

IN THE MATTER OF  
REFUSAL OR OPTING OUT  
OF STATE ASSESSMENTS

BEFORE THE  
MARYLAND  
STATE BOARD  
OF EDUCATION

Opinion No. 16-13

## OPINION

### INTRODUCTION

The Board of Education of Frederick County (local board) has requested a Declaratory Ruling on the true intent and meaning of the laws relating to the administration of state assessments. Specifically, the local board requests a Declaratory Ruling as it relates to parents “opting out” their children from state assessments or students refusing to take assessments.

### FACTUAL BACKGROUND

Maryland’s school improvement efforts include setting high standards for student achievement, measuring academic progress, publicly reporting each school’s performance annually, reducing the achievement gap among disadvantaged populations, and taking action when schools are not making adequate progress. To support these initiatives, Maryland administers statewide assessments every year.

Students in grades 3-8 take the Partnership for Assessment of Readiness for College and Careers (PARCC) assessment in English language arts and mathematics. Students in grades 5 and 8 also take the Maryland School Assessment (MSA) in science. In order to graduate, all students must take state assessments in algebra, biology, English, and government after completing required courses in those subjects.<sup>1</sup> COMAR 13A.03.02.06; 13A.03.02.09. Students with disabilities participate in an Alternative Maryland School Assessment. COMAR 13A.03.02.09E(4)(a); COMAR 13A.05.01.09A(1)(g).

In response to queries from local school systems about whether parents have a right to “opt out” their children from state assessments, the Maryland State Department of Education (MSDE) provided the following guidance:<sup>2</sup>

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<sup>1</sup> Alternatively, students may complete a Bridge Plan if they have passed the underlying course but are having difficulty passing the examination. COMAR 13A.03.02.06E.

<sup>2</sup> Three states currently allow for students to be excused from standardized assessments for any reason while an additional three permit opt outs under certain conditions. Five states permit student “refusals” but do not exempt students from the potential consequences of refusing to take an assessment. (NASBE Opt Out Policies by State, August 2015).

The Maryland State Department of Education advises local school systems to decline requests made by parents to not test, provide a waiver of exemption, or provide other type(s) of instruction to their child during the school day when statewide assessments are being administered.

The Maryland State Board of Education has over time considered the issue of parental requests for waivers or other exemptions from integral parts of the State's public school program. Based on a number of court cases, the Board has said that while parents may have a fundamental right to decide whether to send their child to a public school, they cannot pick and choose the parts of the public education program in which they will allow their children to participate. Issues of public education are generally "committed to the control of the State and local authorities."

During the past two years, some parents have notified the Frederick County Board of Education that their children will not participate in state assessments. In some instances, students themselves refused to participate in testing after being provided with test materials. (Petition, at 1).

In response, the local board seeks a declaration of the true intent and meaning of Maryland's laws governing state assessments. We have rephrased and reordered the questions raised by the local board:

- (1) Does a parent or a student have the right under Maryland law to "opt out" or refuse to take a state assessment?
- (2) May local boards develop procedures to permit parents to opt out of state assessments?
- (3) Is it lawful for the local board to adopt a policy to notify parents that their students have the right to refuse to participate in state assessments?
- (4) If a student "opts out" or refuses to take a state assessment, what alternative activities may a local board provide to those students?
- (5) How should the local board treat students with disabilities for purposes of state assessments? If the parent of a severely disabled student asserts a refusal on the student's behalf, must a school honor that refusal?

#### STANDARD OF REVIEW

The State Board exercises its independent judgment in interpreting the education law of Maryland. COMAR 13A.01.05.05E. The State Board has "the last word on any matter concerning educational policy or the administration of the system of public education" in the State. *Wilson v. Board of Education*, 234 Md. 561, 565 (1964). This is "a visitatorial power of

the most comprehensive character.” *Id.*; see also *Baltimore City Bd. of Sch. Commr’s v. City Neighbors Charter School*, 400 Md. 324 (2007).

## LEGAL ANALYSIS

The chief question posed by the local board is whether Maryland law permits a parent or a student to “opt out” of state assessments.

### *Maryland law requiring statewide assessments*

Under Maryland law, the State Board determines the elementary and secondary educational policies of the State. Md. Code, Educ. §2-205(b). It exercises general control and supervision over the public schools and educational interests of the State; establishes basic policy and guidelines for instruction; directs the future growth and development of public education; and sets short-range and long-term objectives. Md. Code, Educ. §2-205(g)(2); §2-205(h) and (q).

By law, the State Board, State Superintendent, and local boards must “implement a program of education accountability for the operation and management of the public schools.” Md. Code, Educ. §7-203(a). Specifically, the State Board and State Superintendent must “establish educational goals and objectives that conform with statewide educational objectives” in the areas of reading, writing, mathematics, science, and social studies. Md. Code, Educ. §7-203(b)(2)(i). Each public school in the State must “survey current student achievement in reading, language, mathematics, science, social studies, and other areas to assess its needs.” Md. Code, Educ. §7-203(b)(2)-(3).

To implement these laws, the State Board adopted regulations requiring local boards to report student assessment data to the State and to develop test administration and data reporting policies. COMAR 13A.01.04.04; COMAR 13A.03.04.03. Maryland law requires the State Board to identify “school systems that have dropped below the statewide test averages” and find “options available to improve the test averages of these school systems.” Md. Code, Educ. §2-205(q)(2)(viii).

There is no provision in State law that allows parents to “opt out” children from state assessments or that permits children to refuse to take assessments. State regulations permit parents to have their children “opt out” of only two specific elements of the public school educational program. These are classes on “Family Life and Human Sexuality” and “HIV/AIDS Instruction.” COMAR 13A.04.18.01F(5)(a) and I(2)(a). Parents must request in writing that their children be excused from these courses. *Id.*

### *The impact of federal law on assessments*

By accepting Title I funds under the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB) and the Every Student Succeeds Act (ESSA) of 2015, Maryland agreed to implement “a set of high-quality academic assessments” in mathematics and reading/language arts in grades 3-8 and 10-12 and in science in

grades 3-12.<sup>3</sup> ESEA Section 1111(b)(3); ESSA Section 1111(b)(2). State assessments must “be the same academic assessments used to measure the achievement of all children” and “provide for the participation in such assessments of all students.” ESEA Section 1111(b)(3)(C)(i), (ix); ESSA Section 1111(b)(2)(B). At least 95 percent of students must be assessed in order to meet these federal requirements. ESEA Section 1111(b)(2)(I)(ii); ESSA Section 1111(c)(4)(E).

In two December 2015 “Dear Colleague” letters, the U.S. Department of Education emphasized that similar testing requirements continue under ESSA as existed under NCLB. The “reauthorized law maintains the requirement that each State administer high-quality annual assessments in at least reading/language arts, mathematics, and science that meet nationally recognized professional and technical standards.” (12/18/15 Dear Colleague Letter). The “essential requirements” of state assessments, established by NCLB, “are unchanged.” (*Id.*). The U.S. Department of Education warns that it may take enforcement action, including denying federal funds, to states that do not meet these assessment requirements. (12/22/15 Dear Colleague Letter).

ESSA does not preempt state or local laws that allow a parent to “opt out” a child from a state assessment, *if* a state has such a law. ESSA Section 1111(b)(2)(K). But the State is still required to assess 95 percent of its students, even if it allows parents to “opt out” children from tests. (12/22/15 Dear Colleague Letter). Federal law does not require Maryland to permit parents to “opt out” their children from statewide testing. Maryland’s obligation to test 95 percent of its students is a strong reason against adopting an “opt out” provision in the law because permitting “opt outs” could jeopardize Maryland’s ability to receive full Title I funding.

### Parental rights to direct educational upbringing

We acknowledge that parents have a constitutional right to direct the educational upbringing of their children. At a basic level, this means that parents may choose whether to send their children to public school, a nonpublic school, or to homeschool. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that a state may not require students be educated in public schools); COMAR 13A.09 (nonpublic school regulations); COMAR 13A.10 (home instruction regulations).

These parental rights stem from a series of U.S. Supreme Court cases, beginning with *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923), in which the Court held it was a violation of the 14th Amendment’s due process clause to prohibit instruction in the German language. The Court recognized as fundamental the rights “to acquire useful knowledge” and “to marry, establish a home and bring up children.” *Id.* at 399. These rights, among others, “may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.” *Id.* at 399-400; *see also See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality) (recognizing as fundamental “the interest of parents in the care, custody, and control of their children”).

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<sup>3</sup> Some provisions of ESSA cited here take effect on August 2, 2016, while others take effect at the beginning of the 2017-18 school year.

Although parents have a general right to direct their children’s upbringing and education, we have not interpreted this right to allow parents to dictate the specifics of a school system’s curriculum or policies. In *Yasmean W. v. Howard County Bd. of Educ.*, MSBE Op. No. 13-56 (2013), the parents requested that their child be excused from music education courses based on religious objections. We affirmed the decision of the local board denying that request, relying, in part, on the reasoning of the Sixth Circuit Court of Appeals in *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005). We quoted the following statement of the Sixth Circuit with approval:

While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, *the timing and content of examinations*, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally ‘committed to the control of state and local authorities.’

*Blau*, 401 F.3d at 395-96 (emphasis added).

The Second Circuit similarly observed that “[Supreme Court precedents] do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught. . . . [to hold otherwise] would make it difficult or impossible for any public school authority to administer school curricula responsive to the overall educational needs of the community and its children.” *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003); *see also Crowley v. McKinney*, 400 F.3d 965, 971 (7th Cir.), *cert denied*, 546 U.S. 1033 (2005); *Swanson v. Guthrie Independent Sch. Dist.*, 135 F.3d 694, 702 (10th Cir. 1998). Outside the realm of testing, Courts have applied this reasoning to dismiss challenges to particular classes,<sup>4</sup> dress codes,<sup>5</sup> and mandatory community service.<sup>6</sup> In our view, this reasoning applies equally to assessments, which are a necessary part of the State’s education program.

We find persuasive the reasoning of the Court of Appeals of Kentucky, which has concluded that mandatory testing does not violate parents’ fundamental right to control the upbringing of their children. *Triplett v. Livingston County Bd. of Educ.*, 967 S.W.2d 25, 31-33 (Ky. Ct. App. 1997), *cert denied*, 525 U.S. 1104 (1999). The Kentucky Court concluded that the State’s interest in ensuring equal educational opportunities for all was sufficiently compelling as to require mandatory testing. *Id.* at 33. As the Court stated, “We do not see how an assessment

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<sup>4</sup> *See Parker v. Hurley*, 514 F.3d 87, 102 (5th Cir. 2008) (books that included same-sex couples and a same sex wedding); *Myers v. Loudoun County Sch. Bd.*, 500 F. Supp.2d 539, 545 (E.D. Va. 2007) (“patriotic curriculum” and voluntary recitation of pledge of allegiance); *Ouimette v. Babbie*, 405 F. Supp. 525, 530 (D.Vt. 1975) (physical education classes); *In re McMillan*, 30 N.C. App. 235, 238 (N.C. Ct. App. 1976) (lack of courses on Native American heritage and history).

<sup>5</sup> *See Blau*, 401 F.3d at 395-96; *Littlefield v. Forney Independent Sch. Dist.*, 268 F.3d 275, 289, 291 (5th Cir. 2001).

<sup>6</sup> *See Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 462 (2d Cir. 1996); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 178-79 (4th Cir. 1996).

process can measure performance in terms of educational equality and progress unless all students are required to take the exam.” *Id.*

Based on our analysis, we conclude that nothing in state law permits parents to “opt out” their children from state assessments or for students to refuse to take assessments. Indeed, state law requires that students be assessed. In addition, Maryland receives federal funds, the receipt of which is contingent on statewide testing of at least 95 percent of students. Testing is an integral part of the overall educational program in Maryland. Without it, the State Board would be unable to objectively assess educational accountability and student achievement. Although we acknowledge that parents have the right to direct their children’s educational upbringing, this right is limited once parents decide to enroll their children in public school.

## CONCLUSION

We provide the following answers to the questions posed by the local board:

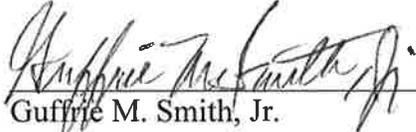
(1) Does a parent or a student have the right under Maryland law to “opt out” of state assessments? No. A statewide assessment program is required by law and the State Board has implemented a program to carry it out.

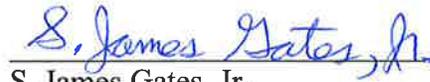
(2) May local boards develop procedures to permit parents to “opt out” of state assessments? No. This would be contrary to State law, as we interpret it.

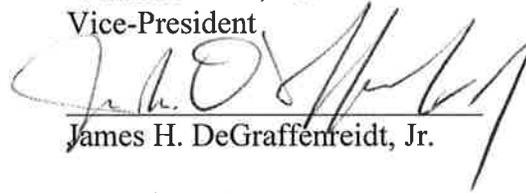
(3) Is it lawful for the local board to adopt a policy to notify parents that their students have the right to refuse to participate in state assessments? No. Given that there is no right to “opt out” of state assessments, a policy notifying parents of such a right would be contrary to law.

(4) If a student “opts out” or refuses to take a state assessment, what alternative activities may a local board provide to those students? We acknowledge that in spite of our declaration, some students may still refuse to take assessments or will be barred from doing so by their parents. There is no legal obligation on the part of school systems to provide alternative activities.

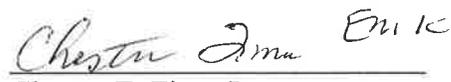
(5) How should the local board treat severely disabled students for purposes of state assessments? If the parent of a severely disabled student asserts a refusal on the student’s behalf, must a school honor that refusal? The Individuals with Disabilities Education Act (IDEA) requires students with disabilities to be included in state assessments. A student’s individualized education program (IEP) team determines the type of assessment that is appropriate for that student. There is no blanket “opt out” for severely disabled students.

  
Guffie M. Smith, Jr.  
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Vice-President

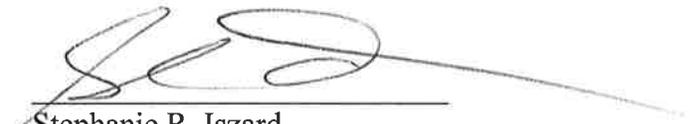
  
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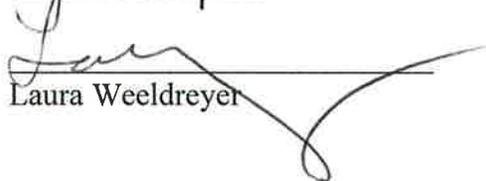
  
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