

Common Core Redux: Is There a Solution To The “Opt Out” Debate?

Education Law Notes

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Almost exactly a year ago, my colleagues Michael P. McKeon and Zachary D. Schurin penned a piece on this blog that explored the deceptively simple question of whether parents could “legally” opt their children out of the Common Core-based “Smarter Balanced Assessment Test” [“SBAC”]. Attorneys McKeon and Schurin aptly offered that “while there is language in both state and federal law that ‘mandates’ that students take standardized examinations, at the end of the day there may be little a school district can do to actually compel a child to sit for a standardized test.” One year later school administrators and boards of education once again find themselves in the same unenviable cross-fire. Questions abound.

1. *Is there a mandate that students take the SBAC test?*

Yes (technically speaking). There is a long-standing general statutory command that students must take standardized testing or “mastery examinations.” *Connecticut General Statutes §10-14n(b)*. Implicit in this mandate is that school districts must administer standardizing testing to their students. The State Department of Education [“SDE”] is relying upon this “mandate” in asserting that the laws do not permit students to “opt out” of the SBAC testing. There is also a mandate for such testing contained in the federal “No Child Left Behind Act” [“NCLB”].

1. *Is there a specific statutory provision allowing for students to “opt out” of taking the SBAC test?*

No.

1. *So does this statutory “mandate” impose consequences upon a student refusing to take the test?*

This is where the legal picture becomes murkier. Connecticut’s mastery examination statute itself indicates that a satisfactory score on mastery examinations **cannot** be the “sole criterion” for promotion or graduation. *Connecticut General Statutes §10-14n(e)*. The law governing policies for promotion and graduation provides that school districts (1) must specify the basic skills for graduation; (2) must include a process for assessing level of competency in such skills; and (3) such assessment criteria “**shall include**, but not be exclusively based on” the results of the mastery examination. *Connecticut General Statutes §10-223a(b)*. (Emphasis added).

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1. *Are school districts compelled to punish students for opting out?*

With the exception of this **possible** use of the SBAC by a school district (via policy) as a factor in the assessment of basic skills for graduation, **nothing** in the current laws mandates any “punishment” of the student for failing to take the SBAC test.

1. *In the absence of specific statutory language, can school districts still permit students to opt out?*

Even the SDOE’s own guidance from December 2013 acknowledges that if a parent insists (despite repeated attempts to persuade) that his/her child not be tested, “the district generally does not test the student and the student is counted as ‘absent.’” As the SDOE itself implicitly acknowledges that one cannot “force” a student to take the SBAC test, then school districts should feel comfortable that they are not required by the State to “force” a child to take the test in 2015. At the same time. . .

1. *What can happen to a school district if it “permits” parents opt their children out?*

The State has expressed a fear that if too many students opt out, then Connecticut potentially faces the loss of federal funds due to the NCLB. Whether lower student participation rates on the tests will directly cause the State to suffer sanctions (either by losing the waiver from complying with certain provisions of NCLB that the United States Department of Education previously bestowed upon it, or by losing or having restrictions placed upon its use of federal funding) is open to some debate.

The SDOE has also opined that a district’s failure to reach mandatory testing participation requirements could expose a district to sanctions. Test participation rates that were lower than the NCLB-mandated 95% rate for an individual school district could theoretically expose a district to varying consequences, such as greater restrictions on a district’s use of federal funding, or a district being subject to increased State interventions and “turnaround” efforts. However, given the US Department of Education’s NCLB waiver, it would appear that this lack of test participation would also have to be in conjunction with **other** school performance issues in order to trigger these consequences. Thus, while the threat of adverse consequences is not non-existent, and while an increasing and persistent/multi-year pattern of non-participation may increase the risk of these penalties, it is unlikely that sporadic opt outs in 2015 will expose a school district to immediate harm.

1. *Can a school district assess basic skills without relying upon the mastery examinations (especially for a student “opting out”)?*

Notwithstanding the testing mandate, school districts still remain responsible under state law for developing graduation policies. Arguably, there is nothing in the law that would prohibit an alternative to the SBAC for assessing basic skills for graduation for students that “opt out.” A review of school district policies reveals the options:

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1. Some school districts specifically mandate a role for standardized testing in graduation policies.
2. Others districts have policies that do not reference any role for testing.
3. Other district policies reference satisfactory performance on the mastery examination as just one alternative for assessing a student’s basic skills for graduation.

In this context, school districts may be able to continue to exercise their autonomy in developing graduation policies, which may include consideration of the appropriate role for SBAC in assessing basic skills, and (perhaps) alternatives.

1. ***Even if not required by State law, could a district by choice punish a student for failing to take the test?***

It is unclear whether a school district could still choose via policy to impose punishment (e.g., discipline, loss of extracurricular privileges) upon students who refuse to take the SBAC test. The courts may be loath to involve themselves in this issue, and it may be a stretch to assert that there is a constitutional right for students to abstain from taking tests. This is especially true given a federal court decision in New York that rejected a lawsuit in which parents challenged a school district’s ability to punish a student for refusing to take certain assessment tests. A safer position is to avoid the punishment route, especially in the absence of state law mandating punitive consequences for non-participation.

1. ***So what should school districts do?***

Local and regional school districts should make decisions for their own stakeholders, while also assessing the legal and educational risks. For example, in the spring of 2014, several school districts permitted a *de facto* “opt out” for students, whereby students would come to school but engage in some alternative activity (e.g., reading silently) in lieu of taking the test, and were marked as “absent” for state reporting purposes. This approach is not necessarily inconsistent with the SDOE’s December 2013 position, as noted above. In essence, the battle is all about 1) whether a school district could permit an “opt out” without making repeated efforts to discourage the parents, and 2) what will be the eventual consequences of the “opt out” movement, if it becomes prevalent. In 2015, there may be little that school districts can do in the face of a determined parent. However, local and regional school boards should still assess their graduation and retention policies and make an assessment as to the role of SBAC testing in promotional decisions. In addition, school districts should consider assigning school-related tasks to students who “opt out”; such tasks should not be overly punitive but should be of a nature to provide educational benefit and to discourage students from refusing to take the SBAC test just to get a “day off.”

In the meantime, our legislature could step into the breach and provide a clear and definitive resolution to this debate, whether specifying consequences for a refusal to take a test, or providing clear alternatives to the SBAC for assessing skills. That could put an end to the guessing game that school districts are now encountering.

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