



THE LABOR RELATIONS IMPLICATIONS OF THE NCLB

When the No Child Left Behind Act (NCLB) was first signed into law in January 2002, it was initially perceived as a signal of the federal government's new commitment to support and demand higher achievement for all students. Early attention and discussion of the law focused on the law's requirements that all states adopt a specific approach to testing and accountability that would assure school districts' continuous annual progress towards improved student performance. At first, the NCLB was mistakenly interpreted as primarily affecting Title I districts. However, as the details of this extensive and complex law and regulations were better understood, the broad and pervasive impact of the law on *all* districts came to light. It soon became clear that NCLB's requirements went beyond issues of Title I funds, Adequate Yearly Progress (AYP), drop out rates, and school safety, but also had an extensive impact on many other aspects of school operations, including profound implications for districts' employment relationships with their paraprofessionals, teachers, and administrators.

This article will not attempt to summarize the numerous provisions of the NCLB. This information, as well as sources of numerous analyses, is available on the NJSBA home page at www.njsba.org at the NCLB icon. Rather, this article will highlight the potentially significant impact of the NCLB on the employment of school staff, examine the resulting effect on school districts' negotiations and labor relations, and explore the implications of all of these issues for boards of education.

NCLB's Impact on Employment of Staff

Initial assessments of the NCLB quickly identified the new law's establishment of federal minimum qualifications for paraprofessionals employed in Title I districts as well as federal standards for Highly Qualified Teachers (HQT). However, the full impact of these requirements, as well as the law's additional impact on the employment conditions of other classifications of school employees, are just beginning to be recognized, appreciated and assessed. It is expected that these still early assessments may well

be subject to change as the provisions of the federal law may be further refined through new amendments or clarification from the federal Department of Education or as the New Jersey DOE's approach to meeting the federal mandate receive federal approval. However, in spite of these anticipated developments, local districts are still required to comply with the law's time lines for implementation and thus need to be aware of the major impact on their employment of paraprofessionals, teachers, and administrators.

Impact on Paraprofessionals' Employment

The NCLB's impact on paraprofessionals' employment stems directly from the Act's following requirements for teacher aides in Title I school districts:

- instructional aides hired after January 8, 2002 must, as a minimum, have 48 college credits or an associate's degree;
- instructional aides hired before January 8, 2002 must, by January 8, 2006, meet one of the following requirements: 48 college credits; an associate degree; or a rigorous standard of quality that demonstrates, through formal assessment, knowledge of, and ability to assist in, the instruction of reading, writing, and mathematics.

In accordance with NCLB requirements, the New Jersey Department of Education has started to define a state-wide system that establishes rigorous standards of quality for paraprofessionals' ability to demonstrate their skills, including a form of portfolio assessment.

Implications for Boards of Education The NCLB's employment standards mean that new paraprofessionals employed by boards after January 2002 must meet the federal standards. However, many previously employed paraprofessionals do not hold the required credentials and will either need to pursue and complete additional course work or to successfully demonstrate their abilities by meeting the standards of New Jersey's formal assessment mechanism. A failure to obtain the required qualifications by January 2006 could mean a transfer to another less desirable position or, possibly, an inability to

continue as an employee of the district. It is therefore not surprising that the NCLB requirements have been seen as holding threatening, unwelcome, and negative implications by many currently employed paraprofessionals, including those who are not directly or immediately affected by the federal law.

Under the provisions of the NCLB, these requirements apply only to paraprofessionals who, under the supervision of a classroom teacher, assist in or support the instruction of students in districts receiving Title I funds. These minimal standards do not apply to paraprofessionals who are assigned to noninstructional duties, such as supervision of corridors, cafeterias or playgrounds. However, many districts routinely reassign their aides to various types of duties in response to changing district needs. Therefore, indirectly, these requirements can affect all paraprofessionals who are employed in schools receiving Title I funds and who are paid, in whole or in part, with these funds.

Further, districts' eligibility for Title I funds can also change from year to year. Thus, even districts that are not currently receiving these funds may find it beneficial to incorporate the federal standards in their local qualifications for employment as a paraprofessional, in the event they subsequently become recipients of the federal program. Therefore, indirectly, the NCLB has a broad and pervasive long-term impact on the employment of *all* paraprofessionals working in *all* school districts.

Impact on Teachers' Employment

The NCLB's impact on school districts' labor relations goes far beyond the realm of paraprofessional employment. The law requires all states to adopt policies to implement the federal standards for "Highly Qualified Teachers" (HQT). Accordingly, New Jersey has adopted new certification regulations that will assure that all teachers in the state meet the required federal standards. The new rules reflect the fundamental assumption of the federal standards: the effectiveness of teachers depends upon mastery of the academic contents of the subject they teach. The state and federal standards are likely to have a significant effect on the employment of teachers which can implicate many districts' personnel goals, staffing patterns, and preparation for negotiations.

New Jersey's "Highly Qualified Teacher" Standard

In compliance with NCLB provisions, New Jersey now requires that all elementary, middle, secondary, and special education teachers of core academic subjects¹ meet the three essential components of a "Highly Qualified Teacher" (HQT). Teachers must:

- hold at least a bachelor's degree; and
- be fully certified/licensed by the state; and

- demonstrate competence in each of the core academic subjects taught by the teacher. Competence can be demonstrated by: a passing score on the National Teacher Examination (NTE) or Praxis Examination; or passing a rigorous state test; or completing an academic major, graduate degree or course work equivalent to an undergraduate academic major. New Jersey veteran teachers can satisfy the testing requirement by meeting the requirements of a high, objective uniform standard of evaluation (HOUSE) developed by the Department of Education.

All teachers of core academic subjects hired as of September 2003 were required to meet the above standards.² Veteran teachers will need to meet the highly qualified standards by the end of the 2005-2006 school year.

Implications of the Highly Qualified Teacher Standard

These standards will not have the same universal impact on all teachers or on all districts. Elementary teachers in grades K-5 and subject area teachers in grades 9-12 certified in 1985 and later will automatically meet the HQT standard as New Jersey's certification regulation required an academic major in the subject area taught or a passing score on an identified subject area test. However, while some veteran teachers hired prior to 1985 may well meet the HQT standards, many teachers may not, as pre-1985 regulations did not require formal subject matter credentials as part of the certification standards.

Further, veteran middle school teachers who teach in a departmentalized setting, and special education teachers, may also have been certified without the current requisite content knowledge in their assigned subject areas. These teachers may need to obtain additional professional development, or fulfill the HOUSE requirements, to reach the HQT standard by the end of the 2005-2006 school year.

Similarly, the new standards will have a disparate impact on school districts. Districts whose middle schools have not been organized along departmental lines, or whose own local qualifications have required demonstrated content knowledge, will experience little or no impact. Other districts may face different conditions that require reexamination of their schools' organizational structure and/or considerations of the communities' reaction to having a number of the district's veteran teachers classified, and identified, as not meeting the highly qualified definition.

NCLB's Impact on Administrators' Employment

In addition to its focus on improving the quality of instructional staff, the NCLB also addresses a number of other issues that are intended to increase districts'

¹ N.J.'s Core Curriculum Content Standards areas are considered core academic subjects as defined by the NCLB. These academic subjects are: language arts literacy; mathematics; science; social studies (civics, history, economics, and geography); visual and performing arts, and world language.

² All future teachers in New Jersey will meet the highly qualified definition by fulfilling the state's certification requirements.

accountability. To achieve that goal, the NCLB establishes a number of federal requirements, including new: testing requirements; standards for assessing and reporting adequate yearly progress; development of corrective action plans, when indicated; plans for parental notice and involvement; and a host of other initiatives.³ The NCLB has charged the states with the responsibility of developing policies to implement the federal program and to monitor districts' compliance with NCLB requirements. However, the actual implementation of the federal requirements, such as the specific collection of data and record keeping necessitated by the federal initiative, falls on local school administrators, including building principals and supervisors.

To date, the full extent of administrative responsibilities resulting from the law are still unknown. While some duties are clearly defined and have already been assumed at the local level (such as maintaining records, meeting time lines, monitoring staff qualifications, etc.), the impact of future obligations (such as the possible need to develop corrective action plans) are, at best, speculative. In addition, the degree and measure of administrative accountability for schools' and students' achievements, and that impact on administrators' job security, remains a possible, future consideration. Only time and experience with the implementation of NCLB on the local level will provide additional information of the impact on administrators' employment.

Implications for Boards of Education The many new administrative requirements placed on local districts result in one of the least discussed, least visible, and still least understood, implications of the NCLB: the effect on administrators' work time and workload. Not only must administrators become familiar with the provisions of the state's NCLB policies, its expectations and rigid time lines, but they also must add these new administrative requirements to their ongoing duties and functions. Boards need to be particularly aware of, and sensitive to, this less obvious impact of the NCLB on the employment of their administrative staff.

The additional duties placed on school administrators may add to the existing concern of an increasingly visible and troubling shortage of applicants for administrative positions. Boards may need to be prepared to consider, once again, their administrative staff, including the adequacy of their staffing level, the costs of administration and the possible reorganization of their administrative teams.

In addition, with many principals and supervisors in New Jersey engaging in collective negotiations over their own terms and conditions of employment, boards will need to be prepared to face bargaining proposals from their administrators' unit that can be directly linked to the provisions of the No Child Left Behind Act. Boards

may also need to be further prepared for previously non-unionized administrators' expressions of new desires to form, or join, a bargaining unit.

Impact on Districts' Labor Relationships

Regardless of districts' particular circumstances and the disparate impact of NCLB on current school employees, the NCLB has an undeniable impact on the terms and conditions of employment of a majority of school employees. In New Jersey's highly unionized school environment, a statutory change in well-known conditions of employment always creates interest in new, and well-established, topics of negotiations. Since all terms and conditions of employment that are not fully preempted by law can be the subject of collective bargaining, boards of education must be prepared to see the effect of the federal law on their districts' labor relationships.

It is expected that the NCLB will affect the nature of bargaining proposals that will be placed on districts' bargaining tables. Many of the issues raised by the NCLB, such as the impact of required additional professional development, are not novel topics of bargaining and, in fact, have been almost universal benefits for teachers. Yet, the new federal requirements create a new context and a new twist to many well-established negotiations issues. It is very likely, for example, that unions will now seek fully-paid professional development for all paraprofessionals. This changed environment is likely to lead to unions' renewed interest in "old" issues and in their introduction of a number of proposals designed to extend and broaden current contract provisions and to provide employee protection within the new NCLB environment. As such, boards must be particularly well-prepared to anticipate, revisit and address the impact of the NCLB on their districts' negotiations and labor relations.

Another potential impact of the federal law, already experienced by a number of districts, is a new interest among previously non-unionized employees to exercise their bargaining rights. As such, some boards may face negotiations with new classifications of employees who may now choose to join an existing bargaining unit or to form a totally new unit. These new negotiations may complicate districts' labor relationships and will require boards to give particular attention to this relatively unanticipated impact of the NCLB.

Employees' Increased Interest in Union Representation

For many years, New Jersey's school employees have had a statutory right to unionize and to engage in collective negotiations over their terms and conditions of employment. Teachers in virtually all school districts in the state

³ Complete information on NCLB requirements, as well as sources of numerous analyses, is available on the NJSBA home page at www.njsba.org at the NCLB icon.

have exercised this right for decades and now enjoy a well-established and longstanding tradition of union representation. Yet, not all categories of New Jersey's school employees have been as highly unionized as their instructional colleagues. For example, paraprofessionals' unionization has lagged far behind that of certified teachers. Further, while principals and supervisors have bargaining rights in New Jersey, and many eligible administrators have chosen to be represented for the purposes of collective bargaining, many others have not done so.⁴ The provisions of the NCLB which affect administrators and paraprofessionals may well spur these employees to trigger their previously unexercised rights to union representation for the purpose of engaging in collective negotiations. In fact, an increasing number of districts have already reported recent requests from their teachers' aides and assistants seeking board recognition of their newly selected majority representative.

The possibility of a negative impact of the NCLB on employees' terms and conditions of employment could, in and of itself, be a major reason for employees' new or renewed interest in the possibility of seeking union representation. For many years, school employees' unions have portrayed their role as that of advocates and protectors of employees' interests and have actively pursued and recruited additional members from the school community. Employees who perceive threats to their employment status, or who feel that they do not have a voice in determining changes that can have a serious affect on their jobs, are more likely to look for the assistance and protection promised by the collective strength of unions.

Given the structure of public employment in New Jersey, it is to be expected that many administrators and paraprofessionals will see this as an opportune and welcome time to initiate their bargaining rights. Administrators may see union representation at the bargaining table as providing bargaining power in obtaining higher increases in salaries, or other benefits, for their additional workload. Paraprofessionals may believe that union representation at the bargaining table can result in assured assistance and support in meeting the new standards for employment as well as greater job security and higher salaries. As such, board members should not be surprised if they are faced with first time requests from their administrators and/or their paraprofessionals to recognize their selected bargaining representatives.

Board Considerations and Responses

Boards must keep in mind that the process and procedures to initiate bargaining rights are well defined and highly structured by the PERC Law and the rules of the Public Employment Relations Commission (PERC).⁵ Board members' timely access to relevant information will prevent and avoid unnecessary complications, including possibly protracted litigation, that can result from boards' understandable lack of awareness of the parties' rights under the law. Thus, upon a request for recognition of bargaining rights, it would be most advisable for boards to seek the advice of their labor and legal resources.

A new request for representation typically raises a number of issues that should form the basis of discussions with your resources. The most common issues that will need to be considered by boards receiving employees' new request to unionize that will require professional advice include:

- boards' rights and options in responding to requests, such as how a board can respond without creating the possibilities of charges of alleged unfair practices;
- established recognition procedures, including information on PERC's rules and determinations of what approach would be most advisable and appropriate for each situation faced by a board;
- the appropriateness of the structure of the proposed bargaining unit, including an understanding of PERC's differing standards for units of supervisory and non-supervisory employees.

Boards' initial responses to requests to initiate collective bargaining will have a powerful and long-lasting impact on the future of a new labor relationship. It is therefore critical for boards to consult with their legal and labor resources and obtain the appropriate information, direction and guidance that will set the framework for a productive labor relationship.

Further, in addition to the major topics highlighted above, boards will also need to seriously consider their best approaches to the first set of negotiations involving a new classification of employees.

Preparing to Negotiate a First Contract

The terms negotiated for newly organized employees will represent a first negotiated document. The first agree-

⁴ According to the Principals and Supervisors Association, there are approximately 300 administrators' bargaining units in New Jersey in the 2002-03 school year. Forming a bargaining unit in New Jersey requires at least two employees who share a community of interest. Not all of New Jersey's 601 districts may have the number of principals and supervisors required for the formation of an administrative unit. Yet, there remains a large number of districts where eligible administrators may be newly motivated to exercise their rights under the PERC Law. (Note: superintendents, assistant superintendents, business administrators or administrators whose responsibilities involve confidential labor relations issues do *not* have collective bargaining rights. For more information on the topic, please see the NJSBA publication "The Public Employment Relations Law", volume 6 of the School Board Library Series.)

⁵ For more information on PERC's procedures please see: *The Negotiations Advisor Online* article on "Bargaining Units: Consolidation, Severance, and Additions" in the Bargaining Skills section; or chapter 2 of the NJSBA publication *The Public Employment Relations Law*, vol 6 of the School Board Library Series. The rules can be found at *N.J.A.C. 19: 11-1.1 et seq.* of New Jersey's Administrative Code.

ment negotiated with any bargaining unit is of extreme importance as it will be most difficult for future boards to change any provisions that prove to be expensive, unworkable, or otherwise disadvantageous to the administration of the district. Therefore, boards must give serious consideration as to how they will prepare to handle this initial round of bargaining.

In addition, board members can expect that the newly selected bargaining agent will vigorously seek to maximize the level of its new members' job protection, benefits and salaries. This union commitment could lead to difficult, delicate and prolonged negotiations. Therefore, boards must approach these negotiations with a strong sense of their bargaining goals, well-developed bargaining skills, and a thorough understanding of the short and long term implications of any negotiated agreement. Given all of these factors, boards are strongly urged to use a professional negotiator for this first round of negotiations.⁶ Professional negotiators are always beneficial in all sets of negotiations. However, their presence is of particular importance in the complex task of negotiating new contracts or in adding a new classification of employees to an existing bargaining unit. Their expertise, experience and skills become invaluable in helping boards to avoid ill-advised agreements and to provide contractual terms that will be most protective of districts' short and long range needs.

Assessing the Negotiability of NCLB Issues

Assessing the negotiability of an issue is always one of the first considerations in preparing for bargaining. However, in dealing with the novelty of many NCLB issues, boards will not have specific guidance from PERC or the courts, as these agencies will not have had the opportunity to determine the specific negotiability of issues arising from the implementation of these federal requirements. Therefore, it is imperative that boards rely on the expertise of their labor and legal resources to apply current negotiability rulings to the novel questions raised by the federal and state requirements regarding NCLB issues.

Presumed Non-Negotiability

Nothing in the law or federal/state regulations governing NCLB implementation appears to change the well-established principles that topics that address educational

policy, or are fully preempted by statutes, are not negotiable and cannot proceed to binding arbitration. Therefore it is to be expected that a significant number of issues related to the NCLB will be found to be nonnegotiable. These types of issues include, but are not limited to, the following examples:⁷

- **qualifications for employment**, such as proposals that reduce the state and federal NCLB requirements;
- **criteria for employee assignments and employee transfers**, such as proposals that base these administrative acts on seniority.⁸
- **criteria for the evaluation of performance**, such as proposals that would establish standards in conducting evaluations for the purposes of fulfilling portfolio or HOUSE assessments;
- **the design of inservice or additional training**, such as proposals requiring the board to provide all training needed by aides or teachers to meet NCLB standards;
- **budgetary allocations**, such as proposals obligating the board to allocate specified amounts in the district's budget to support required training;
- **number of employees**, such as administrators' proposals to hire additional supervisory staff to administer NCLB or proposals guaranteeing continuing employment of aides or teachers who do not meet NCLB's minimum requirements within the defined timelines;
- **job descriptions**, such as proposals seeking to change positions' qualifications or restructure job responsibilities to assure all current aides/teachers do not lose their position as a result of their failure to meet NCLB's minimum qualifications;
- **designs of educational programs and district/departmental reorganization**, such as proposals that would eliminate departmentalized approaches in the middle school or that would limit transfers and reassignments.

Implications for Boards of Education Boards should not engage in negotiating any issue listed above or any other issue which appears to present significant interference with their rights and specific obligations under the law. Engaging in bargaining over topics that are not within the scope of negotiability can be most unproductive and damaging for school management.

Nonnegotiable subjects typically involve boards' ability to manage their schools. Permitting joint decision making

⁶ For a full discussion of the benefits of professional representation, please see the articles "The Use of Professional Negotiators" and "Professional Representation: Beware of False Expectations" in the Structure of Negotiations section of *The Negotiations Advisor Online*.

⁷ For a complete review of the current definition of the scope of negotiations, please see "Guide to Negotiability" in the Reference Section of *The Negotiations Advisor Online*. Boards are also advised to check with their resources to determine if the New Jersey Department of Education's ongoing development of regulations implementing the NCLB result in the preemption of negotiations over other issues that may arise under federal initiative.

⁸ Based on pre-NCLB case law, transfers based on an employee's lack of qualifications to retain an assignment should not be considered as a prohibited disciplinary transfer between worksite, nor should it be seen as a disciplinary action which is subject to binding arbitration. If faced with a challenge to their decisions to transfer employees based on their inability to meet NCLB standards, boards are strongly urged to contact their legal and/or labor relations resources.

over these issues would present unacceptable interference with boards' authority to set and implement educational policies and would compromise elected representatives' accountability to the community. As such, boards should not entertain or engage in negotiating any proposal listed above or any other which falls outside the scope of negotiable subjects. A refusal to negotiate over a nonnegotiable subject is not a failure to bargain in good faith and boards can, and should, petition the Public Employment Relations Commission (PERC) to resolve any dispute over an issue's negotiability.⁹

Boards must be fully alert to the type of topics that are, or are likely to be, defined as "managerial rights" and not subject to negotiations. Preserving management's right to act, without seeking the union's agreement, is a primary employer interest and responsibility. Therefore, in considering the possibility of board proposals or responses to union proposals, boards must always be mindful of the barriers between negotiable and nonnegotiable issues and should be prepared to reject any form of proposals that implicate the issues listed above. Thus, boards should always seek the advice and opinion of their labor relations resources as to the negotiability status of any NCLB proposal.

Presumed Negotiability

Nothing in the law or federal/state regulations governing NCLB implementation appears to change the well-established principles that topics that primarily affect terms and conditions of employment, but are neither preempted by statutes or regulations, and which do not present significant interference with the determination of educational policy are *mandatorily negotiable*. These types of issues include, but are not limited to the following examples:

- **additional compensation for the time involved in meeting NCLB standards**, such as: administrators' responsibilities to implement the NCLB; time spent by aides and teachers in obtaining the required minimum qualifications;
- **paid release time** during the normal work day or work year, such as paid leave of absences to help aides and teachers meet the minimum requirements without adding time to their contractual workday;
- **additional compensation for coverage** of other staff's absences due to their release time to attend to NCLB responsibilities;
- **board payment of costs involved in training**, such as new, or improved, payment for costs of tuition, mileage, books, fees and other related costs;
- **additional compensation for progress towards achieving required qualifications**, such as new columns on salary guides or higher differentials;

- **increased compensation upon attainment of requirements**, such as differentiated salaries among a classification based upon different qualifications and/or assignments;
- **procedures for transfers and reassignments, including notices**, pre-transfer conferences and additional compensation, such as paid release time, to adjust to the new assignment;
- **evaluation procedures**, such as number of evaluations in excess of the Administrative Code's requirements and procedures related to portfolio or HOUSE requirements.

Implications for Boards of Education The PERC Law requires boards to negotiate over issues that are considered to be within the scope of negotiations. A refusal to negotiate over these issues is seen as a violation of the legal requirement to bargain in good faith and can result in prolonged litigation that can damage a board's ongoing labor relations. So, once again, it would be most advisable for boards to seek the advice of their legal and labor resources before refusing to negotiate over issues involving compensation, work time or procedural issues.

However, boards must also keep in mind that the obligation to negotiate in good faith does not involve an obligation to concede to any issue. Although an issue may be designated as a "mandatory topic" of negotiations, it does not mean that an agreement to the topic is either advisable or wise for a board. Therefore, while boards are legally required to consider mandatory topics of negotiations, they are not required to reach any agreement that would be detrimental to their districts.

Here, as well as in all other aspects of bargaining, boards will need to carefully assess the implications of agreement on their districts' operations, their fiscal resources and their bargaining goals. These considerations will guide boards' analyses of, and responses to, union proposals. Therefore, in negotiating over all issues, it is important for boards to carefully prepare for negotiations and assess both the short and long term impact of all proposals affecting terms and conditions of employment.

Considering the Need for Board Bargaining Proposals

At first blush, it would appear that the NCLB's impact on terms of employment would only lead to union proposals specifically designed to assist and protect their members' required compliance with the federal requirements. However, the NCLB also holds many issues that affect the management and administration of school districts, such as staff development and costs of employment. To assure their ability to adequately comply with the NCLB, without damaging other aspects of their districts' opera-

⁹ For additional information on filing scope petitions with PERC, please see chapter 3 of the NJSBA publication *The Public Employment Relations Law*, volume 6 of the School Board Library Series.

tions, boards will need to review their existing terms of employment to determine whether changes are necessary to effectively implement the federal Act. Since changes in terms and conditions of employment require negotiations, boards will not only need to be prepared to respond to union demands, but may also find many reasons to raise their own bargaining proposals. As such, boards will need to consider a number of issues, including their bargaining goals for the implementation of NCLB, the terms of employment that need changes from the board's perspective, and the availability of resources to fund negotiated provisions.

Identifying the Board's Bargaining Goals

In negotiating all terms of employment, boards must first establish bargaining goals that are designed to support their districts' ability to meet their short and long term district needs and their educational goals. The same fundamental principle is particularly important in preparing to face issues arising from the NCLB, a law that strongly implicates district' educational and staffing needs. Boards' assessments of the relationship between NCLB's requirements and their districts' own goals will thus form the basis of their bargaining positions.

The relationship between a board's goal and its bargaining position can be illustrated by the following examples. Another board that believes that it is in the district's best interest to assist its current staff to attain the minimum federal requirements may be most willing to accept increases in the cost of employment inherent in its existing tuition reimbursement program and/or its salary guide. A board that views the required expansion of paraprofessionals' educational background as an ultimately new and vital source of qualified, and known, potential applicants for expected teaching vacancies may be most eager to support and encourage its aides' career development, even beyond the minimum requirements of the NCLB. Yet, still another board may quite legitimately conclude that the federally required minimum qualifications are just like any other statutory standards for eligibility for employment and thus are the full responsibility of individuals' career choices. That board may be philosophically opposed to assuming, or even sharing, in the costs of attaining minimum employment mandates. Thus, a basic step in boards' preparation to negotiate over issues arising under NCLB involves each board's consideration of its underlying philosophy and its short and long term bargaining needs.

Identifying Impediments to Administrative Action

Boards' bargaining proposals are designed to establish, or change, negotiable topics so that the districts' rules of employment support the administrative team's author-

ity and flexibility. Therefore, boards must review their districts' conditions of employment which are established by their negotiated contracts, board policies and binding practices.¹⁰

In dealing with their local implementation of NCLB, boards need to examine both their binding past practices and written contractual provisions that can complicate their administration of the new requirements. Provisions that unduly limit the administration's ability to act or that are, or could become, financially expensive to maintain are generally good sources of bargaining proposals. However, when a binding past practice works in favor of a board's interest, then it is generally unwise for the board to seek the incorporation of that unwritten rule of employment into the body of the written document. Placing that past practice on the bargaining table can give the union the opportunity to negotiate a change and to dilute the board's existing rights in that particular issue. Therefore, boards should only raise bargaining proposals over existing terms that impede the administration's ability to act and impair boards' ability to meet their district' goals.

Compliance with NCLB requirements can be complicated by a number of existing terms of employment and each board will need to review its own local circumstances to identify potential problem spots. Typical areas that can affect the smooth implementation of the federal requirements include, but are not limited to, the following topics:

- ***existing transfer and reassignment procedures*** that may delay administrative action or be otherwise overly burdensome for the administration. In contrast to the non-negotiability of criteria for these reassignments, procedures are both negotiable and arbitrable. Since a transfer or reassignment of paraprofessionals or teachers may be necessary to comply with NCLB's minimum qualifications, a board would want to consider raising a proposal that would eliminate contractual conditions that complicate the administration of transferring/reassigning an employee;
- ***current tuition reimbursement provisions*** that do not provide sufficient administrative or fiscal controls. Since districts may expect higher utilization by a significant number of teachers who need additional course work to meet the HQT standards by the end of the 2005-2006 school year, boards may wish to consider proposing appropriate modifications to achieve better control or caps on their total obligations. Boards may also wish to consider proposals that link their support of current employees' fulfillment of the minimum requirements to employees' commitments to remain in the board's employ for a number of years after achieving the qualifications.
- ***evaluation procedures*** that limit the number of observations and evaluations that can be performed by the administration. Since New Jersey's procedures permit

¹⁰For a full discussion of binding past practices, please see the article "The Meaning and Relevance of Past Practice" in the Selected Topics section of *The Negotiations Advisor Online*.

current employees to meet the NCLB requirements by demonstrating competence in their areas, districts may need, or wish to, increase their opportunities to evaluate staff. As such, boards may consider proposals to obtain the authority to conduct additional performance evaluations.

- **salary guides** that hold many columns, or large differences in salaries between columns. These circumstances create many opportunities for increases in salaries due to the attainment of additional course work. A board's calculation may result in a projected dramatic increase in its costs of employment due to the increased number of staff who will need additional course work to meet NCLB requirements and who will become eligible for placement on a new column of the guide. A board may find that these increases would require an unacceptable allocation of its limited resources to fund these built-in increases. Under these circumstances, that board should give serious considerations to proposals that would reduce or eliminate the anticipated increases, such as: proposals to modify the future structure of the guide or proposals that would preclude credits obtained to meet NCLB requirements from being counted toward movement on the columns of the guide.

There are many other negotiable contractual provisions and past practices that could complicate a board's short and long term implementation of the NCLB requirements. However, there are no universal guidelines that can be applicable to all boards. Rather, each board will need to carefully review its existing terms and conditions of employment and determine its own need for proposals based upon its fundamental district needs and bargaining goals.

Identifying the Board's Resources

In preparing for bargaining over NCLB issues, as well as all other issues, boards must give serious considerations to the costs of their potential agreement. Although some federal funds are available and specifically dedicated to staff training, the NCLB has been nationally criticized for being a significantly underfunded mandate. It is therefore expected that many NCLB requirements will need to be funded by local resources. Further, experience has certainly called into question the reliability, continuity and certainties of governmental funding.

Thus, each board will need to: carefully assess its federal and state aid; cost out any potential agreement to NCLB-related terms and conditions of employment; and include those in the calculation of the total settlement's economic package. In addition, it is essential that each board assess the impact of the costs of any contemplated total agreement with all its bargaining units on the district's total budget and the allocation of funds to support other district needs and goals. In short, in assessing their ability to allocate new funds towards NCLB-driven issues, boards must weigh their commitment and ability to finan-

cially support NCLB in light of their total resources and obligations. This may not be an easy balancing act and is likely to require a careful and deliberate process of setting short and long term priorities. However, boards cannot and should not avoid a fundamental consideration of their goals and resources as they prepare to formulate their own proposals and to analyze the issues the union has placed on the bargaining table.

Analyzing Unions' NCLB Proposals and Avoiding Unwise Agreements

A careful review of the unions' NCLB-related proposals is particularly important, as any agreement in these areas will result in new contract language. In negotiations, it is far easier to obtain new terms that recognize and protect management's needs than it is to change existing, but intrusive and damaging provisions. Therefore, boards should take this opportunity to negotiate advantageous provisions and to avoid unwise agreements that can haunt the district for many years to come.

Assessing Bargaining Unit and Employee Needs

A quick look at the examples of negotiable topics listed earlier in this article can immediately assist board members to anticipate the type of proposals they can expect from some, or all, of the unions representing employees affected by the NCLB requirements. It becomes evident that some of those issues will be common to all bargaining units who are affected by NCLB requirements. For example, proposals for additional compensation for increased workload and/or additional work time or professional obligations resulting from NCLB requirements can be expected to arise in all these units. However, other issues may be of interest to only one group of employees. For example, noncertificated employees who are not covered by statutory tenure or other forms of job security under school law, may seek local protection through contractual tenure or contractual seniority rights.¹¹

Nevertheless, in spite of the commonality of certain issues, boards will need to assess each unit's proposals on its own merits. Any other approach would be nonproductive for a number of reasons. First, the proposal will not have the same degree of importance or the same priority in all units. Second, the board's needs and bargaining goals for different units and different classifications of employees are likely to call for different types of responses at the bargaining table. Therefore, boards will need to be prepared to give all of these "common" proposals special and individual considerations, based on the unit's characteristic and the district's needs. Yet, while boards must assess the special circumstances of each unit's proposals, there are a number of common threads that can be applied to the analysis of NCLB proposals.

¹¹For a complete discussion of issues that are of particular interest to noncertificated employees, including paraprofessionals, please see the article "Special Issues of Support Staff Employees" in the Bargaining Units Section of *The Negotiations Advisor Online*.

Assessing the Economic Costs of Proposals

As in all negotiations, costing of union proposals is of great importance. Boards must have a clear and accurate handle on the price of agreement to particular issues, as well as the total cost of any potential settlement.¹² To avoid nasty surprises, boards must be fully aware of the costs and sources of funding involved with NCLB requirements and must avoid unwitting agreements to provisions that will hold unanticipated, and potentially expensive, consequences.

Funding NCLB Issues The federal legislation provides a degree of funding to help districts meet the costs of implementing its requirements. For example, 5% of Title I funds are earmarked for the exclusive purpose of supporting training required to meet the Act's minimum qualifications.¹³ Yet, NCLB has been characterized as being seriously underfunded and many districts may find that governmental aid is far from sufficient to cover the costs of contemplated NCLB-related agreements. Boards may therefore need to examine their own ability to fund their agreements from their local resources.

Some boards may wish to consider conditioning their costs upon the availability of state/federal or local funds as well as considerations of the district's other obligations.

Boards that believe that they have a responsibility to assist and support their employees' needs to achieve the imposed requirements can negotiate provisions that limit their funding obligations to current employees' needs to attain additional credentials by the end of the 2005-2006 school year. Well-crafted language can thus create a "temporary" professional development expenditure that will end with the NCLB deadline by which all staff must meet the federal requirements. However, all boards should be prepared to seek and obtain controls of their costs of funding any agreement to NCLB issues.

Seeking Means of Minimizing Costs A number of boards have found that their commitment to helping paraprofessionals meet the minimum conditions of employment can best be achieved by entering into partnership agreements with other districts and/or local colleges. Other districts may choose to assist their current staff in meeting their requirements through New Jersey's alternative means of demonstrating performance, such as the DOE's authorized portfolio assessment for aides and the HOUSE standard for teachers.

Note, however, that those options, like many other types of "solutions" are not panaceas and hold their own consequences. For example, local demonstrations of performance are likely to involve administrative oversights that will increase administrators' work load and thus increase that unit's commitment to achieving increased compensation for extra duties. This does not mean that boards should therefore reject these possibly less expensive

approaches, but it does mean that boards need to be aware of the hidden, or less obvious, costs of any agreement.

Avoiding "Hidden" Economic Costs

Some union proposals, such as increased or new tuition reimbursement plans, obviously hold additional costs for a board. Other proposals, however, can also contain "hidden" costs arising from their consequences or interactions with other contractual provisions. In order to fully assess and understand the economic costs of contractual provisions, boards must be aware of the potential ripple effects of their agreements, such as those discussed below.

Contractual "Blank Checks" or Unlimited Board Expenditures Boards' negotiated obligations to fund certain employee benefits, such as tuition reimbursement, can become "blank checks" if these provisions do not contain some forms of cost control. Provisions that do not contain "caps" on boards' commitments to fund negotiated benefits obligate boards to meet the contracted terms, regardless of their costs. Thus, the ultimate costs of complying with these negotiated responsibilities are uncontrollable, unpredictable and potentially threatening to boards' ability to meet other budgeted, but discretionary, expenditures.

To avoid potential budgetary problems, boards should be extremely alert to their needs to achieve cost controls and predictability in all their contractual provisions. Negotiating a "cap" on boards' total financial exposure for any one benefit is the most preferred and prevalent protective approach to achieving controllable and predictable expenditures. This fundamental concept is most important in negotiating over NCLB-related issues, as required professional development can lead to many union proposals seeking boards' financial support for both tuition reimbursement provisions and in providing many in-district training opportunities.¹⁴

"Escalator" Clauses and Per Diem Rates Most frequently, unions base their proposals for additional compensation on an employee's per diem, or hourly, rate. A board's agreement to this approach means that the cost of that particular provision will increase automatically, without further negotiations, as employees' salaries typically increase in each year of the agreement. These type of clauses (known as "escalator" clauses) can be avoided by negotiating a flat dollar rate, rather than linking compensation to each employee's per diem or hourly rate.

Flat dollar rates are generally beneficial to boards. First, these clauses are far easier to administer, as all employees eligible for the benefit receive the same uniform rate. Further, as the rate is known in advance, the future cost of the benefit is far easier to predict. In addition, increases in a stated flat rate must be negotiated. This

¹²For a helpful guide to costing contractual provisions and bargaining proposals, please see the NJSBA publication *Costing Out the Labor Agreement*.

¹³For more information on federal funding for NCLB, please go to the "The No Child Left Behind" page at the NJSBA website at www.njsba.org

means that the provision is no longer an automatic escalator clause. Rather, the burden of seeking an increased rate now falls on the union, and the board is aware of the costs of the potential increase and can assess its merits and feasibility as part of its calculation of the cost of the total package.

Frequent Opportunities for Movement on Columns of the Salary Guide

The number of columns on a salary guide, eligibility for movement across the guide, as well as the differences in salaries on adjacent columns frequently lead to additional (but possibly less visible) costs of required professional development and increased tuition reimbursement plans. Boards facing NCLB-related proposals must examine the structure of their guides and the potential costs related to the interaction of contemplated new agreements and their guides.

Once these costs are identified and assessed, boards can handle these implications in a number of ways. If the costs are acceptable to the board, then the board can account for the expected increases in calculating its real NCLB expenditures. If the costs are not acceptable, then a board can propose changes in the structure of the guide or conditions for eligibility credit on the guide. There are no legal requirements for boards to grant credit on the guide for all reimbursed or required course work. Thus, boards can negotiate appropriate restrictions, in line with their fundamental beliefs, to limit the type of course work that will result in column movement and related salary increases. Under any of these scenarios, boards are, at the very least, aware of all the economic implications of their contemplated agreements to NCLB issues.

Assessing the Non-Economic Costs and Implications of Proposals

Agreements to any proposals can also hold significant non-economic costs that can have a serious negative impact on districts' ability to operate and staff their schools efficiently and effectively. It is, therefore, essential that boards consult with their administrators and assure that any agreement reached at the bargaining table with unions representing teachers and aides will present as little intrusion as possible in their management teams' needs for flexibility and control.

While all boards will need to base their assessments on their own local needs, there are a number of common issues that must be considered by all boards. The most significant issues are discussed below.

Staffing Needs NCLB's requirements and time lines may preclude boards' ability to continue to employ staff who do not meet the federal standards by the established deadlines. Before boards reflexively agree to approaches committing time and resources to support employees' efforts to meet the standards, boards must assess both the affected staff's needs as well as their districts' needs

for staff. Without this information, boards cannot frame productive responses that are appropriate to their districts' real needs.

Therefore, boards must consult with their superintendents and obtain the insight and expertise of their personnel directors, and building and program level administrators.

Boards need to ask questions concerning a broad range of issues, such as: how many of our staff are affected and will need additional credentials? Will our teacher aides and assistants be interested in, and able to, meet the academic standards required by the NCLB? Have we had difficulties in hiring new instructional aides who already possess the minimum qualifications? Do we have a pool of other current aides who can, or already do, meet the requirements? Do we have teachers currently assigned to grades K-5 who meet the standards for middle school assignments? What is the impact of the requirements on each category of current employees affected by the NCLB?

Boards must then, in conjunction with their superintendents' recommendations, develop well-informed bargaining positions that will be well-suited to the particular needs of their individual schools and special district programs.

Seniority Rights and Job Security Issues of seniority and job security for non-instructional employees who do not have statutory tenure rights have always been a priority of these employees' unions at the bargaining table. Given the potential loss of employment facing instructional aides who cannot meet the federal standards in a timely manner, these issues are likely to increase in importance in upcoming negotiations.

Boards must be particularly well-versed in the problems inherent in some approaches of providing contractual seniority and job security. Therefore, interested board members and administrators are referred to *The Negotiations Advisor Online* article on "Special Bargaining Issues of Support Staff Employees" listed in the Bargaining Unit Section which fully explores these issues (as well as those of binding arbitration, just cause, and nonrenewals of fixed-term contracts.)

As a quick alert to the major potential problems of these issues, boards are reminded that they do not have a legal obligation to agree to any such proposal. Further, boards that may be inclined to consider agreement to some form of contractual job security must keep in mind that there are no legal requirement to replicate, or provide, the same degree of protection granted to other staff members through school law provisions. In fact, boards are strongly urged to reject any proposed seniority arrangement or job security provisions that are based simply on longevity but ignore employee qualifications, job performance and district needs. Boards considering the possibility of some form of job security must assure that their agreements protect their districts' ability to staff positions with individuals best

¹⁴For a full description of the various approaches of achieving cost control of professional development, please see the article "An Analysis of Professional Development Clauses" in the Selected Contract Clauses section of *The Negotiations Advisor Online*.

qualified to meet the district's needs.

Renewals of Fixed Term Contracts Protecting employees' entitlements to positions by limiting boards' discretion to issue, or not issue, another employment contract has been a prevalent goal of employee unions. School law protects boards' complete discretion to reissue individual contracts during the non-tenured period preceding the attainment of statutory tenure and precludes arbitration of non-renewal decisions affecting teaching staff members and secretaries. However, school law's prohibition of arbitration of disputes involving boards' nonrenewal decisions does not apply to paraprofessionals.¹⁵

The area of arbitrability of non-renewal decisions affecting non-certificated staff is currently under litigation. Boards are advised to consult with their legal and labor relations resources to keep informed of the latest developments in this important and volatile area of school employment. Nevertheless, boards can, and should, protect their rights to select their staff by rejecting any union proposal seeking specific authorization of binding arbitration over challenged non-renewals. In fact, boards may want to consider express language specifically reserving their final authority to determine the reemployment of staff hired on fixed term contracts.

Release Time A favored union approach to assist members' needs for continued professional development is for the district to release staff members from their normal duties during the normal work day, without loss of pay. Agreement to this approach can hold a number of complications for a board of education which, in the long run, can be far more costly than strictly economic issues. There is little dispute that the release of teachers or instructional aides from their normal work time will result in the interruption and disruption of students' educational programs. The impact on students is likely to differ, based on the amount and frequency of the release time, the nature of the educational program and the staff members' assignments.

Before agreeing to release time, board members must ask their administrators a series of important questions, such as: what will be the effect of this release time on the educational program? Can the effect be minimized through adequate coverage? Are there certain educational programs that could not function with release time? What is the availability of qualified substitutes? What will happen if too many teachers/aides are released at the same time? What will be the cost of providing class coverage? What other options would be better for the administration? Would certain controls make this an acceptable option? Could limited release time, controlled by the administration, be acceptable and, if so, what conditions would be needed?

It is only when board members are fully informed of the potential problems and solutions in each school build-

ing, and each special program, that boards should begin to intelligently respond to issues of release time.

In Conclusion: Negotiations In an Evolving Environment

As the No Child Left Behind Act has become effective, it has become increasingly clear that its provisions which affect terms of employment will ultimately result in a number of bargaining proposals. However, it must be recognized that the administration of the Act is still in its infancy at the federal, state and local level and that currently identified labor relations implications of the NCLB are primarily related to the Act's initial requirements.

Yet, as implementation of the Act enters its subsequent stages, additional employment concerns may emerge. For example, New Jersey's evolving process for continued compliance with the Act is likely to lead to new regulations that may implicate terms and conditions of employment. However, these state rules, as well as federal requirements, may also be found by PERC to preempt negotiations over certain topics that would otherwise be deemed to be within the scope of negotiations.

Further, as deadlines for staff's achievement of NCLB's minimum qualifications materialize, concerns over job security and appropriate assignments are likely to grow. And, additional concerns among both employees and boards of education may result from the future implementation of NCLB which contain the possibilities of future conditions, such as penalties for school districts who continue to fail to meet the Adequate Yearly Progress, required remedial actions, and the introduction of supplemental educational services staffed by state-approved providers. As such, the environment of negotiating NCLB-related issues, as well as the issues themselves, remain extremely volatile and uncertain.

In spite of these uncertainties, boards need to deal with the immediate concerns that have arisen and that are likely to become part of upcoming and ongoing negotiations. Boards must not only be prepared to respond appropriately to unions' proposals, but they must also be prepared to identify current terms of employment and practices that are likely to impede their local implementation of the federal requirements. Boards must be ready to raise their own bargaining proposals to achieve changes that will permit them to comply as effectively as possible with all the current and future statutory and regulatory requirements surrounding this new initiative.

It is never easy to accurately anticipate the board's long-range needs and to plan appropriate protection of the district's future interests. At this time, this task is further complicated by the uncertain shape of NCLB's future implementation and the absence of specific case-

¹⁵For more information on this issue please see *The Negotiations Advisor Online* article on "Special Bargaining Issues of Support Staff Employees" listed in the Bargaining Unit Section. Case-law developments in this area will be posted on the "What's New" page of *The Negotiations Advisor Online*.

law guidance. Yet, within this continuously unpredictable environment, boards can continue to rely on the old, tried and true bargaining techniques which have been, and continue to be, the hallmark of all effective negotiations.¹⁶ Thorough understanding of the issues, careful development of board proposals and counterproposals, as well as the ability to bring bargaining skills and expertise during all

aspects of negotiations will be of particular importance in these negotiations. More than ever, boards would be best served by identifying and relying on their resources and by considering the value of at-the-table professional representation as the best means of protecting their districts' interests in this uncertain environment.

¹⁶For a thorough discussion of bargaining techniques, please see the Bargaining Skills Section of *The Negotiations Advisor Online* and *Collective Negotiations*, volume 5 of the NJSBA's School Board Library Series, 2001 edition.