



Tallan Building
200 West ML King Blvd.
Fifth Floor
Chattanooga, TN 37402
Main 423.265.0214
Fax 423.266.5490
Toll-Free 800.421.0979

November 19, 2015

Direct 423.424.3900
Direct Fax 423.308.0900

scott.bennett@leitnerfirm.com

Hamilton County Board of Education Members
Dr. Jonathan Welch, Board Chairman
Ms. Donna Horn, Board Vice Chair
Ms. Rhonda Thurman
Dr. Greg Martin
Mr. George Ricks Sr.
Ms. Karitsa Mosley
Mr. Joe Galloway
Mr. David Testerman
Dr. Steve Highlander
3074 Hickory Valley Road
Chattanooga, TN 37421

Mr. Rick Smith, Superintendent
Hamilton County Department of Education
3074 Hickory Valley Road
Chattanooga, TN 37421

Re: ***Requests to Opt Out of State
Mandated Testing***

Dear Members of the Board and Superintendent Smith:

Recently, the administration of the Hamilton County Schools has received numerous requests from parents asking that their students be excused from the State's mandatory testing mechanisms, i.e., TCAP and end of course tests. Superintendent Smith has asked me to investigate whether there is any legal authority pursuant to which the Board of Education may excuse these students from otherwise mandatory testing. In my opinion, no such authority exists. In fact, it would be illegal for the Board to excuse students from testing.

Initially, note that the State's testing scheme flows from T.C.A. § 49-1-605, which establishes the Tennessee Comprehensive Assessment Program (TCAP) in grades 3-8, and T.C.A. § 49-1-608, which establishes end of course (EOC) exams for designated high school classes. Both testing schemes are centerpieces of Tennessee's efforts to assess the effectiveness of Tennessee's system of public education.

Tennessee's emphasis on testing does not exist in a vacuum. While Tennessee has had its own testing scheme for decades, Section 1111(b)(1)(I) of the No Child Let Behind Act imposes a federal mandate that 95% of students at each school take the State's standardized tests. Thus while Tennessee was a forerunner for standardized testing, its successful pursuit of federal funds under both NCLB and, more recently, Race to the Top, has solidified its commitment to testing and accountability.

In fact, while the Tennessee Commissioner of Education has broad authority to manage Tennessee's system of public education, even to the point of waiving the applicability of certain laws and regulations per T.C.A. § 49-1-201(d)(1), she has no authority to waive laws that relate to state and federal accountability measures. The Tennessee Attorney General has specifically held that she may not waive TCAP testing. Tenn. Atty. Gen. Op. 14-68 at *6.

Since local boards of education are creatures of the State, it naturally follows that they lack any power that the State has not given them. If the State has mandated testing, and if the State has not granted the Commissioner the power to waive the testing requirement, then obviously a local board of education could not grant a waiver on its own initiative. Indeed, I note that the State actually requires local boards of education to certify annually that they are adhering to State and federal requirements regarding this mandatory testing.

Within this context, a number of parents have asked the Hamilton County Board of Education to excuse their students from TCAPs and EOCs. In support of these requests, they take issue with the number of tests, the nature of the tests, and other objections that relate to the rationale behind these mandatory assessments. Increasingly, however, parents are also objecting on the basis that they have a fundamental right to opt out of testing.

With regard to the parents' philosophical objections to State mandated testing, those decisions have been made by both the General Assembly and the Tennessee Board of Education. If they object to the need for these tests, the nature of the tests, or the frequency of these tests, then those are policy decisions that are best left to policy makers, including the General Assembly and the Governor's office. Local boards of education, however, have taken an oath to uphold the laws of the State of Tennessee, including those laws related to the State mandated testing.

With regard to the parents' claim that they have the right to direct and control the education and upbringing of their students, both the operations of State government and local boards of education must bend to any liberty interest that draws its existence from the United States Constitution. In this case, however, there is no fundamental interest to be free from State mandated testing.

The parents rely upon two cases from the 1920's, Meyer v. Nebraska and Pierce v. Society of the Sisters, in support of the proposition that parents do, in fact, have the right to direct and control the education of their students. In Meyer, however, the State was actually prohibiting private schools from teaching children a foreign language. In Pierce, the State was limiting the right of students to attend private parochial schools. In both cases, the Supreme Court found no rational basis for the State to intrude into these private affairs.

Notably, neither case had anything to do with the State's efforts to regulate its own curriculum or its procedures *in its own schools*. In fact, in Meyer, the Supreme Court stated explicitly that the State has the authority to direct its own curriculum.

In the case of TCAPs and EOCs, there is no question that the State is simply assessing the effectiveness of Tennessee's system of public education, a system that it has a constitutional duty to establish and fund. The State has a rational basis, therefore, to require local boards of education to mandate these tests and to compel students to participate in them.

Accordingly, it is my opinion that the Hamilton County Board of Education lacks any authority to excuse any students from the State's mandatory testing scheme. It is also my opinion that administrators in the Hamilton County Schools have a duty to require students to participate in the State mandated tests. It is also my opinion that any local board of education or any administrator that circumvents the State's mandatory testing requirements is in violation of Tennessee law.

After you have had an opportunity to review this letter and to consider my thoughts, please feel free to contact me if you have any questions or comments.

Very truly yours,



D. SCOTT BENNETT
For the Firm

DSB/jm2