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FORMAL )  
OPINION )

of )

CYNTHIA H. COFFMAN )  
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No. 15-03

February 4, 2015

This opinion, requested by Robert Hammond, Commissioner of Education of the Colorado Department of Education, concerns the statutory authority of the Colorado State Board of Education ("SBOE") to grant waivers to school districts of the performance-based component of the state-mandated assessments for English Language Arts and Math.

**QUESTION PRESENTED AND CONCLUSION**

Question: Does the SBOE have authority to direct the Commissioner of Education to waive local school boards' and districts' statutory obligation to administer the performance-based component of the state's English Language Arts and Mathematics assessment, if requested by the district?

Answer: No.

**DISCUSSION**

**I. Background**

**A. Colorado Educational Assessments**

In Colorado, statewide educational assessments are administered in specified content areas, including English language arts, mathematics, science, and social studies. Sections 22-7-409(1)(h) through (k) and 409(1.2)(d)(I)(A), C.R.S. Under state law, all students enrolled in Colorado public schools must take these statewide assessments. Section 22-7-409(1)(h) through (k), C.R.S. (referencing administering the assessments to "all" students). This requirement is explicit and without

exception: “every student enrolled in a public school shall be required take the assessments.” Section 22-7-409(1.2)(d)(I)(A), C.R.S. The relevant statutes grant no authority for any school district to opt out of administering the statewide assessment, nor does any statute authorize a school district to administer its own assessment or test as an alternative to the statewide assessments listed in section 22-7-409.

These mandatory assessments are part of a broader effort to define and promote statewide academic standards. Under the Preschool to Postsecondary Educational Alignment Act, enacted by the General Assembly in 2008, the SBOE is required to adopt a system of assessments aligned with the Colorado Academic Standards. See sections 22-7-409(1.2)(a)(I), 22-7-1005, and 22-7-1006(1)(a), C.R.S. Further, the SBOE, the Commissioner, and the Governor have all approved—pursuant to the mandate in section 22-7-1006(1.5), C.R.S.—Colorado’s status as a governing board member of the Partnership for Assessment of Readiness for College and Careers (“PARCC”). PARCC is a consortium of states that “focuses on the readiness of students for college and careers by developing a common set of assessments.” Section 22-7-1006(1.5), C.R.S.<sup>1</sup>

Statute mandates that as a PARCC member, the SBOE must “rely upon” assessments developed by PARCC. Section 22-7-1006(1.5), C.R.S. As a result, the SBOE, the Commissioner of Education, and the Governor entered into a Memorandum of Understanding with PARCC in 2012, which obligates Colorado to use PARCC’s system of assessments, including the assessment at issue here: the English Language Arts (readings and writing) and Mathematics assessment.<sup>2</sup>

Relevant here, and according to PARCC, the English Language Arts and Mathematics assessment is a single test administered through two separate components during the spring semester. The first component of the test—known as the performance-based component—is administered after approximately 75 percent of the year’s instruction has been delivered (typically late February or March). This component largely consists of written responses designed to test critical-thinking, reasoning, and application skills through performance of “extended tasks.” The

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<sup>1</sup> This opinion is not intended to address how or whether Colorado could cease to be a member of the PARCC consortium. The States’ partnership with PARCC expires on December 31, 2015, unless otherwise extended by the PARCC Governing Board.

<sup>2</sup> Colorado’s state assessments are collectively known as the Colorado Measures of Academic Success (“CMAS”). CMAS was developed through partnership with PARCC. Importantly, the CMAS assessments, including the PARCC-developed English Language Arts and Math assessment, are the only tests relied upon statewide to satisfy numerous state and federal mandates. See, e.g., Section 22-7-1006, C.R.S.

second, or year-end, component of the test is administered after approximately 90 percent of the year's instruction has been delivered to students. This component is machine-scorable and consists of short-answer questions and items designed to measure concepts and skills. If either component of the test is not administered as designed, the assessment as a whole is invalid. Thus, students who do not complete both components of the test will not receive valid English Language Arts and Math test scores, resulting in a violation of the statutory requirement that all students enrolled in Colorado public schools take statewide assessments. Sections 22-7-409(1)(h) through (k) and 409(1.2)(d)(I)(A), C.R.S..

## B. The SBOE's January 8, 2014 Motion

At its regularly scheduled January 8<sup>th</sup> meeting, the SBOE voted 4-3 to pass a motion directing the Commissioner of Education, if requested by a district, to grant waivers to local school boards and districts exempting them from administering the earlier, performance-based component of the English Language Arts and Math assessment.<sup>3</sup> In light of the SBOE's action, the Commissioner of Education has requested that the Attorney General issue a formal opinion revisiting<sup>4</sup> whether the SBOE has authority to grant a school district a waiver from the state-mandated assessment. Because work has already commenced to begin administration of these tests to students by late February, the Commissioner's need for guidance from the Attorney General's Office is urgent.

## II. Analysis

For three reasons, the SBOE's motion is not authorized under state law.

*First*, by statute, the General Assembly delegated only limited power to the SBOE to grant waivers from state statutes and regulations. Section 22-2-117(1)(a), C.R.S., provides that, upon application of a school district, the SBOE has the authority to "waive any of the requirements imposed by [Title 22 of the Colorado Revised Statutes] or by rule promulgated by the state board." But this authority is

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<sup>3</sup> While beyond the scope of this Opinion, I note that the authority to grant waivers of statutory requirements applicable to school districts, when permitted under state law, is reserved to the SBOE and not the Commissioner. See section 22-2-117(1)(a), C.R.S. Thus, even if it were lawful to grant waivers of the performance-based component of the statewide assessments for English Language Arts and Math—and, as explained in this Opinion, such waivers are *not* lawful—it does not appear that the Commissioner would have authority to grant them.

<sup>4</sup> In November 2014, this Office issued an informal legal opinion on the question presented; the earlier opinion came to the same conclusions as this Formal Opinion.

expressly limited. Section 1.5 of that same statute prohibits granting waivers for statewide testing requirements governed by Section 22-7-409:

Notwithstanding any provision of this section *or any other provision of law*, the state board *shall not waive* requirements contained in article 11 of this title or sections 22-7-409 . . . .

Section 22-2-117(1.5), C.R.S. (emphasis added). As noted above, the referenced statutory provision, section 22-7-409, mandates administration of the English Language Arts and Mathematics assessment to every public-school student in the state. Thus, the very statute that authorizes the SBOE to grant waivers as a general matter also prohibits the SBOE from granting the particular waivers at issue.

In addition, section (1)(b)(III) of the statute further restricts the SBOE's waiver authority, stating that "[t]he state board *shall not waive* . . . [a]ny provision of part 5 of article 11 of this title pertaining to the data necessary for performance reports." Section 22-2-117(1)(b)(III), C.R.S. (emphasis added). Statewide assessments are the primary component of such performance reports, *see* section 22-11-204, C.R.S., and those assessments therefore "pertain[] to the data necessary for performance reports." Section 22-2-117(1)(b)(III), C.R.S. Thus, if the SBOE were to grant a waiver from statewide assessments, the SBOE would violate not only section 22-2-117(1.5), but also section 22-2-117(1)(b)(III).

In sum, because section 22-2-117(1.5), C.R.S., clearly and unambiguously prohibits the SBOE from granting a waiver to local school boards and districts from the performance-based component of the English Language Arts and Math assessment—or any other statewide assessment required by section 22-7-409—the SBOE's January 8 motion is contrary to state law and may not be effectuated.

*Second*, while the above statutes make clear that the SBOE lacks authority to grant waivers for the performance-based component of the statewide assessments for English Language Arts and Math, other statutes further illustrate that the SBOE motion was unlawful.

The motion attempted to draw a distinction between the two components of the English Language Arts and Math assessment. Specifically, it directed the Department to waive the administration of the first component but was silent regarding the second component.

The SBOE, however, lacks discretion to direct the Department's administration of statewide assessments. The Department alone is authorized to administer assessments that are mandated by State law. Section 22-7-409(1), C.R.S. (“[T]he department shall administer statewide assessments adopted by the board . . . .” (emphasis added)); section 22-7-409(1.2)(a)(I), C.R.S. (“The assessments shall be administered on a schedule to be determined by the department on an annual basis.” (emphasis added)). Nowhere in State statute is the SBOE authorized to instruct the Department how to administer statewide assessments; how the assessments are to be issued, graded, or handled; or how and when different components of the same assessment are to be administered.

Moreover, by its very design the English Language Arts and Math assessment is intended to be administered in two separate, but complimentary and interdependent, components. The PARCC bylaws require Colorado to administer the statewide assessment for English Language Arts and Math as developed, meaning that the first component must be administered after 75 percent of the instruction has been delivered and the second component after 90 percent of the instruction has been delivered. Neither the SBOE nor the Department may treat these two interdependent components as severable and thereby create multiple tests, only one of which the school districts may choose to administer. As explained above, both components are required, and neither component may be waived.

*Finally*, while the Department may have discretion to administer tests, neither the SBOE nor the Department have discretion to modify the English Language Arts and Mathematics assessment, because its administration is governed—and the State is presently bound by—the 2012 Memorandum of Understanding with PARCC. Thus, under the current statutory scheme, if tests created by PARCC, approved by the SBOE, and administered by the Department fail to be administered as designed, the State would fail to comply with multiple State and Federal requirements.

The United States Department of Education requires Colorado to ensure that school districts adhere to federal law, including the administration of uniform statewide assessments. See 20 U.S.C. § 6311(b)(3). If a state or school district fails to comply with the assessment requirements in the Elementary and Secondary Education Act (“ESEA,” also known as the “No Child Left Behind Act”), the United States Department of Education could withhold some or all of that state’s Title I, Part A funds. See 20 U.S.C. § 6311(g)(2); 20 U.S.C. § 1234d. In addition, any school district failing to administer the statewide assessments in question could find itself out of compliance with a wide range of federal programs that require statewide assessment results, putting additional federal funds at risk. These additional programs include those targeting students most at risk, including, but not limited

to: the School Improvement Grants (SIG) program; ESEA Title III; Part B of the Individuals with Disabilities Education Act (IDEA); programs for rural schools under ESEA Title VI; migrant education under ESEA Title I, Part C; and programs focused on professional development and other supports for teachers, such as ESEA Title II.

## CONCLUSION

For the foregoing reasons, I conclude that state law prohibits the SBOE from directing the Commissioner of Education, upon request from a school district, to waive local school boards' and districts' statutory obligation to administer the performance-based component of the state's English Language Arts and Mathematics assessment, or any of the assessments mandated by section 22-7-409, C.R.S.

Issued this 4th day of February, 2015.

  
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CYNTHIA H. COFFMAN  
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