

The Road to a National Curriculum

The Legal Aspects of the Common Core Standards, Race to the Top, and Conditional Waivers

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Despite three federal laws that prohibit the federal government from directing, supervising or controlling elementary and secondary school curricula, programs of instruction and instructional materials, the U.S. Department of Education (USDOE) has placed the nation on the road to a national curriculum, according to a new Pioneer report written by Robert S. Eitel and Kent D. Talbert, two former counsels general to the USDOE.

By using their adoption as a condition for states to receive grants under its Race to the Top Fund and the Race to the Top Assessment Program, the USDOE has accelerated the implementation of so-called Common Core State Standards (CCSS) in English language arts and mathematics and the development of common assessments based on the standards. One of the two consortia of states currently developing assessments based on Common Core has even stated directly that it intends to use these federal funds to support curriculum materials and to create a “model curriculum” and instructional materials “aligned with the CCSS.”

The USDOE has used conditions attached to waivers from the accountability provisions included in the No Child Left Behind law to cement state adoption of Common Core and membership in one of the two assessment consortia. The Secretary of Education has the power to grant waivers, but not to attach to them conditions contrary to federal law. By accepting the conditions, states will be indefinitely bound to the Common Core standards and assessments. The result is a de facto national curriculum and instructional materials effectively supervised, directed, or controlled by the USDOE.

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- Analyzes the limitations that GEPA, the DEOA, and the ESEA place on the USDOE.
- Provides background on the rise of the Common Core State Standards Initiative (CCSSI).
- Gives an overview of the Race to the Top Fund and illustrates how the Race to the Top Fund has encouraged states to adopt Common Core standards.
- Reviews the components of the two awardees under the USDOE’s Race to the Top Assessment Program that are working to develop assessments and align them with the Common Core standards. These assessments are critical, as they are designed to link the Common Core standards to a common (that is, national) content for curricula and instructional materials.
- Discusses the USDOE’s use of ESEA waivers to consolidate the nationalizing effects of the CCSSI and the Partnership for Assessment of Readiness for College and Careers (“PARCC”) and SMARTER Balanced Assessment Consortium (“SBAC”) assessments.



This paper makes 7 recommendations

1. **Congress** should immediately pass legislation clarifying that the USDOE cannot impose conditions on waivers requested by states under the ESEA.
2. Appropriate **committees of Congress** should conduct hearings on the USDOE's implementation of the Race to the Top Fund, the Race to the Top Assessment Program, and the Conditional NCLB Waiver Plan to ascertain the Department's compliance with GEPA, the DEOA, and the ESEA.
3. **Congress** should review the curriculum and related prohibitions in GEPA, the DEOA, and the ESEA to determine whether legislation strengthening the ban on federal involvement in elementary and secondary curriculum, programs of instruction, and instructional materials should be introduced.
4. **Congress** should request that the U.S. Government Accountability Office (GAO) conduct a comprehensive review of the USDOE's elementary and secondary education programs, including those implemented under the ARRA and ESEA, to identify programs failing to comply with GEPA, the DEOA, and the ESEA prohibitions. The GAO should submit to the chairmen and ranking members of the appropriate committees written findings no later than September 30, 2012.
5. **Congress** should require that the Secretary review USDOE regulations appearing at Title 34 of the Code of Federal Regulations, and guidance relating to elementary and secondary programs, to identify regulations and guidance failing to comply with GEPA, the DEOA, and the ESEA. The Secretary should submit to the chairmen and ranking members of the appropriate committees written findings no later than September 30, 2012.
6. **Governors, State Superintendents of Education, State Boards of Education, and State Legislators** should reconsider their respective states' decisions to participate in the CCSSI, the Race to the Top Fund, and the Race to the Top Assessment Program.
7. The **11 states that have applied for waivers** under the USDOE's Conditional NCLB Waiver Plan should amend their waiver applications to delete the Department's four non-statutory conditions; states that apply in round two should omit the four conditions from their applications and include only the statutory requirements of 20 U.S.C. § 7861.

About the Authors

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

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