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Standards Firestorm

Common Core has raised legal issues over standards, assessments, and parental rights

ACROSS THE COUNTRY, PUBLIC DEBATE is raging over the implementation of the Common Core State Standards. The administration of new state assessments aligned to the Common Core has fueled the debate and raised many legal issues relating to standardized testing and parental rights.

At the district level, school boards and administrators have found themselves caught in the crosshairs. Those confronted with strong opposition to standardized testing have been forced to try to balance parent concerns on the one hand with state mandates and the imperative to improve student achievement on the other. What are the legal considerations for school boards as they attempt to manage this balancing act?

THE ASSESSMENT DEBATE

States applying for federal Race to the Top (RTTT) grants were required to demonstrate their commitment to the adoption of a common set of high-quality K-12 standards and the adoption of high-quality assessments tied to those standards. Driven by the RTTT competition, the vast majority of states fully adopted the Common Core and committed to a new generation of assessments.

As it turns out, the rollout of new student assessments based on the Common Core has turned up the heat on the debate. No Child Left Behind (NCLB) requires annual testing in English and language arts, math, and science to determine whether schools are making adequate yearly progress (AYP). It man-

dates that districts administer the state assessments to all students.

Among other things, NCLB requires a 95 percent participation rate of students on these state assessments in order to make AYP. Even those states that have received NCLB waivers may have accountability consequences tied to the participation rate. Thus, districts are being required to administer new state assessments to meet federal and state testing mandates while the Common Core debate roils.

OPT-OUT MOVEMENT

The "opt-out of testing" movement is a grassroots effort that has spread across the country largely as a result of opposition to the Common Core, concerns about the amount of standardized testing and its use, and fears around the security of student testing.

Opting out occurs when parents refuse to allow their children to take mandated state assessments, particularly those aligned to the Common Core. Parents opt out in a number of ways. In some cases, parents keep their children home from school on test day. In other cases, parents submit advance directives that their child not be required to take the test. Some parents demand that the districts provide alternate activities for their children during the test administration.

They sometimes request that their children be exempted from any and all testing, including pre-tests and field tests. Local and national organizations have posted information and form letters for parents to use in each state.

PARENTAL RIGHTS?

Opt-out advocates say that parents have the legal right to exclude their children from the state tests. But does the law really support this assertion?

Parents generally have a constitu-



tional right to make educational decisions regarding where their children attend school. This right was recognized by the U.S. Supreme Court in *Pierce v. Society of Sisters* and *Wisconsin v. Yoder*, both of which held that a state could not force all children to accept instruction from public teachers or public schools only.

with an absolute right to opt out of all types of curriculum or testing.

FACING OPT-OUT REQUESTS

Even in the absence of any express right to opt out of testing, school boards inevitably will face such requests. How should you handle such requests?

First, boards should continue to meet



ONLINE EXTRA

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Be aware that any actions that might be perceived as supporting opt-outs might be interpreted as violating the district's legal obligation to offer the test.

However, federal courts have been reluctant to expand parental rights in an educational setting beyond *Pierce* and *Yoder*. Whether it's the curriculum, the hours of the school day, or the timing and content of examinations, issues of public education have been found by the courts to be generally within the control of state and local authorities.

These cases suggest that a parent would not generally have a constitutional right to control which tests are administered by the state to their child. As a result, they likely would have no constitutional right to opt to take their child out from state-mandated tests, or all or part of a curriculum or assessment, based solely on their opposition to the Common Core.

Moreover, where state statutory authority exists for opting out of portions of the school curriculum, that authority is typically restricted to a portion of the curriculum, most commonly in the areas of health and/or sex education. Thus, as a general rule, statutory opt-out rights are limited. They do not provide parents

their legal obligation to offer mandated state tests to all students. Any state laws and regulations imposing testing requirements should be consulted in addition to federal law and/or grant requirements.

Be aware that any actions that might be perceived as supporting opt-outs might be interpreted as violating the district's legal obligation to offer the tests. It could potentially result in serious consequences to the district and even sanctions against individual board members and administrators.

Second, advance planning and development of procedures for handling opt-out requests can both ensure consistency and prevent disruption to the testing environment. If a board provides accommodations to students by offering alternate activities in the testing room or by permitting the removal of opt-out students from the room, it should ensure that the administration follows all state testing rules, such as those relating to the exclusion of electronic devices. This is to make sure that the validity of the test administration is not jeopardized.

Third, if a board wishes to consider imposing student sanctions for test refusals, it should consult with its school attorney. The board's authority to impose student sanctions or other consequences will depend on state law, district policy, and the district's code of conduct. Advance legal consultation can help boards avoid potential legal challenges.

Fourth, know that even nonbinding resolutions critical of state testing mandates might have consequences, particularly where state law or local policies require or permit such tests to be used for student placement and/or teacher and principal evaluation decisions. Boards can anticipate that the resolutions may later be raised as a defense to any action taken in whole or in part on the test results.

Last, but not least, boards should educate and inform their constituents about the educational purposes for testing and the potential negative consequences if such testing does not occur.

Public discussion and early outreach to teachers, parents, and students, in an effort to help them better understand the purpose of state assessments, can be one of the best strategies to help avoid the legal dilemmas posed by opt-out requests.



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