



NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

TESTIMONY OF

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MARYLAND HOUSE OF DELEGATES

PRESIDENT, NATIONAL CONFERENCE OF STATE LEGISLATURES ON BEHALF OF THE
NATIONAL CONFERENCE OF STATE LEGISLATURES

REGARDING

THE UNFUNDED MANDATES REFORM ACT OF 1995

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE
FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA, COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS,

UNITED STATES SENATE

APRIL 14, 2005

Chairman Voinovich, Ranking Member Akaka and distinguished members of the Senate Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia, I am John Hurson, President of the National Conference of State Legislatures (NCSL) and a member of the Maryland House of Delegates. I appear before you today on behalf of NCSL, a bi-partisan organization representing the fifty state legislatures and the legislatures of our nation's commonwealths, territories, possessions and the District of Columbia.

Thank you for the opportunity to testify before you today about the Unfunded Mandates Reform Act of 1995 (UMRA). Thank you Mr. Chairman for your efforts and leadership as Governor of Ohio that helped UMRA become a reality a decade ago and for your continued commitment in the United States Senate to review how it is working. I underscore the bipartisan and bicameral collaboration that led to its enactment.

My presentation today will highlight the effectiveness and limitations of UMRA, the impact of those limitations on state budgets and the need for substantive and technical changes to UMRA. I request that a copy of NCSL's March 10, 2005 *Mandate Monitor* be submitted for the record to accompany my testimony.

Mr. Chairman, NCSL continues to applaud the success of the Unfunded Mandates Reform Act of 1995 (P.L. 104-4) and the work of the Congressional Budget Office (CBO) in bringing attention to the fiscal effects of federal legislation on state and local governments, improving federal accountability and enhancing consultation. CBO's March 2005 report that identified only 5 laws that crossed UMRA's threshold speaks loudly for its effectiveness. The hundreds of fiscal analyses completed by CBO show a commitment to carry out the spirit and letter of the law. Both of these facts, however, mask some of the statute's shortcomings.

The Government Accountability Office's May 2004 analysis of UMRA, conducted at your request, concluded that "...there are multiple ways that both statutes and final rules containing what affected parties perceive as 'unfunded mandates' can be enacted or

published without being identified as federal mandates with costs or expenditures at or above the thresholds established in UMRA.”¹ In addition, the report found that, “The findings raise the question of whether UMRA’s procedures, definitions, and exclusions adequately capture and subject to scrutiny federal statutory and regulatory actions that might impose significant financial burdens on affected nonfederal parties.”²

Because of UMRA’s limitations, much is slipping under the radar. As a result, the federal government continues to effectively shift costs to state governments, thereby intensifying pressures on state budgets.

NCSL has identified a \$51 billion cost shift in federal funding to states for fiscal years 2004 and 2005 collectively and a potential \$30 billion cost shift in FY 2006. This does not take into account the possible adoption of proposed changes in federal Medicaid spending—a proposed net \$45 billion reduction in federal spending over 10 years—the potential impact of any federal tax reform that could impose direct compliance costs or even restrict state revenues, or the impact of numerous regulatory mandates or pre-UMRA mandates. (The minimum cost shift for FY 2004 of \$25.7 billion represented 5 percent of state general revenue funds. For FY 2005, the percentage impact was essentially the same.)

Mr. Chairman, legislators view mandates more expansively than UMRA’s definition. We believe there are mandates when the federal government:

- Establishes direct federal orders without sufficient funding to pay for their implementation.
- Establishes a new condition of grant in aid.
- Reduces current funds available, including a reduction in the federal match rate or a reduction in available administrative or programmatic funds, to state and local governments for existing programs without a similar reduction in requirements.
- Extends or expands existing or expiring mandates.

- Establishes goals to comply with federal statutes or regulations with the caveat that if a state fails to comply they face a loss of federal funds.
- Compels coverage of a certain population/age group/other factor under a current program without providing full or adequate funding for this coverage.
- Establishes overly prescriptive regulatory procedures that move beyond the scope of congressional intent.
- Enacts legislation that indirectly increases costs for states.
- Creates underfunded national expectations, e.g., homeland security.

To illustrate the problem, I would like to provide you examples of provisions contained in 3 bills enacted during the 108th Congress that were not considered intergovernmental mandates under UMRA, but did create a cost shift to the states.

On October 22, 2004, President Bush signed H.R. 4520—*the American Jobs Creation Act of 2004*. In its final version, the bill contained a \$.75 excise tax on hepatitis A and influenza vaccines sold by manufacturers, producers, or importers thereof. Because Medicaid is a major purchaser of these vaccines, the tax will indirectly increase state spending for the Medicaid program by approximately \$90 million over the 2005-2009 period.³ Indirect costs are not considered mandates under UMRA. Therefore, this provision was not considered an intergovernmental mandate.

In 2004, Congress reauthorized the Individuals with Disabilities Education Act (IDEA). Since enacting IDEA in 1975, Congress has never met its commitment to fund 40 percent of the average per-pupil expenditure (APPE) for children with disabilities. Formally recognizing Congress' responsibility, the IDEA conference committee stated in its 2004 report that, "A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals." As such, the new law establishes a seven-year "glide path" to move the federal government towards funding 40 percent of the APPE by FY 2011.⁴ However, with the ink less than 6 months dry, the federal government is already \$1.8 billion behind for FY 2005 in fulfilling its most recent promise. The authorized level was \$12.3 billion

and Congress appropriated \$10.5 billion.⁵ Failure by the federal government to provide 40 percent APPE places on average an additional \$10 billion annually on the back of state budgets. This does not take into account that some research has shown that the cost of educating a child with special needs is twice that of the non-special needs student population. Adjusting for this fact, the gap in funding for IDEA would be more in the range of \$30 billion annually. CBO considers any requirements under IDEA as a condition of grant aid. However, states are really not in a position to refuse participation in the grant program. Any state that refused to participate in IDEA would be open for suit in federal court for not complying with civil rights law.

CBO determined that the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (P.L. 108-173) contains an intergovernmental mandate as it relates to a preemption of state taxes on premiums for prescription drug coverage. The law also contains a number of other provisions that will increase state expenditures that were not determined to be intergovernmental mandates. For example, all prices negotiated under the MMA are not included in the calculation of the Medicaid "best price." States will find it more difficult to negotiate supplemental rebates because the dual-eligibles will no longer be a part of their prescription drug portfolio. Indexing the Part B premium will also result in increased state costs and states expect to see increased administrative costs related to the requirement to conduct eligibility determinations for the low-income subsidy for Medicare Part D.

These are just a few examples of how the federal government can shift costs to states outside of the UMRA process. These actions have resulted in substantial costs to state and local governments. Collectively, actions such as these erode state legislators' control over their own states' budgets.

As such, NCSL urges Congress to consider refining the law to broaden its scope and increase its effectiveness. Specifically, NCSL encourages the federal government to consider reforms that include:

- Expansion of the definition of an unfunded mandate to include all open-ended entitlements, such as Medicaid, child support and Title 4E (foster care and adoption assistance) and proposals that would put a cap on or enforce a ceiling on the cost of federal participation in any entitlement or mandatory spending program. Furthermore, any proposal that places a cap on or enforces a ceiling must be accompanied by statutory offsets that reduce state spending, administrative duties or both.
- Elimination of the existing exclusions under Section 4 of UMRA. The experience of Congress in overcoming an unfunded mandate point of order by majority vote demonstrates that the protections afforded by UMRA will not prevent Congress from exercising its will in important areas such as enforcing constitutional rights or meeting national security needs. However, excluding such legislation from the requirements of UMRA precludes an official accounting of the costs imposed under such legislation.
- Expansion of the definition of mandates to include new conditions of federal funding for existing federal grants and programs, including costs not previously identified.
- Expansion of the definition of mandates to include proposals that would reduce state revenues, especially when changes to the federal tax code are retroactive or otherwise provide states with little or no opportunity to prospectively address the impact of a change in federal law on state revenues.
- Expansion of the definition of mandates to include those that fail to exceed the statutory threshold only because they do not affect all states.
- Revision of the definitions of mandates, direct costs or other provisions of the law to capture and more accurately reflect the true costs to state governments of particular federal actions.
- Enactment of legislation which would require federal reimbursement, as long as the mandate exists, to state and local governments for costs imposed on them by any new federal mandates.
- Improvement of Title II, including enhanced requirements for federal agencies to consult with state and local governments and the creation of an office within the Office of Management and Budget that is analogous to the State and Local Government Cost Estimates Unit at the Congressional Budget Office.

- Improvement of the Joint Committee on Taxation’s consultation with state and local governments.
- Consideration of the cumulative impact of mandates.

Mr. Chairman, in closing I would like to add that NCSL remains steadfast in its resolve to work with federal policymakers to reduce the federal deficit and to maintain critical programs. Controlling the deficit is a daunting task involving difficult choices, many of which involve our intergovernmental partnerships and some of the areas where the largest cost shift occurs—Medicaid and education. We recognize that the pressure for mandatory federal spending and restrictions on the growth of discretionary spending promote a tendency to seek the accomplishment of national goals through federal mandates on state and local governments. However, NCSL is encouraged that you and other federal lawmakers have recognized the difficulties posed by the cost shifts to states and we look forward to working with you on this important issue. I thank you for this opportunity to testify and would be happy to answer any questions members of the subcommittee may have.

1 Government Accountability Office, *Unfunded Mandates: Analysis of Reform Act Coverage*, Report to the Chairman, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Governmental Affairs, U.S. Senate, (Washington, D.C.: GAO, May 2004).

2 Ibid.

3. Congressional Budget Office, *H.R. 4520: American Jobs Creation Act of 2004*, (Washington, D.C.: CBO, August 2, 2004).

4. Tetreault, Yvette; Federal Funds Information for States; *Issue Brief 04-57: IDEA Reauthorization*; (Washington, D.C.: FFIS, December 8, 2004).

5. Ibid.