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OPINION NO. 2015-01

EDUCATION; SCHOOL DISTRICT; SUPERINTENDENT OF PUBLIC INSTRUCTION: Nevada does not provide explicit ability for pupils to opt out of or expiicitiy require participation in CRTs, nor mandate participation in end of course examinations. If the agency requires mandatory CRT participation, individual districts will need to determine consequences for failure to participate.

Dale A.R. Erquiaga
Superintendent of Public Instruction
State of Nevada Department of Education
700 E. Fifth Street
Carson City, Nevada 89701

Dear Superintendent Erquiaga:

You have requested an opinion from this office regarding issues related to parents in Nevada asking to "opt-out" of criterion-referenced tests (CRTs), end-of-course examinations (EOCs), and the options available to schools should a student refuse to participate in testing.

BACKGROUND

NRS 389.550 entitled "Administration of criterion-referenced examinations" was originally added to the Nevada Revised Statutes (NRS) in 1999 with the passage of

Senate Bill 466. NRS 389.550 requires the State Board of Education (State Board), in consultation with the Council of Academic Standards, to prescribe examinations that comply with 20 U.S.C. § 6311(b)(3) and that measure the achievement and proficiency of pupils.

NRS 389.805, enacted in 2007, requires the State Board to adopt regulations requiring pupils to pass four "end-of-course" examinations to receive a standard high school diploma. Regulation R061-14 was adopted and became effective on January 1, 2015. Regulation R061-14 specifies the courses required for pupils in the graduating cohort[1] of 2017 and beyond. For pupils graduating prior to 2017, the Nevada High School Proficiency Examination is still the test required for graduation. NAC 389.655.

QUESTION ONE

May a student opt out of the CRTs required in this state?

ANALYSIS

Nevada state law is silent as to whether the CRTs are mandatory for all students. Where a statute is not explicit, the Nevada Supreme Court has repeatedly recognized the discretion of agencies to interpret the language of the statute that they are charged with administering. *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006) (citations omitted). As long as the agency's "interpretation is reasonably consistent with the language of the statute, it is entitled to deference in the courts." *Id.* The State Board, having been vested by NRS 389.550 with the authority and requirement to prescribe the CRTs, has the discretion to determine whether those examinations are mandatory or optional, or to leave that determination to the local districts. Because the statute is silent on whether the CRTs are mandatory or not, any of these interpretations by the State Board would be "consistent with the language of the statute" and thus entitled to judicial deference. *Id.*

NRS 389.550 states that the State Board shall prescribe examinations that comply with 20 U.S.C. § 6311(b)(3) and which measure the achievement and proficiency of pupils. The Board prescribed tests from the Smarter Balanced Assessment Consortium at its September 25, 2014 meeting.[2] Although some form of

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[1] Graduating Cohort is defined by R061-14 as "a group of pupils who, as of the date on which they begin high school, are scheduled to graduate from high school at the end of a specified school year." Using the anticipated graduation date of students at the time they enter high school prevents students from being subjected to differing graduation requirements if their graduation date changes after they have entered high school.

[2] The Council of Academic Standards officially recommended the selection of the Smarter Balanced Assessment Consortium tests at its September 16, 2014 meeting.

standardized testing for students has been in place since the passage of S.B. 466 in 1999, there have been no prior requests for this office to opine on whether or not parents are allowed to opt their children out of these statutory tests.

Where the language of a statute is plain and unambiguous, there is no need to look for its meaning beyond the statute itself. *State, Div. of Ins. v. State Farm,* 116 Nev. 290, 293, 995 P.2d 482, 485 (2000). Where a statute has no plain meaning, or is ambiguous, the meaning may be examined through legislative history to determine the Legislature's intent. *Chanos v. Nevada Tax Comm'n,* 124 Nev. 232, 240, 181 P.3d 675, 681 (2008). However, courts have been "unwilling to read an unstated element into a silent statute." *Phillips v. State,* 99 Nev. 693, 695, 669 P.2d 706, 707 (1983) (per curiam); *see also Young Inv. Co. v. Reno Club, Inc.,* 66 Nev. 216, 223, 208 P.2d 297, 300 (1949) ("We are not authorized to read into the act by judicial construction terms or provisions concerning which the act is silent.").

The current NRS say nothing about whether the CRTs are mandatory or optional.[3] Silence is not necessarily ambiguity, especially where an agency has been expressly authorized to interpret and apply a statute. Instead, statutory silence in this context means that the statute itself does not require one result over another, and any agency interpretation will receive deference "as long as that interpretation is reasonably consistent with the language of the statute." *Int'l Game Technology, Inc.*, 122 Nev. at 157, 127 P.3d at 1106. Here, the relevant Nevada statute is not ambiguous as to whether CRTs must be mandatory or optional; it simply does not address the issue either way. Because the relevant statute is clear in not addressing opt-outs at all, there is no need to look to legislative history to try to read into the statute a limitation on the State Board's discretion that simply does not exist in any statutory text.

Even if one was inclined to look to the legislative history, it does not clearly compel any conclusion regarding the Legislature's intent. When S.B. 466 was passed, Section 11 included the language that would become NRS 389.550, requiring the administration of CRTs. The next section—Section 12—required the Board to adopt

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[3] NRS 389.550, which prescribes CRTs, makes reference to examinations that comply with 20 U.S.C. § 6311(b)(3). The academic assessments described in this federal law do not specifically require full participation. Rather, this federal law strongly *encourages* that 95 percent of each group of students to whom the test is administered must take the assessments. If less than 95 percent take the tests, the school will be deemed not to have made Adequate Yearly Progress ("AYP") as defined by 20 U.S.C. § 6311(b)(2)(C), which can have significant and severe consequences for the school—including the possibility of eventually replacing all or most of the school staff. *See* 20 U.S.C. § 6316(b)(8)(B)(ii). While near universal participation appears to be a goal of the federal statute, federal law does not attempt to attain that goal by mandating participation. NRS 389.550's reference to compliance with 20 U.S.C. § 6311(b)(3) therefore cannot be read as requiring that the tests be mandatory.

regulations compelling the reporting of those examination results. That Section 12 language was included as NRS 389.560 when S.B. 466 was codified:

> The superintendent of schools of each school district and the governing body of each charter school shall certify that the number of pupils who took the examinations is equal to the number of pupils who are enrolled in each school in the school district or in the charter school who are required to take the examinations, except for those pupils who are exempt from taking the examinations. A pupil may be exempt from taking the examinations if:
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> (a) His primary language is not English and his proficiency in the English language is below the level that the state board determines is proficient, as measured by an assessment of proficiency in the English language prescribed by the state board pursuant to subsection 8; or
>
> (b) He is enrolled in a program of special education pursuant to NRS 388.440 to 388.520, inclusive, and his program of special education specifies that he is exempt from taking the examinations.

NRS 389.560, *repealed by* Senate Bill 442, Act of July 1, 2013, ch. 379, 2013 Nev. Stat. 2042.

Arguably, NRS 389.560 could be read as intending that all enrolled pupils take the tests (with the exception of the two specific categories of students identified in the provision). The superintendent of each district was tasked with certifying full participation. There was no statutory exception for voluntary non-participation or conscientious objection by students or their parents.

But NRS 389.560 was repealed in 2013. While NRS 389.550 remains in effect, local superintendents are no longer required to certify that the number of students taking the CRTs is equal to those enrolled in school. The reason for the repeal of NRS 389.560 is not clear. One of the advocates of the repeal testified that it was "designed to eliminate nonessential reports and *mandates*." Testimony of Joyce Haldeman, Associate Superintendent, Clark County School District, *Hearing on S.B. 442 Before the Senate Committee on Education,* 2013 Leg., 77th Sess. 32 (April 8, 2013) (emphasis added). It is not clear from the record whether the term "mandate" was meant to include only reports or was meant more broadly—perhaps giving the discretion to relax the nature of the previously mandatory CRTs. The relatively sparse legislative record on S.B. 442 underscores the difficulty in interpreting legislative intent when the text of the statute is silent on the question at hand. Even assuming that the

CRTs were intended to be mandatory when NRS 398.560 was enacted, its repeal in 2013 leaves the legislative intent unclear.

As Nevada law currently has no explicit provision making CRTs mandatory or optional, and federal law only encourages substantial but not universal participation in these CRTs, the decision to make the CRTs mandatory, optional, or to give that discretion to individual school districts is within the agency tasked with administering the statute. *See Int'l Game Technology, Inc.*, 122 Nev. at 157, 127 P.3d at 1106; *Cable v. State ex rel. Emp'rs, Ins. Co. of Nev.*, 122 Nev. 120, 126, 127 P.3d 528, 532 (2006); *Meridian Gold Co. v. State*, 119 Nev. 630, 635, 81 P.3d 516, 519 (2003). Any of the above interpretations made by the agency would be lawful and entitled to deference from the courts.

QUESTION TWO

May a student opt out of the end-of-course examinations required by state law which, while not developed by Smarter Balanced Assessment Consortium, are based on the Nevada Academic Content Standards derived from the Common Core?

ANALYSIS

End-of-course examinations are a recent addition to Nevada, having been added to NRS 389.805 by Assembly Bill 288 in 2013. The EOCs have a number of differences from the previously discussed CRTs. First, the statutes creating the EOCs make no reference to federal law. Second, the EOCs have a different and more recent legislative history. Third, the EOCs have a different purpose, serving as a graduation requirement for students, while the CRTs are examinations that measure "the achievement and proficiency" of pupils in grades 3 through 8. Thus, the CRTs and EOCs may require a different factual and legal analysis.

Just as the current Nevada Revised Statutes do not explicitly state whether CRTs are mandatory or optional for students, they are similarly silent as to whether the EOCs are mandatory or optional. Thus, as with the CRTs, interpreting the statutes governing EOCs as constraining the State Board's discretion with regard to opt-outs would impermissibly "read an unstated element into a silent statute." *Phillips,* 99 Nev. at 695, 669 P.2d at 707. Because NRS 389.805 does not address opt-outs at all, there is again no need to look to legislative history to try to read into the statute a limitation on the State Board's discretion that does not exist in any statutory text.

The legislative history of the EOCs is, if anything, even less illuminating than the history of the CRTs in any event. The history of Assembly Bill 288 consists primarily of evidence showing the Legislature's desire to move away from the Nevada High School Proficiency Exam and move to the EOCs in an effort to test students

closer in time to when students actually receive instruction on the content of the tests and to enhance college and career readiness of students. *Hearing on A.B. 288 Before the Senate Committee on Education*, 2013 Leg., 77th Sess. 15 (April 5, 2013). There are no requirements for local education officials to certify anything regarding the numbers of pupils taking the test.

NRS 389.805(2)(a)(3) is clear that failure to take and pass the EOCs will preclude a child from obtaining a high school diploma, but it says nothing about whether students are *required* to take the EOCs. As passage of EOCs is a graduation requirement, statutory language is focused not on making sure that all students are evaluated, but rather on limiting access to the test. NRS 385.805(2)(c) expressly grants to the State Board the authority to adopt a regulation to limit the number of times that a pupil *may* take an EOC.[4] But the statute is silent on the question of whether the State Board of Education must set a minimum number of times a student *must* take an EOC. Because nothing in Nevada law addresses that question, the decision whether EOCs are mandatory or not (or whether that decision can be left to local districts) is again left to the sound discretion of the administering agency. *See Int'l Game Technology, Inc.*, 122 Nev. at 157, 127 P.3d at 1106.

QUESTION THREE

If no opt out provision exists, what options are available to schools should a student be present at school on the testing day but refuse to participate in testing?

ANALYSIS

Just as Nevada law contains no explicit provisions regarding a pupil's mandatory or optional participation in the CRTs, it also contains no explicit provisions regarding consequences for failure to participate.[5] NRS 392.463(2) requires each local district to prescribe written rules of behavior for pupils attending school and appropriate punishments for violations of those rules.[6] When pupils violate school rules, the districts may take action consistent with their rules and punishments validly adopted pursuant to NRS 392.463.

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[4] The State Board has not yet exercised this authority and there is currently no regulation limiting the number of times a pupil may take the EOCs.

[5] NRS 389.805(2)(a)(3), as well as the newly adopted R061-14 regulations, do state that a student who fails to pass the required end-of-course examinations shall not receive a high school diploma.

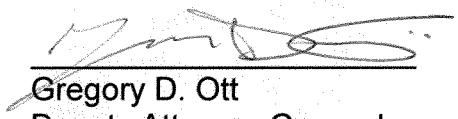
[6] Some disciplinary actions are only available in certain situations according to NRS 392.463. For example, even if authorized by the School District's written rules a student may not be suspended or expelled unless the provisions of NRS 392.467 are followed and a student may not be retained in the same grade rather than promoted unless the requirements of NRS 392.125 are met.

CONCLUSION

As explained, Nevada's statutes are simply silent as to whether students may opt-out of criterion-referenced tests or end-of-course examinations. Consistent with established rules of statutory interpretation, this statutory silence provides discretion to the administering agency to make the tests mandatory, optional, or to allow that choice to be made by individual school districts. Should the agency in its discretion require mandatory participation in the tests, the consequences of a student's failure or refusal to participate are left for individual districts to determine pursuant to valid rules adopted under NRS 392.463(2).

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: 

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