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Common Core Testing Opt-Out…..Is it Legal?

Education Law Notes

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Connecticut's roll-out of the Common Core State Standards has been, to put it mildly, controversial. Critics of Common Core have decried what they perceive as the loss of local pedagogical control in favor of state and federal "Big Brotherism". Another sore spot is Common Core's supposed emphasis on non-fiction texts over the tried and true classic novels that we all remember from high school English class.

And then, there's the testing. Parents in states that are further along in Common Core implementation have called the Common Core testing regime "ridiculous". They argue that testing is over-emphasized under Common Core and that the tests themselves are strange and confusing and unnecessarily undermine their children's academic self-confidence. (You can see part of a New York Common Core test here. As a result of these complaints, more and more parents have expressed their desire to have their children "opt-out" from standardized testing – a development that prompted a district advisement from the State Department of Education in December, along with the distribution of a model notice for districts to send to parents who make opt-out requests.

So, can parents have their children opt-out of standardized testing?

The answer is . . . complicated.

While there is language in both state and federal law that "mandates" that students take standardized examinations, at the end of the day there is little a school district can do to actually *compel* a child to sit for a standardized test. Connecticut General Statute § 10-14n(b)(1), which was amended last year by Public Act 13-207, provides that "[f]or the school year commencing July 1, 2013, and each school year thereafter, each student enrolled in grades three to eight, inclusive, and grade ten or eleven in any public school *shall* annually, in March or April, take a mastery examination in reading, writing and mathematics." (Emphasis added.)

By the same token, the Elementary and Secondary Education Act of 1965, which was amended by the No Child Left Behind Act of 2001, contains similar language. Under the federal law, in order to get federal grant funding under No Child Left Behind, states were required to submit education reform plans that incorporate student assessments that "*shall*…provide for the participation in such assessments of all students." 20 U.S.C. § 6311(b)(3)(A) (Emphasis added.).

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While these statutes are clearly the "law" on the subject, the real question is how such statutory directives would be, or could be, enforced with respect to the student or to his or her parents. Theoretically a student could be disciplined for refusing to follow a teacher or administrator's directive to take a standardized exam, but that seems extremely far-fetched. To that end, what would prevent a student (presumably at a parent's direction) from simply writing in their name and then putting down their pencil (or, in the case of Common Core, turning off their computer)? How could the state or an individual district enforce an obligation for students to make their best efforts on a standardized test? Furthermore, although a parent that elects to keep their child home on testing days could conceivably run afoul of unexcused absence/truancy issues, in order to get there the student would have to miss at least ten days of school.

In short, simply saying that parent opt-out is "against the law" is not dispositive, for if a law is on the books, but it does not carry any real consequences, then questions of legality become little more than abstract academic exercises. The obvious follow-up question, then, is whether there is any other recourse available to districts to ensure students' good-faith engagement in standardized testing?

Perhaps the answer lies in Connecticut General Statute §10-14n(e), which provides: "No public school may require achievement of a satisfactory score on a mastery examination, or any subsequent retest on a component of such examination as the sole criterion of promotion or graduation." Notice the phrase "the sole criterion." Could its use imply that while a satisfactory score cannot constitute the *sole* criterion, it could be a "significant criterion" or a "necessary criterion" that must be satisfied in order for a student to move up a grade or graduate from high school? At the same time, would such an approach create other, even thornier issues?

For example, if a student does not, or perhaps cannot, perform well on standardized testing, precluding promotion or graduation, what would the district's responsibility be to these students? Would it be in either the student's or the district's best interest to have a student retained in his then-current grade despite mastering – or at least showing a sufficient grasp of -- the grade's academic requirements simply because this significant or necessary criterion in determining promotion had not been met? Similarly, what if a student were deemed ineligible to graduate solely because of a less-than-satisfactory score on a standardized test? It is doubtful that the student's parents would be supportive of this decision. Additionally, what curricular or alternative educational programming would the district have to provide to this student who was now caught in a kind of academic limbo?

Of particular note are the consequences that such a policy might have for special education students, for whom school districts are responsible until they either graduate or turn 21. Currently, the inability to establish proficiency or mastery on a standardized test does not preclude a special education student from receiving his or her diploma. If the district implemented a policy that in significant part predicates a student's ability to graduate upon satisfactory completion of the testing, would the student's inability to do so require that the district continue providing educational services until he or she turned 21? Would it provide parents with a basis for demanding that these additional years within the district's educational jurisdiction be spent in

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an out-of-district placement given the district's apparent inability to prepare the student sufficiently to satisfy this standardized-test criterion?

Most importantly, such a policy could possibly have a disparate impact upon disabled students, thereby raising concerns as to whether it was inherently discriminatory and thus illegal.

It would appear, then, that school districts ultimately have little leverage when confronted with students who have decided to opt out of Common Core standardized assessments. Instead, they are most likely reduced to hoping that the vast majority of parents will not elect this approach on behalf of their children to standardized testing.

Tags: Common Core, CT State Department of Education (CSDE)