



**United States
General Accounting Office
Washington, D.C. 20548**

Office of the General Counsel

Subject: Legality of national education testing sponsored by Dept. of Education

File: B-278968

Date: May 28, 1998



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-278968

May 28, 1998

The Honorable William F. Goodling
Chairman, Committee on Education and the Workforce
House of Representatives

The Honorable Robert L. Livingston
Chairman, Committee on Appropriations
House of Representatives

Dear Mr. Chairmen:

In February 1997, the Administration proposed voluntary national testing of the reading proficiency of students in fourth grade, and of the mathematics proficiency of eighth grade students. Members of Congress voiced concern about this program which ultimately culminated in a provision of the appropriation act for the Department of Education for this fiscal year prohibiting the Department from using fiscal year (FY) 1998 appropriations to field test, pilot test, implement, administer, or distribute any national tests.¹

Except for funding a study specifically authorized by Congress, the Department of Education reports that it has not used any FY 1998 funds in support of national testing.² However, beginning in FY 1999, the Department intends to initiate pilot testing, to be followed by field testing in March 2000, and the first national testing of fourth and eighth grade students is planned for March 2001.

¹Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-78, § 305(a) (1997).

²A contract for \$1.8 million, for test bias and equivalency scale studies, was awarded in February 1998 to the National Academy of Sciences, pursuant to sections 306(a) and 308, Pub. L. No. 105-78. Funds for developing national tests had been obligated in the prior fiscal year, FY 1997, from the appropriation to the Department of Education for activities including the Fund for the Improvement of Education, authorized by § 10101, Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § 8001.

You have asked us to examine the Department's legal authority to develop and conduct national testing. Specifically, you asked us to address whether the Department has authority: (1) after FY 1998 (assuming that the prohibition in the FY 1998 appropriation act is not renewed and permanent legislation forbidding such a program or expenditure is not enacted) to use appropriated funds to develop and conduct the national testing of fourth grade reading and eighth grade mathematics, and (2) to spend funds on national testing of fourth grade reading and eighth grade mathematics proficiency if funds for those purposes have not been specifically requested in the President's budget.

In summary, the Department's position -- that its organic legislation provides it with the authority to develop and conduct national tests -- is a permissible reading of the law. In addition, the lack of a specific budget request for national testing for FY 1998 does not preclude the Department from making such an expenditure from a lump-sum appropriation available to it for nationally significant programs and projects to improve the quality of education. A more detailed discussion follows.

The Clinton Administration Testing Proposal

Your questions focus on the voluntary national testing initiative proposed by President Clinton in February 1997.³ Under this initiative, states or local school districts could volunteer to participate in national testing. The tests would measure the reading achievement of fourth grade students and the mathematics achievement of eighth grade students against national content and performance standards derived from the National Assessment of Educational Progress (NAEP).⁴ Unlike NAEP tests (where students each take only a part of the test and results of individual students and their schools remain confidential), under the new testing

³We note that no dispute exists with regard to the Department of Education's authority to conduct or participate in two national tests, the Third International Mathematics and Science Study (TIMSS) and the National Assessment of Educational Progress (NAEP). TIMSS is a comparative achievement test of samples of students in fourth, eighth, and twelfth grades, from 41 nations, in which over 33,000 U.S. students from more than 500 schools were randomly selected to participate. TIMSS is authorized by a provision of the National Education Statistics Act of 1994 that permits the Department to acquire and disseminate data on student achievement as compared to other nations. Pub. L. No. 103-382, Title IV, § 404(a)(6) (1994), 20 U.S.C. § 9003(a)(6).

⁴NAEP is a test of educational achievement in reading, writing, and other subjects, using sampling techniques, that produces results not only for the nation as a whole but also results for each of the participating states. The NAEP is specifically authorized by section 411 of the National Education Statistics Act of 1994. Pub. L. No. 103-382, Title IV (1994), 20 U.S.C. § 9010.

initiative students would take the entire test and results on individual student and school performance could be made available.

Legal Authority to Conduct National Tests

The Department believes that its organic legislation authorizes it to conduct the proposed national tests.⁵ This authority is not explicit in the law; the Department relies on its broad statutory authority to conduct a set of programs under the rubric of the Fund for the Improvement of Education (FIE).⁶

Unless the Department's interpretation of the law lacks a rational basis, it is permissible. The Supreme Court has said that when "a statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' . . . If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight"⁷

We believe that the Department's interpretation is permissible, and must therefore be accorded the weight of which the Court speaks. Under the FIE program, the Secretary of Education may "support nationally significant programs and projects to improve the quality of education"⁸ This includes "activities that will promote systemic education reform at the State and local levels," by such means as developing and evaluating "model strategies for . . . assessment of student learning."⁹ Other authorized uses of FIE funds include "activities to raise standards and expectations for academic achievement among all students" and "other programs and projects that meet the purposes of the section."¹⁰

These provisions support the Department's position that it has legal authority to develop and conduct the proposed national tests. It is not necessary that each action of a federal agency be specifically authorized by the Congress; an action

⁵The Department acknowledges that the appropriation act prevents it from exercising this authority using FY 1998 funds.

⁶Elementary and Secondary Education Act of 1965, as amended, § 10101, 20 U.S.C. § 8001.

⁷Regions Hospital v. Shalala, __ U.S. ___, 118 S. Ct. 909, 915 (1998), quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

⁸Elementary and Secondary Education Act of 1965, as amended, § 10101(a).

⁹See id. § 10101(b)(1).

¹⁰See id. §§ 10101(b)(S), (Q).

must only be "reasonably within the contemplation of [the] grant of authority."¹¹ We believe that condition is met here. While the law creating the FIE program does not explicitly refer to national testing, testing may legitimately be described as an activity intended to "improve the quality of education" or to "promote systemic education reform." Moreover, the reference in the law to "nationally significant programs" supports the idea of testing on a national basis.

Some have suggested that the Congress in effect prohibited the Department of Education from conducting national testing, by its 1994 amendment of the Elementary and Secondary Education Act of 1965. The effect of that amendment was to omit from the Act the explicit authority for a national test that had been previously been included in it. Neither the 1994 law nor its legislative history supports this interpretation.

Until 1994, the Elementary and Secondary Education Act of 1965, as amended, included express authority for a specific national test under a program called the Fund for Innovation in Education (the Innovation Fund).¹² The Department was authorized to approve or develop "Optional Tests for Excellence"--comprehensive tests of academic excellence to identify outstanding public and private school students in the 11th grade--and to award certificates to students scoring well.¹³

In 1994, the Congress removed from the law the specific authority for the Optional Tests for Excellence, while simultaneously enacting the broad new authority for the FIE that, as discussed above, authorizes national testing by implication. As part of an amendment of various elements of the Elementary and Secondary Education Act of 1965, and without specific explanation, the authority for the Innovation Fund, including the Optional Tests for Excellence, was omitted from the law.¹⁴

¹¹National Ass'n of Pharmaceutical Mfrs. v. FDA, 637 F.2d 877, 888-889 (2d Cir. 1981), quoting Chrysler Corp. v. Brown, 441 U.S. 281, 306-308 (1979) (the cases deal with whether regulations promulgated by an agency were within the scope of the grant of legislative authority to the agency.)

¹²The Innovation Fund was authorized by section 4601 of the Elementary and Secondary Education Act of 1965, as amended. This provision and the other sections of the same law referred to in this paragraph appeared at 20 U.S.C. §§ 3151 and 3152 (1988). As discussed below, they have since been omitted from the law and no longer appear in the U. S. Code.

¹³Elementary and Secondary Education Act of 1965, as amended, § 4602.

¹⁴Improving America's Schools Act, Pub. L. No. 103-382, § 101 (1994), 20 U.S.C. §§ 8001-8006.

In taking these actions, the Congress did not manifest any intention to restrict the authority of the Department to conduct national testing. The same 1994 law that omitted authority for the Innovation Fund created the FIE program which, as discussed above, authorizes activities consistent with broad-based national testing. The omission of the narrowly-targeted authority for Optional Tests for Excellence, without more, does not warrant the conclusion that the Congress intended thereby to block national testing for other purposes.¹⁵

The legislative history, while it does not directly address the issue, supports the interpretation that the 1994 law did not prohibit all national testing. The House report explaining the 1994 amendments observes that FIE replaces several discontinued education improvement programs and consolidates a number of current programs. The report describes the new authority as "more flexible than current law which only funds specific educational approaches" and says that the new authority permits the Secretary to "support a broad range of projects of national significance related to high standards and education reform."¹⁶ This is consistent with the conclusion that the 1994 amendments were intended, not to deprive the Department of testing authority, but to permit, among other things, "assessment of student learning."

Authority to Expend Funds for Program Not Included in Budget

Although the budget request for the Department of Education for FY 1998 did not mention testing, funds appropriated to the Department would have been available for that purpose, were it not for the prohibition in the appropriation act. The appropriation act provided funds for the FIE program which, as discussed above, includes authority broad enough to support national testing.

The Department's FY 1998 budget request asked for more than \$510 million as a lump sum for the Office of Educational Research and Improvement (OERI).¹⁷ OERI is the unit in the Department that has responsibility for the FIE program, and that would therefore plan and implement national testing. The OERI budget request proposed funding for FIE, but did not mention national testing. The Secretary explained that the budget documents had been "sent to print before the President

¹⁵63 Comp. Gen. 498, 502 (1984); see Southern Packaging and Storage Co. v. United States, 588 F. Supp. 532, 549 (D.S.C. 1984) ("any number of logical conclusions could be drawn from the failure of Congress to adopt an amendment.")

¹⁶H.R. Rep. No. 103-425 at 24 (1994).

¹⁷The Budget of the United States Government, Fiscal Year 1998, Appendix, at 447. The budget shows an estimate of expenditures of \$40 million for the FIE program in FY 1998.

made the decision to go forward" with national testing.¹⁸ In hearings on the appropriation request, the Secretary said that authority for national testing exists under the FIE program, and that initial costs of developing the tests would be absorbed within the funding for FIE.¹⁹

When it ultimately acted on the FY 1998 appropriations act, the Congress provided approximately \$431 million for OERI.²⁰ The conference report indicated an expectation that, of this amount, \$108 million would be for FIE.²¹

The lack of a budget request for a specific item does not preclude an expenditure for that item from a lump-sum appropriation which is otherwise available for items of that type.²² In upholding the authority of an agency to use its appropriation for an activity not mentioned in its budget request, we said that "in the absence of a specific limitation or prohibition in the appropriation under consideration . . . , [the agency] would not be legally bound by [its] budget estimates or the absence thereof."²³

¹⁸Hearings on 1998 Appropriations for the Departments of Labor, Health and Human Services, Education, and Related Agencies Before the Subcomm. on Labor, Health and Human Services, and Education of the House Comm. on Appropriations, 105th Cong. 223 (1997) (statement of Richard W. Riley, U.S. Secretary of Education).

¹⁹*Id.* at 220-225. The budget request asked for funding for activities under part A of title X of the Elementary and Secondary Education Act of 1965, as amended. Part A of title X is the authority for FIE, as added by the Improving America's Schools Act, Pub. L. No. 103-382, § 101 (1994), 20 U.S.C. §§ 8001-8006.

²⁰Pub. L. No. 105-78, Title III (1997).

²¹H.R. Rep. No. 105-390, at 106 (1997).

²²Principles of Federal Appropriations Law, Volume I, Second Edition, GAO/OGC-91-5, at 4-10 (1991).

²³LTV Aerospace Corporation, 55 Comp. Gen. 307 (1975), citing B-149163, June 27, 1962; see also B-198234, March 25, 1981. In LTV, we went on to say:

If the Congress desires to restrict the availability of a particular appropriation to the several items and amounts thereof submitted in the budget estimates, such control may be effected by limiting such items in the appropriation act itself. Or, by a general provision of law, the availability of appropriations could be limited to the items and the amounts contained in the budget estimates. In the absence of such limitations an agency's lump sum appropriation is legally available to carry out the functions of the agency.

Accordingly, in the absence of the prohibition discussed above,²⁴ the Department's FY 1998 appropriation for OERI would be available for expenses related to national testing, notwithstanding that testing was not an element in the underlying budget request.

If you or your staff have any questions, please call me at (202) 512-5400.

Sincerely yours,

Robert P. Murphy
General Counsel

²⁴Pub. L. No. No. 105-78, Title III, § 305(b) (1997).