

**Legal Alert from NYSSBA:
Managing State Assessment Opt Outs**

. . . The New York State School Boards Association is receiving numerous calls regarding the choices school districts have in managing this situation. Although there are no definitive answers to all of the questions, there are some things that we do know.

- First, federal law requires that states assess students in grades 3-8 on an annual basis in specified areas. It also requires that 95 percent of students in each school participate in such assessments. According to the U.S. Department of Education, failure to comply with these requirements can subject states and school districts to sanctions including, but not limited to, the loss of Title I monies and funding available under other federal programs such as the Individuals with Disabilities Education Act (IDEA).
- Second, the State Education Department considers such testing to be part of the core academic program that school districts must offer all students attending their schools.
- Third, school district officials are bound by an oath of office that requires them to comply with legal requirements that affect the operation of school districts, including the administration of state assessments. Therefore, school district officials have no authority to encourage or promote parental opt out efforts.
- Fourth, the State Education Department has taken the position that school boards refusing to administer state assessments are subject to removal from office, and administrators taking a similar course of action are subject to proceedings leading to the loss of certification.
- Fifth, the State Education Department has stated that there is no provision in statute or regulation allowing parents to opt their children out of State tests.

Unfortunately, the reality that many districts may face this year is that despite warnings and potentially severe consequences, some parents will remain steadfast in their decision to have their children opt out of the state assessments. This leaves districts in the untenable position of figuring out how to appropriately respond on test administration days.

Historically, districts have responded to opt outs in a variety of ways. For example, some have required that students opting out of a state assessment sit in the same examination room with students taking the tests and remain in such room until time has been called at the end of the test. This has been characterized by detractors as the “sit and stare” option.

Other districts have determined that requiring students opting out of an examination to remain in the same examination room during test administration will unduly disrupt and negatively impact students taking the examination. Accordingly, they have placed students opting out of an examination in a separate location where they are still offered the opportunity to take the examination, but if they refuse, are permitted to engage in a quiet activity like reading a book. This option has not been possible for some districts because of insufficient space to provide an alternate location.

Finally, questions have come up as to whether a district may allow students opting out of a state assessment to go to the school library or some other location in their building to engage in separate activities without making the assessment available in those locations. The legality of this option is questionable to the extent that it seems to dispense with a school district’s obligation to administer a test to every student. . .