



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION	No. I15-008 (R15-016)
By MARK BRNOVICH ATTORNEY GENERAL	Re: Whether parents can opt their children out of statewide school assessment tests
October 9, 2015	

To: Superintendent Douglas

Questions Presented

You have asked this Office to clarify the status of parents' rights to allow their children to opt out of statewide assessments such as the AzMERIT. You reference a December 10, 2014, letter from this Office to the Arizona Department of Education. That letter updated Arizona Attorney General Opinion No. I97-008, which concludes that parents may not withdraw their children from Arizona's required standardized tests.¹ In your Opinion Request, you indicate that the December, 2014 letter from this Office may have introduced an ambiguity regarding the rights of parents to withdraw their students from statewide assessments; you therefore ask the following questions:

1. Whether a statewide assessment, such as the AzMERIT test is considered a "learning activity or learning material" under A.R.S. § 15-102;
2. Whether the silence in A.R.S. § 15-102 to include statewide assessment could be read to protect a parent's ability to opt their child out of state assessments as the parent rights included within the statute are not an exhaustive list;
3. Whether a parent can choose to opt their child out of statewide assessments pursuant to A.R.S. §§ 1-601 or -602; and
4. Whether a child who has opted out of the statewide assessment may attend school during the testing window and not be required to test.

¹ It also updated a September 16, 2013, letter from this Office on the same topic.

Summary Answer

The answer to each of the first three questions is “no;” the last question is mooted by these responses. In 1997, this Office reviewed A.R.S. §§ 15-741, 743 and 746, which “establish a comprehensive statewide system for assessing the achievement of public school students through a series of mandatory essential skills tests and a standardized norm-referenced achievement test.” Ariz. Att’y Gen. Op. I97-008. We noted that the obligation to establish, implement, and maintain this system is mandatory, imposing duties on the State Board of Education, the Arizona Department of Education, local school district governing boards, and local schools. The 1997 Opinion also addressed A.R.S. § 15-102, and concluded that a standardized assessment was not a learning material or activity from which parents could exempt their children. *Id.* As a result of your Opinion Request, this Office has carefully reviewed its original conclusions in Opinion No. I97-008 in light of subsequent amendments to existing laws and new statutes. None of the changes affect the reasoning employed in the 1997 Opinion. Our conclusion remains the same: parents do not have a legal right to withdraw their children from state-mandated assessments in Arizona’s public schools.

Analysis

1. Whether a statewide assessment, such as the AzMERIT test is considered a “learning activity or learning material” under A.R.S. § 15-102?

Arizona Revised Statutes § 15-102 addresses schools’ obligations to encourage parental involvement in schools. It requires that “governing board[s], in consultation with parents, teachers and administrators, . . . develop and adopt a policy to promote the involvement of parents and guardians” in a variety of school-related issues. A.R.S. § 15-102(A). Among the procedures that must be developed is one “through which parents who object to any learning material or any activity that they believe to be harmful may withdraw their children from the activity or from the class or program in which the material is used.” Ariz. Att’y Gen. Op. I97-008 (citing A.R.S. § 15-102(A)(3)). The 1997 Opinion concluded that this language did not give parents the right to withdraw their children from standardized tests because such tests are “separate and distinct from the learning material or learning activity contemplated by A.R.S. § 15-102(A)” and added that the statute did not specifically include a right to withdraw from standardized tests. *Id.* The Opinion further noted that allowing such withdrawals might lead to manipulation of the testing system, thus “defeating the purpose of the legislative assessment and reporting mandates.” *Id.*

While Arizona now requires a different standardized assessment than it did in 1997, this difference does not compel a different conclusion regarding whether assessments are a “learning material” or “activity” as contemplated by A.R.S. § 15-102. An assessment is a means “educators use to evaluate, measure, and document the academic readiness, learning progress, and skill acquisition” of students of all ages. (*See* definition of “assessment” at

<http://edglossary.org/assessment/>, last visited Sept. 24, 2015). An assessment is thus not a “learning material” or “learning activity.”

2. Whether the silence in A.R.S. § 15-102 to include statewide assessment could be read to protect a parent’s ability to opt their child out of state assessments as the parent rights included within the statute are not an exhaustive list?

The 1997 Opinion concluded that the Legislature did not intend to allow parents to withdraw their children from statewide assessments on the basis of A.R.S. § 15-102. However, in 2010, A.R.S. § 15-102 was amended and a new statute, the Parents’ Bill of Rights (A.R.S. § 1-601 and 602), was added, by Senate Bill 1309. S.B. 1309, 49th Leg., 2d Reg. Sess. ch. 307 (2010). The changes to A.R.S. § 15-102 include new subsections (A)(4) through (A)(7). Subsection (A)(7) details, in 19 subparagraphs, local school boards’ obligations to ensure they inform parents about their rights to opt out of several obligations, such as the right to opt out of assignments, the right to opt out of immunizations, and the right to opt out of instruction on acquired immune deficiency syndrome. A.R.S. § 15-102(A)(7)(c), (d), and (g). School boards are also required to ensure they provide parents with information about numerous other rights, including the right to review test results, the right to receive a school report card, and the right to public review of courses of study and textbooks. A.R.S. § 15-102(A)(7)(h), (k), and (m). Notably absent from the list of parents’ rights is the right to opt out of any assessments. The Legislature’s failure to include such a right is especially telling because the statute specifically mentions the “right to review test results pursuant to section 15-743” and the “right to receive a school report card pursuant to section 15-746.” A.R.S. § 15-102(A)(7)(h) and (k). In other words, the changes to A.R.S. § 15-102 reinforce the conclusion of the 1997 Opinion: the Legislature could have included a parental right to exempt a child from statewide assessments, but did not. *See, e.g., State v. Roscoe*, 185 Ariz. 68, 71 (1993) (“A well established rule of statutory construction provides that the expression of one or more items of a class indicates an intent to exclude all items of the same class which are not expressed.”) (quoting *Pima County v. Heinfeld*, 134 Ariz. 133, 134 (1982)).

Moreover, review of the “opt out” rights provided in A.R.S. § 15-102 indicates that the Legislature limited the authority of parents who choose public education to customize that education. While local school boards must provide parents with substantial information about their schools, rights to opt out are limited. Although parents may opt their children out of 1) assignments, on the basis that a learning activity or material is harmful because “it questions beliefs or practices in sex, morality or religion;” 2) immunizations; and 3) instruction on acquired immune deficiency syndrome, the limited nature of parents’ opt out rights that are

specified in A.R.S. § 15-102 indicates that the Legislature did not intend to include a right to opt out of statewide assessments.²

3. Whether a parent can choose to opt their child out of statewide assessments pursuant to A.R.S. §§ 1-601 or – 602?

As noted above, Senate Bill 1309 also included the “Parents’ Bill of Rights,” which is codified at A.R.S. §§ 1-601 and 602. These statutes affirm parents’ fundamental rights to, among other things, “direct the education of the minor child.” A.R.S. § 1-602(A)(1). These statutes also note that “parents have inalienable rights that are more comprehensive than those listed in this section.” A.R.S. § 1-602(D). However, neither section 1-601 nor 1-602 specifically references any particular aspect of education, much less statewide assessments. Furthermore, to the extent A.R.S. § 1-602 and § 15-102 address the same topic—a parent’s rights with respect to the education of a child—they should be harmonized to effect legislative intent. *Arden-Mayfair, Inc. v. Dept. of Liquor Licenses and Control*, 123 Ariz. 340, 342, 599 P.2d 793, 795 (1979). Reading a right to opt out of standardized testing into the more general statute, A.R.S. § 1-602, when the more specific statute, A.R.S. § 15-102, does not include such a right would be inconsistent with this principal of statutory construction.

Importantly, while a parent’s right to direct the education of a minor child allows a parent to choose whether to send a child to a public district or charter school, a private sectarian or secular school, or to choose homeschooling, it does not allow a parent who sends a child to a public school to prescribe the details of that child’s education. As the Ninth Circuit Court of Appeals noted, citing to the Sixth Circuit with favor,

While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the

² Moreover, a statute added in 2011—A.R.S. § 15-113—clarifies a parent’s right to opt a child out of a “learning material or activity.” That statute describes a parent’s “right to review learning materials and activities in advance,” and the parent’s right to withdraw a student from a learning material or activity the parent views as harmful. It defines “harmful” by stating: “For the purposes of this section: (1) ‘Objects to any learning material or activity on the basis that it is harmful’ means objections to a material or activity because of sexual content, violent content, or profane or vulgar language.” A.R.S. § 15-113(E)(1). Thus, reading A.R.S. § 15-102 and 113 together, it is clear that a parent’s right to opt a child out of learning materials or activities is limited to material viewed as harmful because of “sexual content, violent content, or profane or vulgar language.” Such objections would not generally apply to statewide assessments.

school or, as here, a dress code, these issues of public education are generally “committed to the control of state and local authorities.”

Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1206 (9th Cir. 2005) (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005) (citations omitted) (emphasis in original).

4. Whether a child who has opted out of the statewide assessment may attend school during the testing window and not be required to test?

Given the answers to the questions above, this question is moot. School districts are required to “administer the tests” prescribed by the State Board of Education. A.R.S. § 15-741(C). Given this requirement, and because there is no right to opt out of statewide assessments, children who attend school during the testing windows are required to take assessments as scheduled.

Conclusion

The answers to your questions are as follows:

1. No, a mandatory statewide assessment exam does not constitute a “learning material” or “activity” as contemplated by A.R.S. § 15-102.
2. No, a fair reading of the plain text in A.R.S. § 15-102 does not provide a basis for finding a parental right to opt out of state assessments.
3. No, the “Parents’ Bill of Rights” as set forth in A.R.S. §§ 1-601 and 602 does not encompass a right for parents to opt their children out of statewide assessments.
4. Because there is no parental right to opt out of a statewide assessment, children who attend school during testing windows must take the assessments as scheduled.

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