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IS THE US DEPARTMENT OF EDUCATION VIOLATING FEDERAL LAW BY DIRECTING STANDARDS, TESTS, AND CURRICULA?

*Analysis conducted by former general counsel and former deputy general counsel of
U.S. Department of Education*

BOSTON, MA – Despite three federal laws that prohibit federal departments or agencies from directing, supervising or controlling elementary and secondary school curricula, programs of instruction and instructional materials, the U.S. Department of Education (“Department”) has placed the nation on the road to a national curriculum, according to a new report written by a former general counsel and former deputy general counsel of the United States Department of Education.

[The Road to a National Curriculum: The Legal Aspects of the Common Core Standards, Race to the Top, and Conditional Waivers](#) is sponsored by Pioneer Institute, the Federalist Society, the American Principles Project, and the Pacific Research Institute of California.

With only minor exceptions, the General Education Provisions Act, the Department of Education Organization Act, and the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act (NCLB), ban the Department from directing, supervising, or controlling elementary and secondary school curriculum, programs of instruction, and instructional materials.

“The Department has designed a system of discretionary grants and conditional waivers that effectively herds states into accepting specific standards and assessments favored by the Department,” said Robert S. Eitel, who co-authored the report with Kent D. Talbert.

The authors find that the Obama administration has used the Race to the Top Fund and the Race to the Top Assessment Program to push states to adopt standards and assessments that are substantially the same across nearly all states. “By leveraging funds through its Race to the Top Fund and the Race to the Top Assessment Program, the Department has accelerated the adoption and implementation of the Common Core State Standards (“CCSS”) in English language arts and mathematics, as well as the development of common assessments based on those standards,” added Talbert, former General Counsel of the Department.

Through its Race to the Top Assessment Program, the authors explain how the Department has awarded \$362 million to consortia to develop common assessments and measure student achievement. Two consortia have won a total of \$330 million, and each has been awarded an additional \$15.9 million supplemental grant to “help” states move to common standards and assessments.

“There is no constitutional or statutory basis for national standards, national assessments, or national curricula,” said Bill Evers, research fellow at Stanford University’s Hoover Institution and Koret Task Force on K-12 Education member. “The two testing consortia funded by the U.S. Department of Education have already expanded their activities well beyond the limits of the law. As this paper recommends, the actions of the Department warrant congressional hearings.”

One of the consortia has stated directly that it intends to use these federal funds to support curriculum materials and that it expects to use the money to create a “model curriculum” and instructional materials “aligned with the CCSS” pushed by the Race to the Top Fund. Secretary Arne Duncan has said that the work of the two consortia includes “developing curriculum frameworks” and “instructional modules.”

“Frankly, this makes sense,” said Eitel. “How can one design assessments without taking into account what is taught? But the legal concern is that these federally funded assessments will ultimately direct the course of elementary and secondary course content across the nation,” Eitel added. “This raises a fundamental question of whether the Department is exceeding its statutory boundaries,” Talbert said.

“Proponents of national standards, curriculum and tests claim they’re merely a logical extension of previous federal education initiatives,” said Pioneer Institute Executive Director Jim Stergios. “The key difference is that prior to Race to the Top and the recently announced federal waivers, the US Department of Education abided by statutes explicitly prohibiting federal direction, supervision, or control of curricula or instruction.”

The authors also explore how the Department’s NCLB conditional waiver program, announced last September, is driving the states toward a national K-12 curriculum and course content. To obtain a waiver from the Department, each state must declare whether it has “adopted college- and career-ready standards” in reading/language arts and mathematics “that are common to a significant number of States.” States seeking waivers must also declare whether they are participating “in one of two State consortia that received a grant under the Race to the Top competition.” The Common Core State Standards and the assessments consortia are effectively the only ones that fit these descriptions.

“Our greatest concern arises from the Department’s decision to cement the use of the Common Core State Standards and assessment consortia through conditional waivers,” said Eitel. “The waiver authority granted by Congress in No Child Left Behind does not permit the Secretary to gut NCLB wholesale and impose these conditions,” added Talbert. “As shown by the eleven states that have already applied for waivers, most states will accept the Common Core State Standards and the assessment conditions in order to get waivers,” Talbert stated.

States need not apply for waivers, the authors said, but most states are desperate enough to escape No Child Left Behind to agree to the conditions. “And once a state receives a waiver, escapes

NCLB’s strict accountability requirements, and makes the heavy investments required by the standards, that state will do whatever it takes to keep its coveted waiver,” said Eitel. In the view of the authors, these efforts will necessarily result in a de facto national curriculum and instructional materials effectively supervised, directed, or controlled by the Department through the NCLB waiver process.

In their analysis, Eitel and Talbert propose several recommendations, including the enactment of legislation clarifying that the Department cannot impose conditions under its waiver authority, as well as congressional hearings on Race to the Top and waivers to ascertain the Department’s compliance with federal law.

Pioneer Institute led a campaign in 2010 to oppose the adoption of national standards, producing a four-part series reviewing evolving drafts. The reports compared them with existing Massachusetts and California standards, and found that the federal versions contained weaker content in both ELA and math. The reports, listed below, were authored by curriculum experts R. James Milgram, emeritus professor of mathematics at Stanford University; Sandra Stotsky, former Massachusetts Board of Education member and University of Arkansas Professor; and Ze’ev Wurman, a Silicon Valley executive who helped develop California’s education standards and assessments.

- [Why Race to the Middle: First-Class State Standards Are Better than Third Class National Standards](#)
- [Fair to Middling: A National Standards Progress Report](#)
- [The Emperor’s New Clothes: National Assessments Based on Weak ‘College and Career Readiness Standards](#)
- [Common Core’s Standards Still Don’t Make the Grade: Why Massachusetts and California Must Retain Control Over Their Academic Destinies](#)

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