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ATTORNEY-CLIENT COMMUNICATION—PRIVILEGED AND CONFIDENTIAL

Cindy Hill, Superintendent of Public Instruction
Wyoming Department of Education
Hathaway Building, 2nd Floor
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Cheyenne, WY 82002

Dear Superintendent Hill:

Before his departure as Director of the Department of Education, Richard Crandall requested an opinion about whether federal or state law prevents school districts from consenting to parents' requests that their children "opt out" of state assessments.

Short Answer

The rules of the State Board of Education require districts to assess all eligible students. This requirement is within the Board's statutory authority. Accordingly, districts must assess all eligible students, and students may not opt out of assessment.

Background

In 2004, the Wyoming Legislature amended the duties of the State Board of Education to require that the Board develop "a coherent system of measures that when combined, provide a reliable and valid measure of individual student achievement for each public school and school district within the state, and the performance of the state as a whole." 2004 Wyo. Sess. Laws 274. The law set out the assessments to be used and set

the grade levels for those assessments. *Id.* at 275. Finally, the law directed the Board to “establish a statewide accountability system” with certain articulated features. *Id.* at 276. Although amended slightly since 2004, these provisions remain. Wyo. Stat. Ann. § 21-2-304(a).

In 2011, the Legislature went one step further and passed the Wyoming Accountability in Education Act. 2011 Wyo. Sess. Laws 491-505. The State Board of Education is now required to implement a statewide accountability system. Wyo. Stat. Ann. § 21-2-304(a)(v). The goals of the accountability system are that Wyoming “[b]ecome a national education leader among states,” “[r]ecognize student growth and increase the rate of that growth,” “[r]ecognize student achievement and minimize achievement gaps,” and “[m]aximize efficiency of Wyoming education.” Wyo. Stat. Ann. §§ 21-2-204(b)(iii), (v), (vi), (viii). The accountability system gathers a variety of information. Based on the information gathered, each school is categorized into one of four performance levels: exceeding expectations, meeting expectations, partially meeting expectations, and not meeting expectations. Wyo. Stat. Ann. § 21-2-204(e). For each performance level, a school may be subject to a variety of supports, interventions, and consequences. Wyo. Stat. Ann. § 21-2-204(f).

The information used to determine a school’s performance level is largely based on various assessments.* These include:

- Reading and mathematics assessments in grades 3 through 8 and science assessment in grades 4 and 8. Wyo. Stat. Ann. § 21-2-304(a)(v)(B).
- Writing and language assessments in grades 3, 5, and 7. *Id.*
- College readiness tests covering English, reading, mathematics, and science in grades 9 and 10. Wyo. Stat. Ann. § 21-2-204(c)(iii).
- An adaptive college entrance exam or a job skills assessment in grades 11 and 12. Wyo. Stat. Ann. §§ 21-3-110(a)(xxix), 21-2-204(c)(iv).

The original 2004 law linked student achievement to practical consequences, albeit not as firmly as after the 2011 amendments. The original law provided for a set of consequences for schools that failed to meet target achievement levels and rewards for schools that did. Wyo. Stat. Ann. §§ 21-2-304(a)(vi)(C) and (E) (LexisNexis 2009). Today, a school’s performance rating carries with it even more consequences under both

* Factors other than assessments have some role, including, for example, graduation rates, ninth-grade credit accumulation, and funding equity. *See* Wyo. Stat. Ann. §§ 21-2-204(c)(v), (vi), and (vii).

state and federal law. Under Wyoming law, each school is categorized into one of four performance levels, and consequences flow from that categorization. Wyo. Stat. Ann. § 21-2-204(f). For example, a school that is not meeting expectations is required to develop a school improvement plan detailing how any areas of poor performance will be addressed. Wyo. Stat. Ann. § 21-2-204(f)(vi). The Department of Education provides assistance in drafting and implementing the plan. *Id.*; Wyo. Stat. Ann. § 21-2-204(f)(vii).

Similarly, schools receiving federal funds under Title I of the Elementary and Secondary Education Act that do not make adequate yearly progress based on the state assessment system results are eventually targeted for progressive assistance and interventions. 20 U.S.C. § 6316(b). At its most severe, federal law requires that a school be restructured, which could include “[r]eplacing all or most of the school staff” and similar measures. 20 U.S.C. § 6316(b)(8)(B)(ii). In other words, the results of the state assessment system play a significant role in directing resources to improve student performance, as well as directly impacting each school.

The Board, by rule, requires, as part of district accreditation, that “all students” in Wyoming public schools participate in the assessments:

(e) The district shall ensure that all students enrolled in the grades required to be assessed participate in the assessment system in one of three ways (W.S. 21-2-304(a)(v) and W.S. 21-3-110(a)(xxiv)):

- (i) In the general assessment with no accommodations;
- (ii) In the general assessment with appropriate accommodations; or
- (iii) In the alternate assessment.

Rules Wyo. Dep’t of Educ., Ch. 6, § 8(e) (Aug. 5, 2009). For the college entrance exam or job skills assessment, the Board requires that all 11th-grade students participate in administration of the ACT or WorkKeys assessments. Rules Wyo. Dep’t of Educ., Ch. 40, § 6(a) (June 9, 2009). The only modifications are for students with individualized education plans. Even then, these students are still assessed, but they may receive accommodations to take the assessment or take an alternate assessment designed for students with the most severe disabilities. Rules Wyo. Dep’t of Educ., Ch. 6, § 8(e) (Aug. 5, 2009).

Based on the Department’s communication with this office, we understand that districts are increasingly receiving parental requests to opt their children out of some or

all assessments. Some districts have permitted the practice, raising the question of whether opting out is permitted by law.

Discussion

Properly promulgated rules have the force and effect of law. *E.g.*, *Doidge v. State Bd. of Charities and Reform*, 789 P.2d 880, 883 (Wyo. 1990). Rules should be construed in the same manner as statutes. *E.g.*, *Romsa v. State ex rel. Wyo. Dep't of Transp.*, 2012 WY 146, ¶ 21, 288 P.3d 695, 701 (Wyo. 2012). As part of this process, all parts of a rule “must be read in *pari materia*, and every word, clause and sentence of it must be considered so that no part will be inoperative or superfluous.” *Powder River Basin Res. Council v. Wyo. Dep't of Env'tl. Quality*, 2010 WY 25, § 30, 226 P.3d 809, 819 (Wyo. 2010) (quoting *KP v. State*, 2004 WY 165, ¶ 22, 102 P.3d 217, 224 (Wyo. 2004)). Construing a rule requires that we consider the rule's structure and the relationship between the parts and the whole. *Id.*

Administrative agencies have only the authority to act where expressly provided by statute, and accordingly, rules promulgated in excess of that authority are null and void. *U.S. West Commc'ns, Inc. v. Wyo. Pub. Serv. Comm'n*, 992 P.2d 1092, 1094 (Wyo. 1999). An agency rule may not add to, modify, or conflict with statute. *Diamond B. Servs., Inc. v. Rohde*, 2005 WY 130, ¶ 60, 120 P.3d 1031, 1048 (Wyo. 2005). The legislative grant of authority may be broad and grant the agency a great deal of discretion. In *Matter of Bessmer Mountain*, the Wyoming Supreme Court held that the Environmental Quality Council, under its general authority to enforce the Wyoming Environmental Quality Act, had the rulemaking authority to set out the criteria for designating lands “very rare or uncommon.” *Rissler & McMurry v. Env'tl. Quality Council (In re the Matter of Bessmer Mt.)*, 856 P.2d 450, 453 (Wyo. 1993). The Court has also held that where the legislature authorized adverse action against licensed outfitters for “[u]nethical or dishonorable conduct,” Wyo. Stat. Ann. § 23-2-416(a)(v), the Board of Outfitters had authority to define in rules what constituted unethical or dishonorable conduct. *Billings v. Wyo. Bd. of Outfitters and Guides (In re Disciplinary Matter of Billings)*, 2001 WY 81, ¶ 29, 30 P.3d 557, 570 (Wyo. 2001).

The first question is whether Board rules require districts to assess all students. Section 8(e) of Chapter 6, by its plain language, requires students to either take the regular assessment with or without accommodations, or take an alternate assessment. Rules Wyo. Dep't of Educ., Ch. 6, § 8(e) (Aug. 5, 2009). The Board rule requires all students to be assessed. Section 8(e) does not, however, specify the circumstances in

which accommodations or alternate assessment are appropriate. To answer that question, we must review Chapter 6 as a whole within the overall accountability system context.

Upon doing so, it becomes apparent that the legislature and Board are concerned with ensuring the full participation of children with disabilities and those with limited English proficiency. For example, the rules require that the state assessment system provide accommodations "so students with disabilities and Limited English Proficient students have fair access to the assessment system." Rules Wyo. Dep't of Educ., Ch. 6, § 8(f)(iii)(C) (Aug. 5, 2009). The Board's duties require that the assessment system "[p]rovide appropriate accommodations or alternative assessments to enable the assessment of students with disabilities . . . and students with limited English proficiency." Wyo. Stat. Ann. § 21-2-304(a)(v)(G). Similarly, the Elementary and Secondary Education Act requires, as a condition of receiving funding, that the State submit a plan that involves assessment of all students, with reasonable accommodations for those with disabilities. 20 U.S.C. § 6311(b)(3)(C)(ix). Viewing the law as a whole, we conclude that the provision for assessment with accommodation or alternative assessment applies only to students with disabilities or limited English proficiency.

Given that the rules require an assessment, the remaining question is whether the Board's statutory authority permits the Board to require that all students be assessed.

The Board's authority, both before and after the 2011 Accountability Act, as to the implementation of the statewide assessments is broad. The statute sets out the various performance indicators to be used, including the assessments specified. Wyo. Stat. Ann. § 21-2-204(c). But the law leaves to the Board discretion, within certain procedural processes, to determine the target performance levels of the indicators. Wyo. Stat. Ann. § 21-2-204(e). Further, the Board is charged with implementing the accountability system through accreditation without much additional legislative guidance. Wyo. Stat. Ann. § 21-2-304(a)(ii).

We conclude that the Board does have authority to require that districts assess all students as part of the implementation of the accountability system.

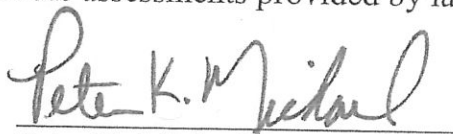
As the Department indicated in its request, an alternative policy that would permit parents to opt their children out could compromise the integrity of the information which determines school classification and adequate yearly progress. For example, if students who perform poorly decide to opt-out of the assessments, the school could appear to be better performing than it is. Consequently, that school might not receive the support it is entitled to receive under the Accountability Act. Or if the opt-outs are correlated with high student performance, the opt-outs could lower a school's performance level, which

could cause that school to take actions that would be unnecessary if those students had participated. This effect could be particularly significant in some of Wyoming's smaller schools and school districts.

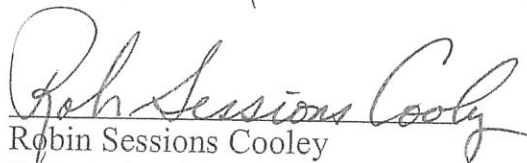
As the agency responsible for establishing the accountability system, the Board's rulemaking authority includes the ability to structure that system in a manner that reduces the chance of error. To conclude otherwise would frustrate both the stated goals of the 2011 Accountability Act and the directive to create a "coherent system of measures that . . . provide a reliable and valid measure of individual student achievement for each public school and district within the state, and the performance of the state as a whole." Wyo. Stat. Ann. § 21-2-304(a)(v). Similar to the Wyoming Supreme Court's analyses in *Bessmer Mountain* and *Billings*, we conclude that the grant of authority to the Board for the purpose of establishing an education accountability system includes the authority to require that districts administer the statewide assessments to all students of the appropriate grade levels.

Conclusion

In summary, the State Board of Education is authorized to establish the statewide accountability system pursuant to state law, including the Wyoming Accountability in Education Act. It has promulgated rules that require districts to administer the relevant assessments to all students in the appropriate grade levels. These requirements are within the authority granted to the Board by the legislature. Consequently, districts may not allow students or their parents to opt them out of the assessments provided by law.



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TO: Peter Michael, Attorney General
FROM: Richard Crandall, Director
DATE: April 9, 2014
RE: Request for Formal Opinion

Like a number of states across the country, districts in Wyoming have anecdotally reported an increase in the number of parental requests for opt outs of both state and local assessments. It has been the WDE position that, while we cannot find explicit prohibitions of parental opt outs in either state or federal statutes, full participation of students in tested grades is expected in all public schools.

ESEA school accountability requirements establish a minimum threshold of 95% assessment participation in schools. This threshold is premised on the obvious need for validity in the accountability system, one that's unaffected by selection bias that could occur if opt-outs and other non-participants are systematically different from their peers who do participate in the assessments.

The Division of Assessment recently provided the following guidance to districts in its weekly newsletter and on its website (<https://edu.wyoming.gov/educators/assessment/paws/>):

Parent Opt-Outs and Wyoming Statewide Assessment

In Wyoming, there is NO STATUTORY AUTHORIZATION for parental opt-outs of state assessments. State statute is very clear; all students enrolled are to be tested with the regular assessment, the regular assessment with accommodations, or the alternate for students with significant cognitive disabilities. In rare and very specific instances, WDE can approve exemptions from testing. Exemption categories include, and are limited to, the following four categories of students: medically fragile, out of state placements, expelled without services, and English learners who have been in US schools for less than a year (but only from reading/writing tests).

Under both WAEA and NCLB, schools are expected to achieve participation rates on statewide assessment of at least 95%. Rates lower than 95% result in a school missing AYP and dropping one performance level (or more) on the Wyoming School Performance Reports.

At this point, at least one district has created an official opt out form (attached) and anti-CCSS activists are promoting parental opt outs: <http://wyomingagainstcommoncore.wordpress.com/2014/03/07/yet-another-test-for-your-child-sbac-field-testing-piloted-in-wyoming/>

Please review both federal and state statutes addressing student assessment and school accountability to provide WDE with a legal opinion on whether, under state and federal law, the WDE has correctly concluded that parent opt-outs of state assessments are not allowed, and that the four articulated exemption circumstances noted above are appropriate. If you have questions, please contact Deb Lindsey, Division Administrator, State Assessment at 777-8753.

Sweetwater County School District #2

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www.sw2.k12.wy.us



District & State Assessment Refusal Documentation Form

Please print the following information:

Student's Name _____

Parent/Guardian's Name _____

School _____

Student's Grade Level _____

Date of Assessment _____

Sweetwater County School District #2 participates in the Proficiency Assessments for Wyoming Students (PAWS), and the Student Assessment of Writing Skills (SAWS), state administered standardized tests. SW#2 also administers several District assessments including, Measures of Academic Progress (MAP), DIBELS, and AIMSWEB, which are administered three times each school year, Fall, Winter, and Spring.

These assessments provide information for teachers to make instructional decisions regarding their students throughout the school year. This allows re-teaching within specific standards focused upon concepts where students need additional opportunities for success.

As the parent/guardian of the above named student, I choose for my child to not participate in the following State and District assessments.

I choose for him/her to not participate: (check one)

The entire PAWS Assessment _____ certain subtests: _____ please specify: _____
(Reading, Math, Science)

The SAWS Assessment _____

The entire MAP Assessment _____ certain subtests: _____ please specify: _____
(Reading, Math, Language Usage)

The DIBELS Assessment _____

The AIMSWEB Assessment _____

My reason for this decision is: _____

I have read and understand the outcomes of this decision.

In particular, I understand that:

- ✓ PAWS and SAWS are required for all students grade 3-8 by the United States Department of Education under NCLB and the Wyoming Department of Education.
- ✓ I will not receive assessment performance information about my child.
- ✓ My child may need to be educated in an alternative location while his/her peers are testing.

Signature of Parent/Guardian: _____

Date Signed: _____

School Representative: _____

This form is to be filed within the student's cumulative record located at the school building.