Justice Deferred; Quality Denied:

Defining a “Highly Qualified Teacher” in the United States of America. ©

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**Legislating High Quality Teachers**

*A History of Good Intentions*

No government has found the panacea of legislative action by which students from low-income and historically underrepresented groups may instantaneously overcome the decades of educational disadvantage and inadequate academic support often present in those communities. However, in the United States, there remains hope that the right combination of federal control and capital will find compliment with the right mixture of state policies and programs to yield educational success for every student. When President Lyndon Johnson signed the Elementary and Secondary School Act (ESEA) of 1965there was hope that the programs it created and funding it provided would close the academic achievement gap between disadvantaged students and their more affluent peers. (Vinovskis, 2011). Perhaps recognizing that ESEA—like previous large scale legislative initiatives—may fail for its overly ambitious mandates and unforeseeable needs for additional funding or oversight, the Act was crafted with a requirement for regular review and update through continual congressional reauthorization.

*Elementary and Secondary Education Act Reauthorization*

After a half-dozen reauthorizations, Congress and the President turned their attention to improving on previous iterations of ESEA by offering a keener focus on standards for student progress and teacher excellence. (Business LEADs Institute, 2010). Confident that the reauthorized Act would provide, “a quality teacher in every classroom in America,” President George W. Bush signed into law the No Child Left Behind Act (NCLB) of 2001, Pub. L. No. 107-110 Stat. 1425 (U.S. Department of Education, 2002). ESEA, under the new moniker of NCLB, serves as the underpinning for the current federal education policy which requires regular student testing, a demonstration of “Adequately Yearly Progress” towards achieving test goals, and the employment of “Highly Qualified Teachers (HQT).” (U.S. District Court Northern District of California, 2007, pp.15-16). Having led a decade-long campaign to get Congress to pass legislation providing for higher teacher quality, Representative George Miller, a Democrat from California, rejoiced in the fact that “for the first time in federal law [Congress had established] a clear goal that every teacher is fully qualified to teach in his or her subject area within four years.” (Miller, 2001).

NCLB defines the minimum qualification to be considered a Highly Qualified Teacher as:

(i)     The teacher has obtained full State certification as a teacher (including certification obtained through alternative routes to certification) or passed the state teacher licensing examination, and holds a license to teach in such State, except that when used with respect to any teacher teaching in a public charter school, the term means that the teacher meets the requirements set forth in the State’s public charter school law; and

(ii)     The teacher has not had certification or licensure requirements waived on an emergency, temporary, or provisional basis.

(20 U.S.C. §7801(23)(A)).

NCLB recognizes the protracted timeframe by which it could take most school districts to ensure all new and existing teachers meet the minimum qualifications to be an HQT. Therefore, the Act mandates that teachers failing to meet the highly qualified standard can not be disproportionately concentrated in schools with high percentages of students from low-income and racial minority groups. (U.S. District Court Northern District of California, 2007, pp. 22-25). NCLB also requires that each state and school district provide a regular status report regarding the distribution of HQTs to federal education policymakers as well as parents of children in Title I schools.

*U.S. Department of Education Implementation*

A year after the legislation’s passage, the U.S. Department of Education (ED) issued final regulations further defining the term “Highly Qualified Teacher” as one that has “passed the state teacher licensing examination” or “is participating in an alternative route to certification program.” (34 C.F.R. § 200.56(a)).

ED’s regulations further explicating the definition of HQT belie the statements of congressional leaders regarding the meaning of HQT as drafted into NCLB.  House Democratic Committee Staff grumbled of the proposed regulation, “This would allow uncertified teachers to be considered highly qualified. This contradicts the statute…” (U.S. District Court Northern District of California, 2008, pp. 17). Withstanding this criticism, the regulations were promulgated without change.

The flexibility that ED’s implementing regulations afforded states in defining HQT and “full State certification” was underscored in a March 24, 2003 letter from Secretary of Education Rod Paige indicating, “Each State continues to have full authority to define and enforce its own requirements that teachers must meet in order to receive full State certification or licensure.” (U.S. Department of Education, 2003).

*Regulatory Effects on the State of California*

Prior to NCLB, a bachelor’s degree was the only requirement to become a secondary school teacher in California. Moreover, there was not even a provision mandating that the required bachelor’s degree be in the same subject in which the teacher provides instruction to students. (Sacks, J. L., 2002).

Subsequent to NCLB and parallel with the scope of ED’s regulatory guidance, the California State Board of Education adopted its own HQT regulations. These rules provided that in addition to teachers that *completed and obtained* full State certification through traditional routes, the state’s university and district intern-teachers (“intern-teachers” or “interns”) *currently enrolled* in approved alternative route certification (ARC) programs were to be defined as “Highly Qualified Teachers” for purposes of NCLB for up to three years. (U.S. District Court Northern District of California, 2007).

In the first five years after the California HQT statute went into effect in 2002 the number of intern-teachers in California rose from 7,251 to 10,716. Of these 10,716 intern-teachers 53% were teaching in schools with populations of 91% to 100% minority students as compared with only 3% of interns in schools with the lowest minority percentage populations. (U.S. District Court Northern District of California, 2007). Throughout the state the intern distribution was also reflective of the aggregate academic performance of a school. According to Patrick Shields, Director of Research with the Center for the Future of Teaching and Learning in Santa Cruz, “Sixty percent of interns serve in the lowest-performing 30% of schools in [California], while only 10% serve in the highest performing 30% of schools in the state.” (U.S. District Court Northern District of California, 2008).

In 2006, Sonya Renee, a parent and local education activist, was surprised to learn that she had received no notice that intern-teachers were instructing her daughter in English and Algebra-1. In fact, in the 2006-07 academic year at Washington Prep High School (WPHS), where Renee’s daughter attended classes, 11% of the entire school’s teachers were interns.(U.S. District Court Northern District of California, 2007, pp. 6, 13-14).

**Federal Court**

*Claim for Relief*

Renee was incensed by the inequity in distribution masked by a lack of reporting. Joined by other effected parents and students as well as two grassroots community activist organizations—Association of Community Organizations for Reform Now, Inc. (ACORN) and Californians for Justice Education Fund (CFJ)—Renee filed suit against the U.S. Department of Education. Plaintiffs contended that ED’s regulations led to inaccurate reports on HQT distribution, thus frustrating their ability to receive information and advocate for education equality.(U.S. District Court Northern District of California, 2007, pp. 12-14).

*Holdings & Rationale – District Court*

On June 16, 2008, the U.S. District Court for the Northern District of California upheld ED’s regulations defining the Highly Qualified Teacher provisions of NCLB. Judge Phyllis Hamilton noted that in failing to define or establish standards regarding “full State certification,” Congress was ambiguous as to whether one participating in an “alternative route” program could be considered “highly qualified.” As such the court only had to examine the reasonableness of the regulation in light of Congressional intent.

Judge Hamilton found that the interpretation of ED was reasonable because in the same law that Congress drafted the NCLB Highly Qualified Teacher language it also recognized two ARC programs. It would not make sense for Congress to promote the presence of ARC program teachers to immediately teach in high-need classrooms if only to bar them from entering these classrooms by provisions within the same statute. (U.S. District Court Northern District of California, 2008, pp. 8-10).

*Holding & Rationale – Circuit Court*

Undaunted, Plaintiffs appealed the lower court decision to the U. S. Court of Appeals for the Ninth Circuit. At the Circuit Court level, the Plaintiff’s originally ran into the same legal technicality of standing which prevented the merits of their case from being heard in District Court. Ruling in favor of the Department of Education, the three-judge panel found that Plaintiffs lacked standing to file suit because the definition of, “full certification remains a matter of state law.” Thus, no matter if the federal law was declared void; the state of California could still determine that teachers participating in ARC programs remained highly qualified. (U.S. Court of Appeals for the Ninth Circuit, 2009, pp. 9475-80).

Despite this ruling, Judge Dorothy W. Nelson, noted in her majority opinion that California education law did differentiate teachers on the basis of credentialing. The ruling suggested that teachers who had not yet completed ARC programs should not be considered highly qualified. With the hint that a subsequent ruling in their favor was possible if the issue of standing could be overcome, Plaintiffs decided to petition for a rehearing. (U.S. Court of Appeal for the Ninth Circuit, 2011).

*Holding & Rationale Reversed – Circuit Court*

On rehearing, the same three-judge panel reversed its earlier decision. The Circuit Court now held that the definition of HQT in ED’s regulations was an invalid expansion of the statutory definition of “Highly Qualified Teacher” in NCLB. Writing for the majority, Judge William A. Fletcher explained that the matter at issue was not the meaning of “full State certification” as had previously been argued. Instead, the Court had based its new opinion on the more precise question of the difference in meaning between “*has obtained*” full State certification (as appears in the statute) and “*demonstrates satisfactory progress toward*” full State certification (as appears in the regulation). (U.S. Court of Appeals for the Ninth Circuit, 2010, pp. 16333).

Using this refined question of law to guide their legal analysis, the Court felt that ED’s regulations were inconsistent with the intent of Congress because the California Education Code—drafted in the mold of ED’s regulations—allowed for intern teachers to be considered HQT despite the fact there was never a formal change in the definition of a fully credentialed teacher under California law. In fact, the California Education Code still maintained several differentiations between teachers participating in ARC programs that held intern credentials and those teachers that held preliminary and clear credentials. (Ibid, pp. 16337-8).

In addressing the matter of standing, Judge Fletcher concluded that both injury in fact and causation had been demonstrated through the earlier presentation of evidenced showing how California education law was drafted in the image of ED’s regulations and how both had a strong corollary to the proliferation of interns with low-quality teaching ability in high-need districts. Further, the Court found that the Plaintiffs demonstrated a substantial likelihood that after invalidating the federal statute California would be compelled to make requisite changes to its existing laws regarding the status of intern teachers. (Ibid, pp. 16335-6).

**United States Congress**

*Intervention*

Though no explicit claim was taken by the highly regarded ARC organization, Teach for America (TFA), some suspect this group used its substantial clout with Congress to urge federal legislation protecting its economic interest in supplying interns to California school districts. (Affeldt, 2010). To this end, there was hurried passage of a Congressional resolution that intervened in judicial matters and overturned the Court’s decision only weeks after it was filed. (Ibid). Perhaps more shockingly, the self-styled legislative father of teacher quality, Congressman George Miller, was the culprit that split the parchment curtain of the U.S. Constitution to author and advocate for the passage of the offending legislation. The Continuing Appropriations and Surface Transportation Extensions Act 2011, was originally proposed to keep the U.S. government funded during a period of political stalemate. However, with the insertion of Section 163, proposed by Miller, the legislation would additionally provide:

1. A “highly qualified teacher” includes a teacher who meets the requirements in 34 C.F.R. 200.56(a)(2)(ii), as published in the Federal Register on December 2, 2002.
2. This Provision is effective on the date of enactment of this provision through the end of the 2012-2013 academic year.

(H.R. 3082, 2010).

Since Section 163 converted the language used in ED’s regulations into federal statute, the overarching question before the Court regarding the legal equivalency of the ED regulation and federal statute definitions was rendered moot—at least until the end of the 2012-2013 academic year. Voicing his support of Plaintiffs legal actions and the national need for better teacher quality measures, Congressman Miller clarified that his advocacy for Section 163 stemmed from his fear that the, “Ninth Circuit decision could cause major and unpredictable disruptions to schools across the country.” Further, Miller suggested, the two-year lifespan of the legislation would allow time for Congress to, “…fully address issues of teacher preparedness, effectiveness and access in the reauthorization of ESEA.” (Miller, 2010).

*Public Reaction*

Various individuals, like University of Colorado Professor, Joshua Dunn, supported Miller’s actions as testament to the belief that elected institutions are better equipped to resolve complex public problems and less susceptible than courts to bowing to the oft “strange assertions” of Plaintiffs. (Dunn, 2011). However, the rally cry against Miller’s actions was far more thunderous. Perplexed that the Congressional action was signed by President Obama, Plaintiff in the *Renee* case, Maribel Heredia, stated, “I don’t understand why Congress and the Administration are interfering with the victory we won in court. […] We deserve at least the same quality of teachers as affluent communities.” (Hausser, 2011). Even stronger sentiments came from a group of 72 national education reform organizations who, in a letter to President Obama, derided Congressman Miller’s resolution as, “reinforcing the unequal allocation of fully trained and certified teachers to all students,” and further pledged to, “work tirelessly and in concert,” for future legislation that will provide a high quality teacher in every classroom. (Action United et. al., 2011).

**Defining Opportunities for the Highly Qualified Teacher**

*Continuing Court Cases*

Despite the new federal statute, Plaintiffs continue their legal fight by highlighting the sunset provision in the law and the fact that a backlog of reports regarding the distribution of Highly Qualified Teachers are still due to ED. Plaintiffs argue that the Circuit Court must retain jurisdiction of the case should the law sunset and the legal situation existing prior to the passage of Section 163 reemerge. Additionally, Plaintiffs argue that numerous reports due to ED must be derived using the definition of HQT outlined in the Courts latest ruling. (U. S. Court of Appeals for the Ninth Circuit, 2011).

In opposition, ED argues that standing is once again an issue because the passage of Section 163 forecloses all legal remedies requested by the Plaintiffs. Defendant highlights the unlikelihood that the same legal issues will reemerge because the two-year period was designed to allow Congress the ability to more formally and appropriately address issues of HQTs in the upcoming reauthorization of ESEA. Defendant further asserts, that though delayed, any reports now written regarding HQTs are by tradition written using the definition in law at the time the report is written. Thus, the language of Section 163 would now be controlling. (U. S. Court of Appeals for the Ninth Circuit, 2011).

Given the very explicit purpose and manner in which Congress passed Section 163, it is highly unlikely that Plaintiffs will succeed on their claim when heard by the Court on June 22, 2011. Whatever the final disposition of the case at the Circuit Court, successful appeal by either Party to the Supreme Court is even more unlikely. Of the 8000 petitions annually received by the Supreme Court, approximately 150 cases with the deepest constitutional questions are granted a hearing. (Supreme Court Historical Society, 2011). With the passage of Section 163, the probability that the Court will view an existence of a deep constitutional question is slim to vanishing.

For these reasons, the final definition of an HQT is now more likely to come from federal legislative action as proposed through government officials or the public at large. To this end, it is critical to conduct an analysis of how the definition of HQT may be influenced by either of these entities.

*Obama Administration Guidance*

In *A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act* President Barak Obama details his plans to renovate NCLB and establish a new federal role for education reform. Among other things, this new federal role will focus on improving the recruitment, development and support of the nation’s classroom teachers. (U.S. Department of Education, 2010, pp.1-2).

Though seemingly contrary to some of the legal arguments offered by the federal government in *Renee*, the outline for the new legislation indicates that, “districts will be required to put in place a few specific policies and systems,” including definitions of “effective teacher,” and “highly effective teacher.”  Even more importantly, these definitions are to be crafted with the advice of teachers, principals, and other stakeholders.  By insisting that teachers are included in the creation of new definitions for “effective teacher” and “highly effective teacher,” it is probable that there will be a strong differentiation between those participating in teacher training programs and those that have completed. Furthermore, the President’s plan suggest that new definitions for an HQT may include such key and substantial differentiators of effectiveness as basic job qualifications, attendance, retention, as well as teacher performance and student growth. (U.S. Department of Education, 2010, pp. 14, 16).

*Congressional In/Action*

As the United States draws closer to a Presidential election year it becomes increasingly uncertain whether Congress will act to reauthorize ESEA in the current legislative session. Though the President and Secretary of Education continue to promote education reform as yielding national economic benefits that should appeal to both parties, the bipartisanship that characterized the 2001 reauthorization may give way to the building of competing political platforms.

Despite serving as Chair of the House education committee when NCLB was passed, the current Speaker of the House, Congressman John Boehner, may be unable to overcome the demands of the Republican Party’s core. A constituency that is increasingly suspect of large federal programs that seek to rest away control from local government. (Barone, 2011). Further, as the Republican Party begins to position itself and potential Presidential candidates, Party members may be unwilling to provide President Obama an education reform package that can be viewed as legislative victory for the Democratic agenda. (Williams, 2011). The challenge facing Democrats is driven by the methods and speed by which members of that Party are seeking reform. Described by Congressman Miller as the “incrementalist” and “disrupter” camps, Democrats up for reelection will have to decide between tempered policies championed by many education organizations that provide campaign funding and more drastic ideas heralded by the Administration. (Barone, 2011).

**Redefining Quality in Reauthorization**

*Public Involvement*

Congress commonly looks to the public and leading organizations in an affected field to provide advice as it crafts statutes requiring special knowledge of a complex industry.  Therefore, as a means to illustrate the general tenure of counsel available to Congress as it reviews the HQT provisions in NCLB, it is essential to examine the thoughts of influential education scholars and organizations that may be called upon to assist.

*Inserting Output Measures*

The current minimum criteria that states must adopt under NCLB for a teacher to be considered highly qualified puts a heavy emphasis on “input measures.” These measures are defined as *those demonstrated educational benchmarks that prepare a teacher to instruct*. Such benchmarks measure a teacher’s content and pedagogic knowledge as determined by passing a subject matter exam in addition to participating and completing a prescribed course of study at a college or approved ARC program. While input measures serve as a valuable base component of the federal HQT definition, a growing number of proposals for redefining HQT in the reauthorization of NCLB call for Congress to take into account the need to address “output measures.” These measures are defined as *those learning and achievement outcomes a student is likely to have when taught by a highly qualified teacher*. (Commission on No Child Left Behind, 2007, pp. 47-49).

Those critiquing proposals redefining HQT with a greater emphasis on “output” tend to only disagree upon the extent to which a variety of measurements should be used to assess a teacher’s output. Noting that standardized test scores can only measure a small fraction of how a teacher gets a student to learn, Barnett Berry of the Center for Teaching Quality, has advocated for more sophisticated value-added measures that examine multiple indices to evaluate a teacher’s practice, student learning, and the manner in which a teacher’s expertise is spread to colleagues.(Berry, 2007).

Other education researchers, such as Mark Tucker of the National Center on Education and the Economy, draw on observations from top-performing countries throughout the world to suggest how U.S. officials may better the domestic teaching force. As observed by Tucker, standards for classifying a high quality teacher should include: graduation from a major research university, participation in a clinical preparation program, in depth knowledge of the field in which one instructs, skills in diagnosing student problems, and never waiving high internationally-benchmarked standards for licensure.

*Identifying Teacher Excellence*

In *Beyond No Child Left Behind*, a 2007 report issued by The Commission on No Child Left Behind, it was recommended that HQT be restructured and renamed “Highly Qualified and *Effective* Teacher.” The Highly Qualified and Effective Teacher (HQET) differs from the HQT in that this teacher is called upon to also “demonstrate effectiveness, beyond credentials, in the classroom.” The Commission expounded on the idea of teacher “effectiveness” by indicating that the HQET would demonstrate effectiveness by producing output in the form of measurable gains in student achievement and positive evaluations from peers. (Commission on No Child Left Behind, 2007, pp. 47-49).

As teacher-labor unions continue to be seen as the fount for poor school performance, the National Education Association (NEA)—a teacher union of over 3 million members—has been showcasing its continuous efforts to raise the standards of teacher preparation, induction and professional development. In creating a workforce of professional teachers, the NEA advocates for the demonstration of abilities beyond subject matter knowledge. Examples of these abilities include diagnostic skills to analyze various learning styles, understanding of English language acquisition, as well as displaying cultural competencies and classroom management expertise.

Since its inception, the National Board for Professional Teaching Standards (NBPTS) has set the professional teaching standard across virtually all elementary and secondary teaching fields and certified nearly 100,000 teachers that have met those high standards. It is estimated that the National Board Certification process may take candidates 200-400 hours to complete over a period of three years. During this time, candidates are expected to familiarize themselves with the standards of their chosen certificate area in order to prepare for assessment of their content knowledge as well as evaluation of their teaching practice through a portfolio of work. (NBPTS, 2007, pp. 9).

Espousing high and rigorous standards for the teaching profession, NBPTS has gone on record against the current HQT definition as written in NCLB. The organization has stated that NCLB “diminishes many of the factors that research and practice indicate are critical to effective instruction and student learning. […] With states reporting up to almost 100 percent of their teachers as highly qualified, the term becomes virtually meaningless.”(NBPTS, 2010). Though the official public position of NBPTS is to not mandate National Board Certification as a federal or state requirement to teach, the organization does assert that teachers successfully completing its certification process “embody the very essence of what it means to be a highly effective teacher.” (NBPTS, 2010).

Given the overwhelming number of studies conducted regarding the impact of National Board Certified Teachers, this otherwise immodest claim is proven to be extremely accurate. In one such study conducted in 2004, teachers certified by NBPTS had students that made learning gains equivalent to an extra month in school. In a 2008 study mandated by the United States Congress, the National Research Council confirmed the positive impact that teachers with National Board Certification had on student achievement; improving a student’s deep learning capacity and higher-order thinking needed upon graduation from high school. (NBPTS, 2009).

**Conclusion**

Since the Elementary and Secondary School Act of 1965 was first promulgated, the United States government has sought to more affirmatively set its hand into providing for the academic success of every student. With the reauthorization of ESEA in 2001, No Child Left Behind was intended to have firmly established a barometer by which the United States could evaluate teachers and ensure that parents of children in schools qualifying for additional federal resources were informed about teacher quality. Instead, a regulatory framework was created by the Department of Education that allowed states to circumvent the very intent of the law by defining nearly all teachers as highly qualified.

Seeking refuge in the federal court system, Plaintiffs continually suffered at the hands of legal technicalities that prevented judges from fully addressing the merits and moral issues surrounding the proper interpretation of what Congress meant by Highly Qualified Teacher. Just when Plaintiffs had secured a legal victory, a covert lobbying campaign drove a well-intentioned Congressman to circumvent the usual process by which the public is involved in the development of new federal statutes. The eventual result being a delay in justice, causing an even more protracted legal fight and uncertainty as to what if any resolution may be found when Congress and the President work to draft and pass a newly reauthorized ESEA.

An eventual victory by Plaintiffs in *Renee v. Duncan* may be seen as a victory for those that champion a stronger “output measure” emphasis in redefining HQT. This is because the crux of Plaintiffs’ argument is based on the strong suggestion that the prevalence of intern-teachers in high-need schools resulted in the poor academic performance of pupils.(Center for the Future of Teaching and Learning, 2007, p. 76). The current “input measure” only definition of HQT relies on the assumption that uniform high-level performances by teachers can be expected from teachers meeting uniform minimum-level preparation standards. If “output measures” were a component of the HQT definition in the federal statute and ED regulations, Plaintiffs’ children would have only received Highly Qualified Teachers that had previously demonstrated student learning and achievement gains.If HQT was defined with the inclusion of certain “output measures” the possible performance of an HQT would show a stronger correlation to the actual past performance of that same teacher regardless of whether they were participating in or had completed a certification program.

Notwithstanding the quizzical position taken by the Obama Administration—as exemplified in pressroom plans for education reform that were not espoused in courtroom arguments—another legal defeat for Plaintiffs would likely reinforce the current legal position of the Department of Education and lead to little effort from the legislative or executive branch to make substantial revisions to the HQT definition in ESEA. For their part, the vast majority of highly regarded education policy scholars and organizations agree and continue to press for a redefinition of HQT that addresses the effectiveness of a teacher across the continuum of their career.

Beyond the legal, policy and moral questions raised in this analysis, Linda Darling-Hammond, of Stanford University, suggest a greater point of contemplation—*Do people want to see a stable high quality teaching force in a high-need district?* The answer to this question is at the heart of how quickly and at what precision the United States will define a Highly Qualified Teacher. In a country where many fail to see teaching as a serious profession and even more think anyone with an affinity for children can teach, perhaps Darling-Hammond was also right to concluded, “For some [a high quality teaching force] is not a real goal.” (Darling-Hammond, 2011).

For those that desire a stable, highly qualified and effective teaching force, there is a vexing awareness that comes from an examination of how the United States is working through its courts, government, and people to develop a clear and more precise definition of a Highly Qualified Teacher. This realization is the fact that any “perfected” definition has and will be written into a law that is continually reauthorized. Thus, even the most clear and comprehensive definition of a Highly Qualified Teacher will be built on a foundation of sand later subject to the political winds of an uncertain future.

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