB includes “systematic, empirical methods that draw on observation or experiment” and acceptance by a “peer reviewed journal or panel of independent experts.” SBRR is specifically defined in NCLB as follows:

---

84 Id.
85 Id.
86 See Allen, supra note 14, at 26. See also Louisa Moats, “Whole-Language High Jinks: How to Tell When ‘Scientifically-Based Reading Instruction’ Isn’t” Thomas B. Fordham Institute January 29, 2007 (differentiating characteristics of reading programs that adopt a whole language approach from those that incorporate scientifically based reading research.
87 St. Pierre, supra note 8, at 244.
The term ‘scientifically based reading research’ means research that—
(A) applies rigorous, systematic, and objective procedures to obtain valid knowledge relevant to
reading development, reading instruction, and reading difficulties; and
(B) includes research that—
   (i) employs systematic, empirical methods that draw on observation or experiment;
   (ii) involves rigorous data analyses that are adequate to test the stated hypotheses and
       justify the general conclusions drawn;
   (iii) relies on measurements or observational methods that provide valid data across
       evaluators and observers and across multiple measurements and observations; and
   (iv) has been accepted by a peer reviewed journal or approved by a panel of independent
       experts through a comparably rigorous, objective, and scientific review.\(^90\)

While the above language may seem straightforward on its face, there is some wiggle
room in its interpretation. For example, the requirements of SBRR do not differentiate among
programs that have themselves been evaluated to meet SBRR requirements and those programs
that have not been evaluated but can cite SBR that supports their components.\(^91\) Also, SBRR is a
relatively new science with limited evaluation of its application to educational interventions.\(^92\)
Even the creator of the definition of SBRR, Robert Sweet, later recognized its shortcomings and
said that his original definition of quality educational research was too narrow.\(^93\)

In anticipation of the far-reaching effects that the definition of SBRR would have on
curricular selection, weeks before the Reading First legislation was finalized legislators changed
the statutory language adopted from the Reading Excellence Act that required states to select
reading programs with “strong evidence of effectiveness”\(^94\) to read that states were only to fund
districts that selected and implemented “a learning system or program of reading instruction

\(^90\) Id.

\(^91\) Gail McCallion, Cong. Research Serv., Reading First: Implementation Issues and Controversies at 7 (2006); see
Johnathan Margolin, Beth Buchler, N. Cent., Reg’l Educ. Lab., Critical Issue: Using Scientifically Based Research
to Guide Educational Decisions, http://www.ncrel.org/sdrs/areas/issues/evnrmnt/g0/g0900.htm.

\(^92\) St. Pierre, supra note 8.

\(^93\) Id. at 246.

based on scientifically based reading research that includes the essential components of reading instruction.” According to Robert Sweet, the change was based on a concern that the language would restrict the program to two reading programs—Success for All and Direct Instruction—and would thereby possibly conflict with the federal prohibition against endorsing/directing curricula. The theory behind removing this restriction was that more reading programs would meet the definition; unfortunately, removing the restriction did nothing to abate the need for guidance as to which programs met the definition of SBRR.

Almost immediately after the Department released the Reading First application for grant funds and accompanying program guidance, there was an onslaught of questions and speculation about which commercial reading programs would meet the SBRR requirements. With so much money at stake, how the federal definition of SBR (or SBRR) is interpreted, and who meets it, have far-reaching effects on national education policy and on the reading research and reading programs that will be funded. Vendors of commercial reading products were especially troubled by the possibility that there would be preferences for specific programs, and with good reason; they had a huge economic interest in meeting SBRR requirements because an increased likelihood that they would be used in Reading First schools potentially translated to millions of

95 There are five, essential component of reading instruction are defined as “explicit and systematic instruction in: phonemic awareness; phonics; vocabulary development; reading fluency, including oral reading skills; and reading comprehension strategies.” § 1208(3)(A)-(E), 20 U.S.C.S. §6308(3)(A)-(E).

96 Id.

97 Supra note 43.

98 “The federal government’s focus on SBR is moving through all aspects of education, from extending NCLB to high schools, to making plans to require teacher certification programs to confirm that their work is based on scientific evidence, to making plans to ensure that colleges of education train researchers who can conduct research that is ‘scientific,’ to attempting to discipline the educational research community and thereby all areas of education in a multitude of ways. It seems that at the beginning of the 21st century, notions of a particular kind of science and a particular kind of evidence have been put into play regardless of continuing critiques from educators, many of whom have lived this battle before.” St. Pierre, supra note 8, at 249.
dollars.\textsuperscript{99} States wanted to receive their grant funds expeditiously so that they could run competitions for the school districts and implement the program as soon as possible. Many questioned whether the Department created a list of approved Reading programs; in fact this concern was so widely expressed that the Department published a statement on its website to reinforce its assertion. The response specifically stated:

Just like every other aspect of No Child Left Behind, states and local communities maintain control.

- States and local schools have the flexibility to determine how reading programs are selected as long as the selected program has been scientifically proven to work.
- There is no federally prescribed program.
- States are responsible for the quality of the local programs they fund, and for ensuring that these programs rely on scientifically based reading research.\textsuperscript{100}

The Department’s Institute of Education Sciences (IES) created a What Works Clearinghouse (WWC) that claims to “focus on identifying and using scientifically based or scientifically valid research in designing and implementing educational programs and instructional strategies.”\textsuperscript{101}

However, the IES website clearly separates the Reading First grant application process from the WWC’s review of reading programs and studies even as it encourages states to review the WWC reports of research-based programs under NCLB.\textsuperscript{102} Oddly, even though the WWC evaluates the effectiveness of reading programs, it does not tie that effectiveness to whether those programs

\textsuperscript{99} Success For All developer, Robert Slavin expected the use of his program to expand to an additional two hundred school after the enactment of Reading First and when this expectation failed to materialize Mr. Slavin filed a formal complaint with the Department of Education. Glenn, see supra note 95, at A8.

\textsuperscript{100} U.S. Dep’t of Educ. Reading First: Resources, http://www.ed.gov/programs/readingfirst/resources.html; See also note 33 at H-7 (guidance states that local educational agencies have “considerable flexibility” in selecting core programs).

\textsuperscript{101} The What Works Clearinghouse (WWC) evaluates the strength of the evidence of effectiveness of educational interventions and produces reports with their findings. WWC employs studies that provide the strongest evidence of effectiveness by focusing primarily on “well conducted randomized controlled trials and regression discontinuity studies, and secondarily quasi-experimental studies of especially strong design”. What Works Clearing House, Review Process, http://www.whatworks.ed.gov/reviewprocess/review.html.

\textsuperscript{102} Id.
meet the SBRR requirements of NCLB. 103

When states’ applications were not approved, many states contacted the federal Reading First program for guidance on how to modify their applications in order to increase the likelihood of subsequent approval. While the Department did not create a list of approved reading programs, program officials were alleged to have sometimes directed states whose applications had been rejected to the websites of those states with approved state applications; and sometimes those states did include lists of their approved SBRR programs on their websites. 104 The predictable result would then be that states would adopt aspects of the successful state applications—including their choice of reading programs. The dollars at stake were so high, that only one state challenged the process during the application period. 105

In fairness to the Department and the expert review panelists, states were not required to specify reading programs in their applications, they only had to include the criteria they would use to select reading programs and assessment; in fact, only three states identified the reading programs that their districts would use. 106 Many merely included the tests and criteria that they would use to approve programs. Moreover, while the Department may have directed states to those websites, approved state applications were public record; once the review panel began to approve applications, quite naturally states that were still struggling to understand the criteria

103 Id.

104 See supra note 1, at 23 (Maryland was advised during its application process to review the Oregon Reading First Center: Review of Comprehensive Programs in response to a request for assistance regarding Maryland’s selection of core reading programs).

105 That state was Kentucky. Supra note 53.

106 Hearings, supra note 5, at 10 (testimony of former Reading First Director Chris Doherty); According to a survey by the Center on Education Policy, “half of the districts receiving Reading First funds reported changing their reading programs to qualify for a subgrant.” Presumably, those changes were a result of states selecting reading programs that met the rigorous SBRR requirements. Caitlin Scott, Tom Fagan, Ctr. on Educ. Policy, Ensuring Academic Rigor or Inducing Rigor Mortis? 8 (June 2005).
were certainly going to look at the successful applications for guidance, particularly where the Department could provide none.

THE FALL OF READING FIRST

OIG’S Findings

The OIG began to investigate the Reading First program as a result of a hotline complaint filed by a vendor who alleged that his program met the requirements of SBRR, but that states were being directed to implement specific programs other than his as a result of pressure from the Department and its contractors.\footnote{Glenn, supra note 95, at A8 - A9.} The OIG findings supported the allegation, and the report charged that Department officials unduly influenced state and LEA (local educational agency) selection of reading programs.\footnote{Supra note 1, at 22.}

The OIG released a final inspection report of Reading First in September 2006 that included the following findings: 1A-The Department did not select the expert review panel in compliance with the requirements of NCLB; 1B-While not required to screen for conflicts of interest, the screen process the Department created was not effective; 2A-The Department did not follow its own guidance for the peer review process; 2B-The Department awarded grants to states without documentation that the sub panels approved all criteria; 3-the Department included requirements in the criteria used by the expert review panels that were not specifically addressed in NCLB; 4-In implementing the Reading First program, the Department obscured the statutory requirements of the ESEA; acted in contravention of the GAO \textit{Standards for Internal Control in the Federal Government}; and took actions that call into question whether they violated the
prohibitions included in the Department of Education Organization Act. It is this fourth finding that highlights the conflict between the prescriptive SBRR requirements in the Reading First statute and the prohibitions against federal directed curricula.

A series of emails support the allegation that Department officials influenced state choice of curricula by selecting experts for the review panel with predilections towards and/or biases against certain reading programs. Emails also support allegations that once the selection process was complete, the program director cautioned states against allowing districts to use certain reading programs, asserting that those programs were not grounded in SBRR even when states provided evidence to the contrary. Some argue that the behavior of Department officials was based on a very aggressive means of ensuring that districts implemented the most rigorous programs under the SBRR approach, while others to the Department officials and contractors more sinister motives. Whatever the basis, some of the behavior was questionable at best. On the other hand, the rigorous implementation and enforcement of the program resulted in historic gains in reading. The situation begs the greater question—where do we draw the line between the statutory prohibition against the federal direction of curricula, and the Department’s obligation to enforce statutory grant conditions that set curricular requirements?

The Prohibition Versus the Department’s Role in Enforcing Curricular Grant Conditions

109 Id.
110 Id.
111 See id. at 22.
112 See id. at 22.
113 Id. at 7. One of the allegations is that the push towards certain programs was based on financial interest in those programs, but those allegations have not been substantiated.
The majority of the legal challenges under No Child Left Behind have been based on Title I part A requirements related to academic standards, annual testing, highly qualified teachers, and adequate yearly progress; these challenges are most often based on allegations of inequitable application of the program, and its lack of state and local capacity and funding.\textsuperscript{114} Given NCLB’s emphasis on results, and its curricular requirements surrounding SBR, it is not a stretch to expect a legal challenge to the parameters within which the Department officials implement and enforce these provisions. Certainly, the OIG report has provided a vehicle for such a legal challenge in Reading First\textsuperscript{115}, and while it is OIG’s charge that Reading First officials violated the prohibition against directing curricula, a closer examination of the statutes and the Department’s duty to enforce them suggests otherwise.

The Department of Education’s Organization Act (DEOA), which established the Department in 1979 and provides its overarching legal principles, and the general provisions in

\textsuperscript{114}See e.g. State of Connecticut v. Spellings, 453 F.Supp.2d 459 (CT 2006) (challenging the Secretary’s interpretation of the unfunded mandates provision, and alleging that the Secretary violated the Administrative Procedure act by denying certain waiver request and certain plan amendments); Save Our Schools-Southeast & Northeast v. District of Columbia Board of Education, not Reported in F. Supp.2d (2006)(unfunded mandates); Reading Sch. Dist. v. Dep’t. of Educ., 855A.2d 166 (Pa. Commw. Ct. 2004)(challenging the U.S. Department of Education’s administrative decision to uphold the Pennsylvania Department of Education’s methods of determining subgroups for the purposes of adequate yearly progress. For an examination of how courts have treated challenges to NCLB implementation, and a proposed approach to how they should treat them see Benjamin M. Superfine, Using the Courts to Influence the Implementation of No Child Left Behind, 28 Cardozo L. Rev. 779 (2006).

\textsuperscript{115}There are two pending law suits against the Department that are connected to Reading First program, but neither lawsuit is based on the prohibition on federal control of curriculum. The Citizens for Responsibility and Ethics in Washington (C.R.E.W.) has filed suit against the Department of Education based on alleged violations of FACA and the Freedom of Information Act (FOIA). The first CREW suit arose after CREW requested documents relating to Reading First March of 2007. The Department of Education informed the organization that some communications by Department officials were sent via private email and as such were not accessible by the Department to disseminate. Citizens for Responsibility and Ethics in Washington v. U.S. Dept of Educ., No. Civ. (D. D.C. May 22, 2007) available at http://www.citizensforethics.org/files/Complaint_0.pdf. The second suit is also for the failure to provide information, but rather than communications of Department officials, CREW requested documents prepared during the review of the states’ applications by the peer review panels. Citizens for Ethics and Responsibility in Washington v. Spellings, No. Civ. (D. D.C. Dec. 8, 2006) available at http://www.citizensforethics.org.
No Child Left Behind’s amendment to the Elementary and Secondary Education Act of 1965 both prohibit Department control of state and local curricula. The language in Section 3403(b) of the DEOA reads:

No provisions 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 systems…over the selection or content of …textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.116

Section 9527(b) of the general provisions of the ESEA affirms the DEOA provision, stating that, Notwithstanding any other prohibition of Federal law, no funds provided to the Department under this Act may be used by the Department to endorse, approve, or sanction any curriculum designed to be used in an elementary school or secondary school.117

The statutory curricular requirements surrounding SBRR do not themselves conflict with any prescriptive curricular requirements in the statute. The additional language “except to the extent authorized by law” in the DEOA seems to negate the possibility that any ESEA statute, no matter how directive, can actually conflict with the prohibition.118 Moreover, the prohibition in NCLB was passed under the same statute as the prescriptive SBRR requirements; as such if those two statutory provisions are at odds, the most reasonable explanation is that the SBRR requirements would serve as exceptions to the prohibition. Of course, in the case of Reading First, it is not a conflict of statutory provisions that needs to be resolved, but the role of the Department in adhering to and enforcing them. The Reading First officers were charged with

116 20 U.S.C. § 3403(a). Subsection (b) of the same provision reads “The establishment of the Department of Education shall not increase the authority of the Federal Government over education, which is reserved to the States and the local schools systems and other instrumentalities of the States.”


118 Id.
going beyond the scope of the authority provided in the authorizing Reading First statute. The
question then becomes whether the Department’s influence on the choice of curricula was
necessary to implement the statutory requirements of scientifically based research, or whether
those officials exceeded the scope of their authority in enforcing those provisions, thereby
violating the prohibition against directing curricula.

As administrators of an academic results-oriented statute, Department officials have an
affirmative obligation to implement and enforce federal education statutes. Congress enacts the
statutory provisions that create grant conditions, and recognizes that the administrators of the
statute are in the best position to enforce them. The General Education Provisions Act (GEPA)
specifically delineates the Department’s role in enforcing the provisions of any “applicable
program,” defining it as “any program for which the Secretary or [the Department] has
administrative responsibility as provided by law or by delegation of authority pursuant to
law.”119 Under GEPA authority, the Secretary may issue cease and desist orders, enter into
compliance agreements, recover and withhold funds, and take any other action authorized by
law.120

Courts grappling with issues of education law and policy do so cautiously, with an
understanding of the significance of their societal impact; Justice Powell once noted the special
dilemma that law such issues present to courts:

Education, perhaps even more than welfare assistance, presents a myriad of
‘intractable economic, social, and even philosophical problems. . . The ultimate
wisdom as to these and related problems of education is not likely to be divined
for all time even by the scholars who now so earnestly debate the issues. In such
circumstances, the judiciary is well advised to refrain from imposing…inflexible

119 20 U.S.C. at § 1221(c)(1).
120 Id. at §1234(a-f).
constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions. 121

Accordingly, courts have long deferred to administrative interpretation of a statutory scheme that an agency must administer and enforce, recognizing that if Congress has not spoken to the specific issue at question in the statute or has left its terms ambiguous, then the court should accept the administrative agency’s interpretation of that statute, and its formulation of policy to fill in any gaps in that law, unless it is contrary to the legislative intent. 122 Along the same vein, courts are reluctant to step into the purview of administrators of educational programs and have traditionally shown great deference to state educational agencies in their implementation of federal education statutes, noting the need for deference to those who are experts on, and administrators, of educational programs. 123 Even in those cases in which state administrators have been challenged on their administration of federal law, the courts’ reasoning has broader application. For example, in Pennsylvania, the Reading school district appealed the decision of the U.S. Department of Education to affirm a determination by the Pennsylvania Department of Education that the district failed to make adequate yearly progress (AYP) as required under NCLB. 124 The school district challenged the U.S. Department of Education’s administrative decision on three grounds: 1) the Pennsylvania System of State Assessment was discriminatory because it did not provide native language testing; 2) the statistical number the Pennsylvania Department of Education used to determine the size of subgroups for AYP purposes was not appropriately developed; and 3) the Department did not provide the technical assistance


123 See id.

necessary to enable the District to achieve school improvement.\textsuperscript{125} In affirming the U.S. Department of Education’s decision, the District Court held that the means of enforcing the provisions surrounding AYP were in the discretion of the Pennsylvania Department of Education, and that the court would not challenge what should be in the purview of the statute’s administrators unless that discretion had been abused.\textsuperscript{126}

Challenges to the ability of the Department to enforce provisions in NCLB indicate that even where congress has enacted provisions that impede on state and local authority, courts afford similar deference to federal administrators of education statutes.\textsuperscript{127} While no one has yet brought a challenge under NCLB’s section 9527(b)’s prohibition on endorsing curricula, parties have brought suit under a companion statutory provision.\textsuperscript{128} The appellants in \textit{School Dist. of City of Pontiac v. Spellings} challenged the Department’s implementation of section 9527(a)-- the subsection that precedes the prohibition of federal control of state and local curricula in

\textsuperscript{125}Id.

\textsuperscript{126} \textit{“[W]e will not substitute our discretion for administrative discretion even if we could have come to a different conclusion than that of the agency. Homer v. Department of Education, 73 Pa. Cmwlth. 623, 458 A.2d 1059. We are not educators nor is it our place to substitute our judgment for those of learned educators who have experience and knowledge in such matters. We must proceed with caution when an administrative body is interpreting its own regulations in reaching a decision and we must defer to the agency’s interpretation of those regulations in most instances. Id. Although NCLB is not the Department’s own regulation, it is a regulation within the Secretary’s educational sphere and expertise. As such, the Secretary has the experience and knowledge to make such decisions.” Id. at 173. \textit{See also}, Village School of Northfield v. Independent School Dist. #659, Nos. A06-1585, a06-2045 2007 WL 217781 (July 31, 2007 Minn.App.); \textit{e.g.}, Save Our Schools-Southeast &Northeast v. District of Columbia Bd. Of Educ., 2006 WL 1827654 (July 3, 2006 D.D.C.).}

\textsuperscript{127} \textit{See e.g.}, Arizona State Department of Education v. U.S. Dept. of Educ, Slip Copy 2007 WL 433581(D.Ariz ) (the Department is responsible for determining whether state reporting practices violated NCLB, and the Court has no pre-enforcement subject-matter jurisdiction); Cal. Dep’t of Educ. V. Bennett, 833 F.2d 827 n. 4 (9th Cir. 1987)(noting that the U.S. Department of Education is responsible for administering Title I part A of the ESEA); Bell v. New Jersey 7 Pennsylvania, 461 U.S. 773, 780-93(1983) (holding that the U.S. Department of Education is responsible for determining the appropriate use of Title I part A funds under GEPA).

The language in section 9527(a) of the No Child Left Behind Act is very similar to that of 9527(b), but its focus is on prohibiting federal control of state and local education funding rather than choice of curricula, providing:

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. 130

The Pontiac Plaintiffs-Appellants were nine school districts (one from Michigan, one from Texas and seven from Vermont) and eleven education associations (one national association, nine state associations and one local association) 131 that filed a complaint on April 20, 2005 against the secretary alleging two causes of action: the first was that the Secretary

129 Sch. Dist. Of City of Pontiac v. Spellings, No. 05-71535.

130 § 9527 (20 U.S.C. § 7909) in its entirety reads as follows:

PROHIBITIONS ON FEDERAL GOVERNMENT AND USE OF FEDERAL FUNDS.

(a) 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.

(b) PROHIBITION ON ENDORSEMENT OF CURRICULUM.- Notwithstanding any other prohibition of Federal law, no funds provided to the Department under this Act may be used by the Department to endorse, approve, or sanction any curriculum designed to be used in an elementary school or secondary school

(c) PROHIBITION ON REQUIRING FEDERAL APPROVAL OR CERTIFICATION OF STANDARDS.-

(1) IN GENERAL.-Notwithstanding any other provision of Federal law, no State shall be required to have academic content or student academic achievement standards approved or certified by the Federal Government, in order to receive assistance under this Act.

(2) RULE OF CONSTRUCTION.-Nothing in this subsection shall be construed to affect requirements under title I or part A of title VI.

(d) RULE OF CONSTRUCTION ON BUILDING STANDARDS.

Nothing in this Act shall be construed to mandate national school building standards for a State, local educational agency or school.

131 The eleven education association appellants are the National Education Association (“NEA”), nine NEA state affiliates, and one NEA local affiliate. Brief of Petitioner-Appellants at 6-7, Sch. Dist. Of City of Pontiac v. Spellings, No. 05-278 (6th Cir. July 19, 2006).
violated the Spending Clause of the United States Constitution by changing the conditions of the grant agreement that Congress made with states and school districts who opted to participate in NCLB programs; the second was the identical claim alleging direct violation of the unfunded mandate language of section 9527(a). The Pontiac plaintiffs asserted that by requiring states to spend beyond those federal funds provided to support implementation of the statute, the Department’s enforcement of NCLB requirements exceeded the scope of the statute and Congressional intent. Specifically, they sought a declaration that the court interpret section 9527(a) to mean that states and school districts are not required to spend non-NCLB funds to comply with NCLB and may not lose federal NCLB funding if they fail to comply fully with the NCLB for that reason.

The district court granted the Defendant’s 12(b)(6) motion to dismiss the case for failure to state a claim, holding that section 9527(a) only bars unauthorized actions by federal officers or employees and does not limit the obligation of states and school districts to comply fully with the substantive requirements of the Act. The court stated that “[i]f Congress had meant that federal funding would pay for 100% of all NCLB requirements, the inclusion of these words would have been unnecessary.” The Department argued, and the court affirmed, that the specific inclusion of the language prohibiting “an officer or employee of the Federal Government. . . [from mandating] a State or any subdivision thereof to spend any funds or incur

---

132 Sch. Dist. Of City of Pontiac v. Spellings, No. 05-71535 at 2.
133 Id.
134 Brief of Petitioners-Appellants, supra note 131, at 4-9.
135 Sch. Dist. Of City of Pontiac v. Spellings, No. 05-71535 at 5.
136 Id. at 4.
any costs not paid for under this Act” is a general provision that was enacted to prevent federal officials from imposing additional mandates beyond those authorized by Congress, but that it does not limit Congress’ ability to legislate such conditions, nor does it relieve state and local compliance with the statutory requirements of NCLB.\textsuperscript{137} In fact, the Department asserted that the language in 9527(a) is extraneous because even in its absence, nothing in NCLB authorizes Department officials to mandate the expenditures of state and local education agencies. Instead, the provision was enacted “to provide a final safeguard against usurpation by the Department of Education of fundamental and long-respected areas of state and local sovereignty in educational matters.”\textsuperscript{138}

The appellants argued that the plain meaning of the language, the legislative history, and the rules of statutory construction support a broad read of 9527(a).\textsuperscript{139} Importantly, the Department pointed to the language in the House and Senate reports for NCLB where the Committees affirmed that the statutory provisions in NCLB are grant conditions of assistance rather than mandates; accordingly, the Department referenced the numerous statutory provisions in NCLB that require grant recipients to provide assurances that they will implement the program requirements. That language, the Department noted, is absolute.\textsuperscript{140} The court likewise recognized that the 9527(a) prohibition did not preclude the Secretary from ensuring compliance with conditions that were imposed by Congress.

\textsuperscript{137} Id. at 4; Memorandum in Support of Defendant’s Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) at 18, Sch. Dist. Of The City of Pontiac v. Spellings No. 05-71535 (E.D. Mich. June 29, 2005).

\textsuperscript{138} Sch. Dist. Of City of Pontiac v. Spellings, No. 05-71535 at 9.

\textsuperscript{139} The Plaintiffs-Appellants argued that applying legislative history and the “clear statement rule” of statutory construction require that § 9527(a) be read to prohibit the federal government from requiring states and school districts to spend their own funds to comply with NCLB statutory requirements. Brief of Petitioners-Appellants, \textit{supra} note 131, at 29-39.

\textsuperscript{140} Id. at 19.
There is no language in 9527(b) that discusses whether an officer or employee can create mandates beyond its congressional authority but, as the Department argued in Pontiac, that language is unnecessary. The Department cannot go beyond the authority granted by Congress, and therefore cannot prescribe curricula unless there is statutory language that authorizes such interference with local control. On the other hand, the statutory language that sets forth the prescriptive SBRR requirements are grant conditions, and it is the within the Department’s authority—indeed it is its obligation—to administer those requirements. While no court has ever suggested that the agency have carte blanche in interpreting and implementing statutory provisions, the determination of what programs meet the definition of SBRR should be left to those administering the program and educational experts—not the courts; this is particularly true where Congress has not detailed every aspect of implementation. Consequently, the Department has responded to more prescriptive curricular and academic directives by more aggressively implementing and enforcing them. Accordingly, we should view the Department’s role in enforcing Reading First in the context of the evolving Congressional role in education.

The Expanding Federal Role in Education

The statutory language that purports to prohibit federal control of education actually pre-dates the ESEA, first appearing in 1950 as part of the Impact Aid statute—a statute that

---


142 “It is unnecessary here to adopt the Government’s suggestion that the Secretary may rely on any reasonable interpretation of Title I’s requirements to determine that previous expenditures violated that grant conditions.” Bennett v. Kentucky Dept. of Educ. 470 U.S. 656, 670, 105 S. Ct. 1544, 1553 (1985).

143 Chevron, U.S.A., Inc. v, Natural Res. Def. Council, Inc., 467 U.S. 1984 at 843(recognizing in the course of administering a congressionally created program, the administering agency has must fill in gaps and clarify ambiguities)

144 The statute was P.L. 81-815, relating to school construction in areas affected by federal activities. See Paul Riddle, Internal notes on legislative history of the Prohibition Against Federal Control of Education. Dep’t of Educ. September 2, 2004.
provides funding to educate children who were schooled on military bases.\textsuperscript{145} Borne in the era of McCarthyism, the prohibition was a response to a rising fear of centralized, federal control and--in the case of education--the fear of a National School Board;\textsuperscript{146} Francis Keppel, who was Johnson’s commissioner of education, also expressed a more practical concern about the need to prevent the additional bureaucracy that federal control of education would add.\textsuperscript{147} There are those who contend that the provision was a political poultice to the public; whatever the politics, the role of public education was left solely to the states and districts.\textsuperscript{148} Later, in response to a rising sense of international competition ignited at the height of the Cold War, Congress enacted the National Defense Education Act of 1958; this was the first time that Congress enacted a major education bill that was not in support of military bases.\textsuperscript{149}

The 1965 initial enactment of the Elementary and Secondary Education Act was a result of President Kennedy and then Vice-President Johnson’s efforts to expand the federal role in education to address issues of civil rights and equity, but even as early as 1965, Congress noted the need to include accountability measures in its largest ESEA appropriation-Title I part A.\textsuperscript{150}

Unfortunately, for the first time of what would become a familiar pattern in ensuing

\textsuperscript{145} 20 U.S.C. §7702.

\textsuperscript{146} Riddle, \textit{supra} note 144.

\textsuperscript{147} Paul Manna, \textit{Conductor, Schoolmarm, or Struggling Substitute Teacher? Explaining the changing federal role in K-12 Education}, The Policy History Conference (June 1-4, 2006) at 7.

\textsuperscript{148} \textit{See e.g.} Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (recognizing that public education was under the control of state and local authority).


\textsuperscript{150} “During the legislative process Senator Robert Kennedy argued that the ESEA would be ineffective unless some mechanism existed to measure the law’s performance. To address those concerns, Title I section 205(a)(5) of the ESEA required states to work with local districts to devise ‘effective procedures, including provision for appropriate objective measurements of educational achievement…for evaluating at least annually the effectiveness of the programs in meeting the special educational needs of educationally deprived children.’ \textit{Supra} note 147, at 8.
reauthorizations of the ESEA, the State and local districts did not have the guidance, technical assistance or fiscal capacity to adequately evaluate or enforce these minimum accountability measures, and as a direct result the program was an abject failure.\footnote{Id.; see also Bennett v. Kentucky Dep’t of Educ., 470 U.S. 656 at 667 (citing L. McDonnell & M. McLaughlin, Education. Policy and the Role of the States 13, 90-91 (1982; Murphy, Title I of ESEA: the Politics of Implementing Federal Education Reform, 41 Harv.Ed.Rev. 35, 41-45 (1971))(acknowledging that the Title I was poorly enforced during the first years after its enactment).}

Almost twenty years later, in 1983, a federally appointed panel published \textit{A Nation at Risk}\footnote{U.S. Dep’t of Educ., Nat’l Comm’n on Excellence in Educ., \textit{A Nation at Risk: The Imperative for Educational Reform} (1983), http://www.ed.gov/pubs/Nat/At/Risk/risk.html.}, the publication is the turning point for the historic shift towards education as a national concern. The report’s recommendations for uniform, high school graduation and course requirements was a particularly strong push towards an increased federal role in educational policy, and its publication set the stage for congressional demands for increased academic accountability.\footnote{Id.; see also supra note 147, at 9 (noting that \textit{A Nation at Risk} resulted in aggressive federal pursuit of academic achievement and not just equity).} In 1984, the year after the release of \textit{A Nation at Risk}, education as a national issue was at the forefront of a presidential race for the first time, but the campaign platforms adhered to the traditional premise that the educational reform would occur primarily at the state and local levels.\footnote{National Education Association, \textit{ESEA: It’s Time for a Change! NEA’s Positive Agenda for the ESEA Reauthorization} (July 2006) appendix 1 pg 4.} By 1987, the nation seemed to have responded to the growing call for accountability in education and its fear of the academic failure of its children seems to have superceded the fear of federal control of education; that year, a Gallup poll reported that 87\% of
Americans believed that the federal government should require states and districts to meet minimum academic standards.155

Responding to the national call for academic reform, in 1988 President George H.W. Bush hosted the nation’s fifty governors at the first national “education summit” in Charlottesville, Virginia.156 In a combined effort that was largely a result of the governors’ collective desire for nationwide educational objectives, they produced a set of national educational goals for the United States to achieve by 2000.157 President Bill Clinton continued this effort by later passing his Goals 2000: Educate America Act and reauthorizing the ESEA, as the Improving America’s Schools Act (IASA), in 1994.158 Goals 2000 awarded grants to states to set state standards, assessments and systems of accountability.159 Its accountability provisions were mostly voluntary, and allowed the states to take full responsibility for the implementation, enforcement and accountability of the Act at the local level; additionally, the Secretary could waive any of the statutory and regulatory requirements if those requirements impeded the ability of the state or district to carry out the state or district plans.160 Despite the flexibility of the provisions, Goals 2000 was still opposed by those who feared that it represented

155 Id.
157 Supra note 147, at 10.
158 Forty-eight state educational agencies and the District of Columbia and Puerto Rico participated in Goals 2000; Oklahoma and Montana participated at the local level. Supra note 156.
159 Id.
161 Id.
a shift towards a national curriculum.\footnote{See Benjamin M. Superfine, \textit{The Politics of Accountability: The Rise and Fall of Goals 2000}, 112 American Journal of Education (2005) (analysis of the politics and difficulties surrounding the implementation of Goals 2000).} The Department responded to the statute’s flexibility, and political pressure by not enforcing what few accountability measures there were. States awarded money with virtually no accountability and many did not comply with the goals and provisions of the Act, consequently, the politics surrounding Goals 2000’s implementation and enforcement resulted in its failure—it was not reauthorized in 1999.\footnote{Id.}

Since its initial enactment in 1965, the ESEA has been revised eight times and has grown from fewer than fifty pages to 670 pages; through its iterations, it has expanded its educational efforts from targeting disadvantaged students to raising the academic achievement of all students.\footnote{“Before passage of the NCLB Act in 2002, the federal government’s role in education generally was limited to providing supplemental resources to targeted groups of disadvantaged students, generally “Title I” students (with the most economic disadvantages, such as high poverty and homelessness) and special education students. By contrast, the ten titles of the 670-page NCLB Act affect all students in the nation’s public schools, no only special education students or those in public schools that qualify for and receive Title I funding. The NCLB Act greatly expands federal involvement in the traditionally State-dominated realm of education.” The State’s Opposition to the Secretary’s Motion to Dismiss at 3, Connecticut v. Spellings, 453 F.Supp.2d 459 (CT 2006).} The achievement and accountability measures of the Improving America’s Schools Act and the ensuing No Child Left Behind Act were unprecedented federal responses to a call for increased national achievement in education. Certainly, the federal role in education has taken a sharp departure from the political environment in which Congress drafted the language of the original statutory prohibition against federal control of curricula. Since the first enactment of this prohibition there has been a move towards centralized, increased federal control of education. Some argue, in fact, that NCLB has transformed the federal government into a “de
facto national superintendent and school board\textsuperscript{165}, precisely the situation that the original prohibition was enacted to prevent.

No Child Left Behind responded to the failure of predecessor programs in the Improving America’s Schools Act by increasing its accountability measures; accordingly, the Department of Education raised its level of enforcement of the law to ensure that its provisions resulted in increased student achievement. The Department did eventually relax its enforcement of some of NCLB’s provisions (most notably Title I part A) in response to political pressure, but prior to the release of the OIG report Reading First officials consistently enforced the letter and the spirit of the strict curricular and enforcement provisions.

**The Politics of Reading First**

Reading First demonstrates what can happen when prescriptive curricular requirements must be enforced in light of the prohibition against endorsing curricula. Certainly, there is no language in the Reading First statute that directs, or even allows, the Department to direct grantees and grant applicants toward specific reading programs.\textsuperscript{166} On the other hand, the curricular requirements surrounding SBRR are grant conditions, and as such the Department has an administrative obligation to enforce the legislative directive;\textsuperscript{167} therefore, the Department’s enforcement of the statute must be examined in the context of Congressional expectations and demands.\textsuperscript{168} The NCLB Act supports a greater federal role in academic accountability than ever

\textsuperscript{165} Id.

\textsuperscript{166} See supra note 1.

\textsuperscript{167} 20 U.S.C. §1221(c)(1); 20 U.S.C. 1243(a)-(f).

\textsuperscript{168} Bennett v. Kentucky Dept. of Educ., 476 U.S. at 670 (noting that federal grant programs are governed by Congressional enactment of desirable public policy).
before; the legislative history of the Act’s House and Senate Committee Reports for the NCLB Act leaves no doubt that the “centerpiece” of the Act “is academic accountability.”\textsuperscript{169} The statute holds “States, [LEAs], and schools accountable for ensuring that all students, including disadvantaged students, meet high academic standards.”\textsuperscript{170} And that the Department is expected to aggressively enforce those high measures of accountability is clear. “[t]he Federal Government must insist that, whatever the level of its investment in education, it must receive the highest return possible in the currency of well-educated children.”\textsuperscript{171}

Reading First is the “academic cornerstone” of NCLB\textsuperscript{172}, and at the center of both are the scientifically based research requirements to which the grantees must adhere in order to be eligible to receive grant funds.\textsuperscript{173} As one of the highest-profile programs in NCLB, everyone in the Department who worked on the Reading First program was keenly aware that the White House and Congress were deeply invested in its results. Department officials were questioned in 2003, and again in 2004, about what the Department was doing to ensure that Reading First funds were not going to programs that were not aligned with SBRR.\textsuperscript{174} The message to aggressively enforce the Reading First academic requirements was clear, yet the OIG report does support allegations that Department officials went too far in enforcing the statute’s curricular

\textsuperscript{169} H.R. 1939, 110\textsuperscript{th} Cong. (2001).

\textsuperscript{170} Id.

\textsuperscript{171} Id. at 4.

\textsuperscript{172} Supra note 34, at A-3.

\textsuperscript{173} Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 101 S.Ct. 1531 (1981) (legislature may enact grant conditions pursuant to spending power so long as the grant conditions unambiguous so that states can knowingly choose whether to accept funds and consent to those conditions); See also Bennett v. Kentucky Dept. of Educ., 476 U.S. at 790.

\textsuperscript{174} Hearings, supra note 5, at 10 (testimony of former Reading First Director Chris Doherty).
provisions. Christopher T. Cross, a policy consultant who helped to author the ESEA ban on federal intervention in curriculum and instruction in the 1970’s, said that the Department’s role with regard to Reading First was “…an unprecedented level of interference” into curricular choice on the part of the federal government.175 “The intention when that language was put into the statute was that these were decisions that had to be made at the local level in connection with local standards. I think there’s no question what went on [in Reading First] is right on the border of crossing the line on that provision.”176 Cross’ statement is valid, but it fails to acknowledge that the curricular requirements in the Reading First statute are also unprecedented directives on State and local curricular choice, and that enforcement of such provisions are therefore likely to result in a similarly high level of interference. According to Robert Sweet, a former staff member for the Education Committee on the House of Representatives who helped draft the Reading First legislation, “Chris [the former Reading First program director] was faced with a daunting task: pressure to get money out the door, a staff of two, highly reluctant state officials, and the duty to explain a challenging new reading paradigm.”177 Indeed, the former federal director of Reading First, Chris Doherty noted in his testimony to Congress that there is a structural tension between the law that emphasizes the need to keep the federal government out of local curricular decisions, and Reading First’s mandate to provide instruction based on scientifically based research.178

176 Id.
177 Hicks, Director Draws Fire, supra note 4.
178 Hearings, supra note 5, at page 30.
is not merely with the influence that the Department or its contractors may have used to implement particular programs. The problem is that the SBRR requirements created an inevitable tension from the moment the program was implemented. Congress set forth statutory language that required reading programs to meet specific academic requirements.\textsuperscript{179} Department officials were and are under tremendous political pressure to make this program work, and states desperately wanted information and guidance on what programs would meet SBRR requirements. On the other hand, the statutory prohibitions against endorsing curricula theoretically tied the hands of Department officials by prohibiting it from directing states to adopt reading programs that were presumably more likely to meet these criteria. As Timothy Shanahan, president of the International Reading Association (IRA) put it, “Congress gave Chris a tough order: force schools to change or improve their curriculum, but don’t tell schools what that curriculum can be. No doubt, that is a recipe for lots of violations of law or policy.”\textsuperscript{180}

A program that requires such high levels of accountability, rigor and enforcement cannot be successfully implemented without providing states strong guidelines and concrete examples of how to meet its standards. While it may have overstepped its authority to do so, the Department aggressively implemented the statute, and much of the academic success of Reading First can be attributed to its rigorous implementation.

THE FUTURE OF READING FIRST

\textbf{The Academic Success of Reading First}

\textsuperscript{179} § 1201, 20 U.S.C. § 6301.

\textsuperscript{180} Hicks, \textit{Director Draws Fire}, supra note 4.
Despite the controversy, alleged conflicts of interest, and finger pointing, the bottom line is that Reading First seems to work. Ironically in 2006, the same year the OIG report was released, Reading First was the only No Child Left Behind program to receive the highest rating from the White House’s Office of Management and Budget.\footnote{\textsuperscript{181} “Effective” is the highest rating a government program can receive. OMB assesses the performance on every Federal program to provide tax payers with an understanding of how well or poorly the programs are working. Of the 977 programs (96% of all Federal programs) that OMB assessed 17% received an effective rating, 30% moderately effective, 28% adequate, 3% ineffective and 22% did not demonstrate results. Title I part A--the only NCLB with a larger appropriation than Reading First (Title I part B)-- was rated moderately effective. Office of Management and Budget, About Program Ratings, \url{https://www.whitehouse.gov/omb/expectmore/about.html}.} Unlike Title I part A (the only program in NCLB with a larger appropriation) the Reading First program itself seemed to be supported without much controversy.\footnote{\textsuperscript{182} Since the enactment of NCLB, plaintiffs have challenged testing practices, AYP determinations, highly qualified teachers, unfunded mandates and other financial and technical assistance to its implementation. Most of these challenges have been to Title I part A. See Benjamin Michael Superfine, \textit{Using the Courts to Influence the Implementation of No Child Left Behind}, 28 Cardozo L. Rev. 779 (2006).} The overall response from states, districts and the educational community is positive, and preliminary data support that the program is effective.\footnote{\textsuperscript{183} The day before the April 20\textsuperscript{th} hearings, the Department released data from about half the states--the ones that reported baseline data from their participating schools—that showed a fifteen percent improvement in the proportion of first, second, and third graders who can read fluently. U.S. Dep’t of Educ., \textit{Reading First Achievement Data Demonstrate Dramatic Improvements in Reading Proficiency of America’s Neediest Children}, \url{http://ed.gov/news/pressrelease/2007/04/4192007.html} (April 2007).} The Center on Education Policy cited preliminary positive results from their survey of states and district recipients of Reading First grants--disclosing that some states and the majority of districts in its surveys “reported that their chosen Reading First instructional and assessment programs resulted in improved student achievement.”\footnote{\textsuperscript{184} The report did note that the reports represent the views of state and district officials, and not a statistical connection between Reading First and student achievement. “In measures of comprehension, those states showed a twelve percent in the number of third graders who were proficient in comprehension. While the preliminary data are positive, a definitive assessment won’t be made until the state gains in Reading First schools are measured against a control group, those in non-reading First schools are measured against a control group, those in non-Reading First Title I schools. Such a study is expected to be released in 2008. The announcement of the state gains came soon after the release of a report from Congress’ Government Accountability that said that a majority of state officials
The Department has already jeopardized the promise of academic achievement under NCLB by diluting the enforcement provisions of Title I part A through a number of regulatory decisions and waivers. All but ten states have sought an exemption, waiver, or some other alteration of NCLB (mostly Title I part A) requirements. In conceding rigorous enforcement in an attempt to achieve results via cooperation, the Department sacrificed academic achievement under Title I part A. Already, the Reading First program is showing more dramatic evidence of student achievement in its short existence than grantees under Title I part A have demonstrated since the original 1965 enactment of the ESEA. In fact, Reading First is tentatively being heralded as the most successful academic program in the history of federal education law.

Despite the furor that followed the release OIG report, most states appreciated the Department’s rigorous enforcement of the Reading First statute. In the Center on Education Policy’s (CEP) 2005 survey of states, the majority of states “reported that Reading First was strictly or very strictly enforced”, yet the general state response to the officials running the program was overwhelmingly positive. In fact, two years later in 2007, CEP reported that in a survey of various programs in NCLB, the majority of surveyed states found that the information

---

185 Supra note 145, at 12 (Some members of Congress were angered by the flexibility Secretary of Education Rod Paige granted states when he allowed states to use a combination of state and local tests, rather than state tests, alone, to gauge yearly progress; they viewed it as weakening the accountability measures of NCLB.)


188 Scott, supra note 184, at 3.
they received from Department officials to not be helpful with the exception of Reading First.\textsuperscript{189}

Currently, most states and districts are coordinating Title I part A programs with Reading First\textsuperscript{190}, and if that trend continues, the two largest programs (by appropriation and impact) in the NCLB will have SBR at their center. Though many are inferring a correlation between the preliminary positive results in Reading First and SBRR, there is not yet concrete evidence in the current data that specifically points to the use of SBR or SBRR as a cause for the increased achievement in NCLB. Certainly there are a number Reading First program requirements other than SBRR that contribute to its initial positive gains in reading achievement including: more time devoted to in class reading, increased funding for better products, and increased teacher training. On the other hand, initial data have demonstrated enough progress in reading achievement to warrant further evaluation.\textsuperscript{191}

**Legislative Proposals**

Regardless of where the Department has heretofore fallen on the continuum of acceptable enforcement of the Reading First curricular requirements, Congress needs to delineate the parameters of the Department’s authority to provide grantees the information they need to effectively implement statutory requirements. Unfortunately, current efforts to reform the Reading First statute reflect political expediency rather than a focus on measures that will


\textsuperscript{190} Supra note 12.

\textsuperscript{191} “Reading First is having a significant impact. Our surveys and cases studies show that Reading First is changing reading curriculum, instruction, professional development, and assessment in Reading First schools. Most states and districts are coordinating Title I programs with Reading First. Fewer states coordinate Reading First and Early Reading First. While some states and many districts reported that Reading First was an important cause of increased achievement in reading, very little is known about the actual achievement of Reading First versus non-Reading First schools nationally. Given this uncertainty as well as the widespread effects of the program, policymakers, administrators, and educators need to pay close attention to Reading First.” Scott, *supra* note 184, at 15.
continue to increasing student achievement and the program’s effectiveness; this lack of foresight might gut the program’s potency. Congress is currently in the midst of modifying the Reading First Statute with the cooperation of the Department of Education. In the meantime, Representatives Howard “Buck” McKeon and Michael Castle propose to reinforce the prohibition against endorsing curricula without clarifying its parameters in a bill entitled “Reading First Improvement Act.” The Reading First Improvement Act proposes major modifications to the peer review process, including: specifying the role of the oversight committee and potential subcommittees; detailing a screening process for possible conflicts of interests of the committee, subcommittee, contractors and subcontractors; and finally, the act re-emphasizes the prohibition on the federal government’s ability to endorse curricula, and requires that the Department develop guidance that assists employees and contractors in complying with that prohibition.

The Reading First Improvement Act specifically describes the role and composition of the oversight committee. Under the proposed legislation, this oversight committee will be the entity that ultimately presents recommendations for approval or disapproval of a state Reading First application to the Secretary. Although the oversight committee may set up subcommittees to review applications, the oversight committee is responsible for reviewing the recommendations and feedback of the subcommittees before making a final recommendation to the Secretary. All recommendations must be publicly available, and states will have the

192 Senators Susan Collins and Olympia Snowe have proposed an amendment to Reading First as part a bill they introduced called the “No Child Left Behind Flexibility and Improvements Act” but its provisions are less relevant to this discussion. S. Res. 562, 110th Cong. (2007).

193 Under the proposed bill, this oversight committee will be called the “Reading First Advisory Committee”. H.R. 1939 § 3.
opportunity to directly interact with the Committee and any subcommittee.\textsuperscript{194} By statute, composition, and role, the oversight committee will be subject to the governance of the Federal Advisory Committee Act (FACA)\textsuperscript{195} and as such, its meetings will be open to the public and closely regulated; advisory committees cannot hold meetings “except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees. . ., with an agenda approved by such officer or employee.”\textsuperscript{196} Now that the States have been through the rigorous initial application review process; new applications will require little modification, and it is no longer impracticable for the oversight committee to review subpanel decisions—especially since it is likely that the role of this oversight committee would be largely perfunctory—reviewing the summary of the comments that the subpanels provide.

The Reading First Improvement Act also includes specific language about screening members of the oversight committee and subcommittees for conflicts of interest.\textsuperscript{197} The specific language requires that

\begin{quote}
...at a minimum, a review of each potential Committee or subcommittee member’s connection to any State’s program under this subpart, each potential Committee or subcommittee member’s potential financial interest in products that might be purchased by a State educational agency or local educational agency in the course of such agency’s implementation of the program under this subpart, and each potential Committee or subcommittee member’s professional connections to teaching methodologies that might require the use of specific
\end{quote}

\begin{footnotes}
\footnotetext{194}{Id.}
\footnotetext{195}{5 U.S.C. App.1.}
\footnotetext{196}{Id. at § 10(f).}
\footnotetext{197}{H.R. 1939 § 3.}
\end{footnotes}
products; and be designed to prevent, to the extent possible, bias or the appearance thereof in the Committee’s performance of its responsibilities...

While the above language is well-intentioned, it does not account for the reality of the limitations of the reading research field. In a developing field such as scientifically based research, the pool of experts is relatively small. It is extremely difficult to select experts in such a narrow field who have not developed their expertise through their affiliation with existent reading programs. With the amount of money at stake, every panelist has a potential financial interest in the programs the states implement. Any expert who has the ability to influence the state selection of reading programs (and that would be all of them) can potentially benefit financially from that influence.

While the Reading First Improvement Act includes modifications that will improve aspects of the Reading First statute, it is shortsighted with regard to its practical implementation and serves as a political band-aid for an administrative hemorrhage. Whether or not Congress elects to maintain the prescriptive nature of the program, it needs to relieve the Department of the burden of adhering to a statute that when effectively implemented and enforced comes precariously close to violating the prohibition against endorsing curricula. In order to do that, it must define curriculum; specify the Department’s administrative role in identifying and enforcing SBRR; and re-define the role of an oversight committee.

The Reading First Improvement Act includes language that addresses potential conflicts of interest, and--more significantly for the purposes of this article--reinforces the prohibition against directing curricula by requiring the Department to develop guidance for its employees that will assist them in complying with the prohibition; that guidance will emphasize the

198 Id. (emphasis added).
importance of consulting with the Department’s Office of the General Counsel on issues related to the prohibitions, and most notably “shall stress that any information disseminated, or technical assistance provided, related to this subpart, shall represent multiple perspectives and not in any way endorse or appear to endorse any particular product or service that might be purchased by a State educational agency or local educational agency in the course of such agency’s implementation of [the Reading First program].”199

The language “reinforcing” the prohibition is superfluous, and does nothing to define curriculum or set forth the parameters of the prohibition itself. In fact, evidence supports that its drafters made a politically-conscious decision not to take on that task. During the April 19th congressional hearings on the Reading First program, Congressman McKeon asked a Department official whether there was a definition of curriculum as it applied to the prohibition, to which the reply was no; he also asked whether there were any policies the Department has in place to ensure that the provisions are not violated.200 There seems to be a move towards addressing the latter and not the former concern because in McKeon’s proposed legislation to reinforce the prohibition against directing curricula, a definition for curricula is noticeably absent. Despite the fact the McKeon publicly noted this void, there is no indication that either Congress or the Department is in the midst of providing any guidance with regard to its definition.201

When the Department begins to grapple with how the Department should interpret “curriculum” it must consider the word in the context of its obligation to provide guidance to

199 H.R. 1939 § 3.

200 Hearings, supra note 5, at 29. (testimony of former Reading First Director Chris Doherty).

201 Id.; see also supra note 22.
grantees. If the Department broadly interprets the definition of curriculum to include any mention of specific curricular programs, then implementing the statutory requirements surrounding SBR is more likely to conflict with the prohibition against the Department directing curricula. SBRR requires curricula to meet very specific requirements; that level of specificity narrows the state and local choice of reading programs. A definition for curriculum could definitively address whether providing a list of specifically named commercial reading programs that meet the definition of SBRR violates the prohibition against endorsing curricula. If Congress enacts statutory curricular requirements that narrow the selection of reading programs that states may implement, then certainly it is reasonable to expect the Department to name the programs that meet those requirements. That Congress has charged the Department with creating guidance surrounding that prohibition suggests a political punting of the ball.

**Balancing Autonomy and Academic Achievement**

The Reading First Improvement Act fails to provide the Department with the legislative support it needs to be able to continue to enforce the high-accountability measures of the Reading First statute. In fact, the pending legislation indicates that Congress is taking the opposite approach and is likely to modify Reading First to a statute that talks the accountability talk without walking the enforcement walk. That Congress has legislated prescriptive curricular measures that the Department is unable to effectively enforce flies in the face of the spirit of the law. Though it is highly unlikely that Congress will dismantle Reading First, its current emphasis on reinforcing the prohibition against endorsing curricula is likely to create a chilling effect on Department officials’ enforcement of the statute. Congress should be focused on setting forth parameters for the Department (or encouraging the Department to create guidance) that detail how the Department can be instrumental in providing states with specific direction as
to which reading programs meet SBRR requirements. If Reading First continues to require that reading programs funding under it be based in SBRR, then someone must be the arbiter of which programs meet that definition.

It may be practical to assign the oversight committee an expanded role that includes reviewing reading research programs to determine which meet the rigorous requirements of the statute. The group that generates this list should include experts with diverse expertise in reading who can support its decisions with scientific evidence. Alternatively, Congress may determine that it would be more prudent to create an entity independent of the Department to perform this task. National Institute of Child and Human Development and former Department advisor, Reid Lyon suggests that “Congress...create for reading (and perhaps other subjects were scientific research can be done) the equivalent of an FDA for education to ensure that states and school districts only spend their Reading First funds on interventions that have been conclusively shown to work.”202 While the selection and specific function of such arbiters should be in the hands of Congress and reading experts, certainly the questions about SBRR necessitate their appointment.

A list of approved programs should be the result of an ongoing, publicly accessible discussion subject to the Federal Committee Advisory Act203 and the Freedom of Information Act204 and their accompanying requirements surrounding public meetings and published minutes;

202G. Read Lyon, How to Improve Reading First, http://www.edexcellence.net/foundation/gadfly/issue.cfm?edition=&id=287#3359 (April, 19 2007). Reid Lyon’s also suggests that “Congress revisit the original statutory requirement of “proven effectiveness.” While this article does not purport to endorse a particular commercial reading program or even a specific educational approach, if the education community only recognizes that only two commercial reading programs the use of that language could lessen the need for federal guidance on which programs would meet the definition of SBRR.


204 5 U.S.C. §552 et seq.
meetings should be scheduled bi-annually or as needed so that the committee can keep current its list of new and modified reading programs and assessments that meet SBRR requirements. The public nature of the process would make it very difficult to surreptitiously promote a personal financial or political agenda, thus decreasing the possibility of conflicts of interest that are otherwise likely as part of the selection process.

Nothing about this process would diminish State and local choice of curricular programs beyond that what Congress has already diminished through statute; the scientifically based reading research provisions already narrow state and local choice of reading interventions. A list of programs that meet SBRR requirements would merely provide grantees with information they need to effectively meet the grant conditions mandated by statute.

**Conclusion**

As former Reading First counsel, I never presumed to be an expert on educational approaches. However, in my work I witnessed firsthand Reading First program staff that weathered intense political pressure and demonstrated genuine commitment to raising academic achievement. The Reading First program officers made the academic success of the program a priority, and the program’s national success is testament at least in part to their diligence and dedication in implementing it.\(^\text{205}\) The OIG report correctly identified some questionable actions on the part of certain Department officials and possibly some Department contractors, but it may be that in focusing on the missteps of Department officials, Congress is losing sight of the big picture. The OIG report and the ensuing public and Congressional reaction have created a gunshy agency in the Department, and despite initial reports of its success, the promise of

\(^{205}\) *Supra* note 43.
Reading First has given way to a prevailing concern in the Department that enforcing its curricular requirements will unduly influence state and local control of curricula in violation of federal statute. Consequently, a statute that once held the promise of demonstrating historic results in closing economic and racial gaps in reading achievement will potentially be declawed by a fear of political reprisal, and no one will be willing to enforce curricular requirements without explicit direction or permission to do so.

The direction Congress now takes following the Reading First controversy will have vast implications for the future of federal education policy, and the extent to which the Department can enforce congressional decisions to legislate curricular choice. Congress enacted NCLB as a mechanism for the federal government to have more control over academic accountability, and through its prescriptive legislative measures, has recognized that it cannot continue to pour billions of dollars into federal education grant programs without setting expectations for achievement. The Department should be able to respond in kind, and exercise its authority to enforce these statutes in a manner consistent with legislative intent. A call has been issued for Congress to “get off the federalism fence.” with regard to its role in education policy, and the

---

206 Supra note 22.

207 “Since the No Child Left Behind Act was enacted more than five years ago, it has spurred as many changes in elementary and secondary education as any federal policy in U.S. history.” Ctr. On Educ. Policy, supra note 12, at 7.

208 “If Congress believed that states and school districts would invariably take responsibility for low-performing schools, make effective use of available resources and implement needed remedial measure, there would have been no need for the NCLB [Act].” Reply to Plaintiffs’ Opposition to defendants Motion to Dismiss Brief of Petitioners-Appellants Sch. Dist. Of The City of Pontiac v. Spellings No. 05-71535 at 13-14 (August 19, 2005).

209 “[T]he federal government should get off the federalism fence. In an attempt to drive education policy without intruding too greatly upon state authority, the federal government has combined regulatory stringency regarding AYP with regulatory laxity regarding the quality of standards and assessments. This will likely prove to be an unworkable compromise.” James E. Ryan, The Perverse Incentives of the No Child Left Behind Act, 79 N.Y.U. L. Rev. 932 (June 2004)(...the accountability measures of NCLB have the unintended effect of lowering rather than raising student achievement). See also Goodwin Liu, Interstate Inequality in Educational Opportunity, 81 N.Y.U.
children of this nation are awaiting its response.

L. Rev. 2044 (December 2006) (arguing for national education standards and an expanded federal role in school finance within “an existing framework of cooperative federalism”).