“OPTING-OUT” OR “OPTING-IN” AN OVERVIEW OF PARENTS’ RIGHTS

Presented by:

Shellie Hoffman Crow
scrow@wabsa.com

&

Deron T. Robinson
drobinson@wabsa.com

WALSH, ANDERSON, GALLEGOS, GREEN and TREVIÑO, P.C.
ATTORNEYS AT LAW

www.WalshAnderson.com

Austin ★ San Antonio ★ Irving ★ Houston ★ Rio Grande Valley ★ Albuquerque
Introduction

In recent years, a significant amount of administrators’ time is spent addressing parent concerns. These concerns involve everything from the parents’ right to “opt-out” their child from high stakes testing, usually the State of Texas Assessment of Academic Readiness (STAAR), to visitation and records issues raised by custody battles, to restrictions on the release of confidential student records. When those concerns are not addressed to the parents’ satisfaction, more and more of those parents are filing formal parent complaints. This presentation will provide an explanation of the most common of those parent concerns and recommend strategies to respond to them.

1 “Opt-Out” Requests for STARR Testing

A growing number of parents are standing up and having their voices heard by informing school districts of the parents’ right to “opt-out” their child from high stakes testing, usually the State of Texas Assessment of Academic Readiness (STAAR). Unfortunately, according to the Texas Legislature and the Texas Education Agency, parents do not actually have a right to “opt-out” of testing. Texas public schools are required to provide standardized testing pursuant to Texas Education Code Chapter 39 and 19 Texas Administrative Code Chapter 101. Specifically, Texas Education Code 39.023(a) requires “all students” to be assessed with the appropriate test. Consequently, school districts do not have a choice as to whether to administer the state tests, end-of-course (EOC) exams, or STAAR exam to all of its students; they are required to do so by Texas law. Accordingly, such a right to “opt-out” does not exist, and Texas school districts are left in the middle of this dispute to bear the pressure of these countervailing forces.

During the 2013-2014 school year, Texas school districts received a record number of requests from parents for their students to “opt-out” of the state standardized testing requirements. School administrators were required to decide how to respond to these requests in a way that respected parent rights and still met the requirements of state law. We have no reason to believe the “opt-out” movement will do anything but grow, and schools will likely see an increase in the number of “opt-outs” this year. Various websites have blank “opt-out” letter templates available for parents to download and provide to schools. These websites and the letters often include misinformation and misinterpretations of the law. In addition, while many school districts and school personnel agree that Texas pedagogy has become too focused on standardized testing, some parents erroneously believe such testing is a school driven initiative, rather than a state mandate. Such confusion may sometimes lead parents to make various unsustainable threats against schools and school personnel. Individual school districts must
determine how they will respond to such requests, threats, and misunderstandings often proffered by well-intentioned parents.

A. Texas Education Code Section 26.010

1. The primary source of confusion regarding a parent’s right to “opt-out” seems to be Texas Education Code Chapter 26, entitled “Parental Rights and Responsibilities.” Many well-meaning parents believe this Chapter affords them control over the instruction received by the children. Specifically, Education Code 26.010 is mistakenly believed to provide parents such authority. An example “opt-out” letter found on the website of the Texas Parents’ Education Rights Network (http://www.txedrights.net/) begins as follows:

   This letter is to inform you respectfully of my intention to have my child excused from all mandated standardized testing during the remainder of the school year. I do this in recognition of my parental rights and obligations under the due process clause of the Fourteenth Amendment of the United States Constitution and of the Texas Education Code (Title 2, Subtitle E, “Students and Parents, Section 26, Parental Rights and Responsibilities”). It is my parental right to choose to “opt my child out” of curriculum or instruction that is harmful to children as stated in the Texas Education Code CHAPTER 26. PARENTAL RIGHTS AND RESPONSIBILITIES Sec. 26.010.EXEMPTION FROM INSTRUCTION. (a) A parent is entitled to remove the parent’s child temporarily from a class or other school activity that conflicts with the parent’s religious or moral beliefs if the parent presents or delivers to the teacher of the parent’s child a written statement authorizing the removal of the child from the class or other school activity.

2. Does Texas Education Code Section 26.010 really say that? Yes it does. More precisely, the first sentence of Section 26.010(a) says that. “Opt-out” sources often convey to well-meaning parents that Section 26.010 provides them the right to “opt-out” of standardized testing. However, such information is misleading, as Texas Education Code Section 26.010 as a whole includes clarifying language related to the supposed “opt-out” right. In its entirety, Section 26.010 reads:

   26.010. EXEMPTION FROM INSTRUCTION.
   (a) A parent is entitled to remove the parent's child temporarily from a class or other school activity that conflicts with the parent's religious or moral beliefs if the parent presents or delivers to the teacher of the parent’s child a written statement authorizing the removal of the child from the class or other school activity. A parent is not entitled to remove the parent's child from a class or other school activity to avoid a test or to prevent the child from taking a subject for an entire semester.
(b) This section does not exempt a child from satisfying grade level or graduation requirements in a manner acceptable to the school district and the agency.

TEC §26.010 (emphasis added)

Accordingly, Section 26.010(a) clearly stipulates that a parent does not have the authority to remove a student to avoid a test. Further Section 26.010(b) limits the applicable of Section 26.010 to exclude grade level or graduation requirements.

B. A Rose by Any Other Name

1. This simple explanation of the unambiguous language contained in Texas Education Code Section 26.010 may be enough to dissuade some individuals. However, some individuals have claimed that this is an erroneous interpretation of the law, as illustrated by a website entitled “Opt-Out of State Standardized Tests”:

According to Texas Education Code 26, parents can “opt-out”. That is clear. Our organization, Texas Parents “Opt-Out” State Tests, believes our parental rights are clearly stated in Section 26 of the Texas Education Code and through the 14th Amendment Due Process Clause to protect the integrity of our children’s education. Your school district and the Texas Education Agency will tell you different. We believe their interpretation is not accurate.

http://optoutofstandardizedtests.wikispaces.com/Texas+TX

2. The focus of such arguments is not based on any legal premise, rather, the argument essentially consists of “I’m right and you’re wrong.” This can put a school district in a very precarious political predicament. Alternatively, a parent may argue that the STAAR or EOC exams are not tests at all, and therefore the second sentence found in Section 26.010(a) does not apply. Consider another example from the Texas Parents’ Education Rights Network website:

In addition, the Texas Education Code does not describe the STAAR/EOC exam as a “test.” Rather, the statute refers to it as an assessment instrument. The legislature deliberately chose those words, indicating a clear intention that the STAAR/EOC regime be considered something other than a test. Further, the administration and assessment process shows this is not a “test” as used within Ch. 26. The exam forms no part of a student’s class grade (this was a deliberate legislative change); it is not made available to parents under the test provisions of Ch. 26. Moreover, the legislature recognizes a distinction between a “test” and
an “assessment instrument” in Ch. 26 itself. The legislature created specific, but different, provisions relating to the rights of parental access to tests and to assessment instruments. Compare Tex. Educ. Code §26.006 (access to tests) with Tex. Educ. Code §26.005 (access to assessment instruments). If an assessment instrument was the same thing as a test, there would be no need for § 26.005 to even exist as parental access is already guaranteed by §26.006.

3. This argument suggests that these are assessment instruments, not tests. While plausible enough to confuse many, this argument fails legal analysis. Both the Texas Education Code and Texas Administrative Code use the term “test” to reference the state assessment instrument countless times. In fact, we suggest that the issue of whether the STAAR or EOC exam should be considered a “test” is Education 101...quite literally. The education rules found in the Texas Administration Code Title 19 Section 101 include the following references:

The **statewide assessment program** consists of the following criterion-referenced **tests**:

1. the assessments of academic readiness in English and Spanish for the grades and subjects as specified in the TEC, Chapter 39, Subchapter B;
2. the alternative assessments of academic readiness for eligible students receiving special education services as specified in the TEC, Chapter 39, Subchapter B;
3. the assessments required for graduation as specified in the TEC, Chapter 39, Subchapter B; and
4. the reading proficiency **tests** in English for eligible limited English proficient students as specified in the TEC, Chapter 39, Subchapter B.

19 TAC §101.1 (emphasis added)

4. The interchangeable references between “assessment” and “test” found in the Education Code and the Administrative Code are quite literally too numerous to include in this handout. Another source to consider regarding whether an assessment might be a test is the opinion of the Texas Attorney General. In 2002, the Texas Attorney General clearly provided that an assessment and a test are the same, when he opined:

> The State Board of Education's general responsibility with respect to the assessment of students' knowledge and skills is to create and implement a statewide assessment program. **The development of appropriate assessment instruments, which is to say tests,** is the responsibility of the Texas Education Agency.
The Attorney General’s statement confirms the terms “test” and “assessment” can be used interchangeably. Accordingly, there is no doubt that both the EOC and STAAR exams can be considered either a test or an assessment. Accordingly, it appears that the Texas Education Code Section 26.010(a) exception applies to both the EOC and STAAR exams.

C. Grade Level and Graduation Requirements

1. Grade level promotion. In addition to being tests, both the EOC and STAAR exams are directly connected with grade level and graduation requirements. Texas law requires a District to consider a student’s assessment scores when determining grade promotion. *Education Code §28.021(c).* Please note that this provision does not mandate that a student must pass a state assessment before promotion in all cases, but it does require a school district to at least consider the student’s assessment scores.

In addition, the students in grades 5 and 8 must pass the math and reading portion of the STAAR exam to be promoted. School districts are required by state rule to administer three testing opportunities for students who fail to meet satisfactory performance on these assessments. A student who does not pass the test may advance to the next grade level only if:

1. The student has completed required accelerated instruction (tutoring); and,
2. The student’s grade placement committee, established at the student’s campus, determines by unanimous decision, in accordance with the standards for promotion established by the school board, that the student is likely to perform at grade level at the end of the school year; and,
3. In accordance with Education Code §28.0211(n), the District will ensure that a student who is promoted by a GPC under 19 Administrative Code 101.2007 shall be assigned in each subject in which the student failed to perform satisfactorily on an assessment instrument specified under Education Code 28.0211(a), to a teacher who meets all state and federal qualifications to teach that subject and grade.

19 TAC 101.2001(b)

2. Graduation. Finally, in order to graduate, students are required to fulfill the curriculum requirements and satisfactorily pass the state-required assessments, also known as the EOCs. *Education Code §28.025(d).* As explained, both the STAAR exam and EOCs are considered tests, and both are directly connected with grade level and graduation
requirements. Accordingly, there is no parental right to opt-out provided by Section 26.010.

D. To Score or Not to Score

1. **Guidance from TEA.** Much of the debate concerning opting out of testing has focused on the coding involved with a student’s exam. It is important to note that Texas Education Code 39.023 requires the Texas Education Agency to adopt and develop assessment instruments and rules. Accordingly, TEA may alter their procedures for the 2014-2015. For the 2013-2014 school year, TEA provided the following instructions, along with the *2014 Student Assessment Program Coordinator Manual* (promulgated by TEA). During the past year, TEA has consistently held the position that if a student is present at school on the day of testing, that student’s test shall be coded as an “S” for “scored”, regardless of whether or not the student actually took the test. The *2014 Student Assessment Program Coordinator Manual* provides the following guidance and coding directions:

A = Absent  
O = Other, such as test administration irregularity or illness during testing.  
R = The ARD committee has determined that STAAR Modified is not the appropriate assessment for SSI retest opportunities because the student meets participation requirements for STAAR Alternate (applicable for May and June grades 5 and 8 reading and mathematics).  
PW = Parental Waiver: a parent or guardian requested that a student not participate in the third testing opportunity for STAAR or STAAR Modified in SSI grades and subjects (applicable for June grades 5 and 8 reading and mathematics).  
P = Previously met passing standard (SSI retests only)  
* = The student did not test on the answer document for the subject indicated.  
S = Test to be scored

2. **The “S” Scoring.** TEA’s mandate that any student in attendance have their test marked “S” has met with considerable resistance by some parents. Many of whom disagree with TEA’s interpretation and implementation of their own guidelines. Consider the following communication a school district received from a parent:

This letter hereby demands that [SCHOOL DISTRICT] not mark [his/her] assessment instrument as S. Based on my instructions, and the exercise of my statutory and constitutional rights, my [child] will not be completing the assessment instrument. Pursuant to the TEA’s own testing manual, the appropriate code is "*" - The Student Did Not Test on the Answer Document for the Subject Indicated, or “O” - Other. Any other such entry would constitute the falsification of a government
record (see Tex. Penal Code§ 37.10 (1)), which constitutes a third degree felony if the document in question is a school record. I expect that the school district will accurately record the circumstances surrounded my child's refusal to participate in the state assessment system.

Unfortunately, this parent mistakenly directs their ire at the school district, without understanding that the district is simply following TEA’s instructions. Irrespective of such parental responses, school districts should always follow the guidance of TEA with regard to the scoring and handling of the standardized tests. The chances of a school administrator being charged with a felony for following written TEA guidance while administering TEA’s test which TEA is legally required and obligated to create are extremely low.

E. Inspection of Assessment Instruments

Some school districts have also received requests from parents to review and analyze assessments taken by their students. The Family Educational Rights and Privacy Act (FERPA) provides parents or those individuals standing in parental relation to a student with access to student educational records. Some parents will cite the right of access provided by FERPA or that provided by Texas Education Code Chapter 26 when requesting access to such assessment instruments. As a practical matter, because these records are not records that are maintained by the individual school district, they are not available for inspection by parents in response to a request to the school district. The state assessments are created, prepared, assembled and maintained by TEA under Texas law. School districts receive these assessments for temporary use, use them for a defined period under the guidelines created by TEA, and then return these records to TEA without keeping even a copy of any of the documents. These are not typically records owned or maintained by the school districts. Rather, the state assessments are property of the TEA and are records maintained by the TEA. Thus, any parent wishing to inspect assessments should direct their inquiry to the TEA. Individual school districts do not have the legal duty or the legal authority to provide access to the state assessments. School districts should direct any FERPA or Public Information Requests regarding the state assessments directly to TEA.

F. Exemption from Accelerated Instruction

Finally, many schools are receiving requests for exemptions from accelerated instruction for students who have failed the STAAR for EOC tests in the previous year, using letters very similar to the ones already quoted in this handout. Again, regardless of the citation to rights to exemption from instruction and/or quotes of federal rights, school districts are required by state law to provide (not just offer) accelerated instruction for students who have failed a state assessment. The school district is simply not permitted by law to grant these requests, a legal interpretation that TEA has affirmed.
2 Parental Rights and Chapter 26

Part of the controversy regarding the right to “opt-out” of standardized testing stems from the broad language in Chapter 26 regarding parents’ rights with respect to the education of their children. The case law is well established that parents have the right to direct the upbringing of their children. Meyers v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925). In addition, Texas state law provides that parents will be partners with educators, administrators, and school boards in their children’s education and that they are encouraged to actively participate in creating and implementing educational programs for their children. Tex. Educ. Code §§ 4.001(b) & 26.001(a). This language has created many struggles over exactly which educational activities the school will control versus which the parent may control.

A. Parent Requests

1. A parent may request the reassignment of the parent’s child or a change in that child’s classes or teachers if the change would not affect the assignment of another student.

   • A parent is entitled to reasonable access to a school principal or administrator with the power to grant this request.
   • A decision by the Board of Trustees with respect to this decision is final and cannot be appealed.

   Texas Education Code, Section 26.003.

2. A parent has the right to request that a school add an academic class within the course of study of the parent’s child if such class is economically practical by virtue of student interest.

   • The district cannot unreasonably deny this request.
   • A decision by the Board of Trustees with respect to this decision is final and cannot be appealed.

   Texas Education Code, Section 26.003.

3. A parent may request that the child be allowed to attend a class above the child’s grade level in the child’s present school or another school.
• Such requests can be denied if the school board or its representatives believe the child cannot perform satisfactorily in this class. Otherwise, requests for accelerated education cannot be unreasonably denied.
• A decision by the Board of Trustees with respect to a request for accelerated instruction is final and cannot be appealed.

Texas Education Code, Section 26.003.

4. If a child completes the requisite course of study, a parental request that the child be allowed to graduate early cannot be unreasonably denied.

• The parent has a right to have a child who graduates early participate in graduation ceremonies.
• A decision by the Board of Trustees with respect to a request for early graduation is final and cannot be appealed.

Texas Education Code, Section 26.003.

B. Parent Right of Access

1. A parent is entitled to all written records maintained by the school district which concern the parent’s child.

• This includes attendance records, test scores, grades, disciplinary records, counseling records, psychological records, applications for admission, health and immunization information, teacher and counselor evaluations, and reports of behavioral patterns.
• Parents also have a right of access to student records under the Family Educational Rights and Privacy Act.

Texas Education Code, Section 26.004.

2. A parent is entitled to a copy of each state assessment instrument administered to the parent’s child except questions which were being “field tested” and were not used to compute the child’s score.

Texas Education Code, Sections 26.005 & 39.023(e)

3. A parent is entitled to review all teaching materials, textbooks, and other teaching aids (decorations, music, etc.) used with the parent’s child. The parent is also entitled to see any tests administered to the child after the test is administered.

4. A school district must provide grades to parents at least once every 12 weeks. At least once every three weeks or during the fourth week of each nine-week grading period, the school districts must inform the parent in writing if a student’s performance in a foundation curriculum class is consistently unsatisfactory as determined by the school district.

Texas Education Code, Section 28.022.

5. Schools do not have an affirmative obligation to permit parents to attend their child’s classes. Ryans v. Gresham, 6 F.Supp.2d 595 (E.D. Tex. 1998). However, a school district has the authority to permit reasonable classroom visitation if it chooses.

6. A parent is entitled to full information regarding the school activities of the parent’s child except when such information must be withheld pursuant to a child abuse investigation.

- In 2002, the Commissioner of Education issued a decision holding that anonymous evaluations of a student which determine a grade or whether a student may participate in a school-related program violate § 26.008 of the Texas Education Code. A parent of a student who tried out for cheerleader requested the teacher “character” evaluations of her daughter used in the ranking system for the tryouts and wanted to know the identities of the teachers filling out each evaluation.

The Commissioner held that Section 26.001, which provides that “parents shall be partners with school districts in the education of their children,” and Section 26.008, which provides that parents are entitled to full information regarding the school activities of a parent’s child entitles the parent to know the identities of persons evaluating their children. Although the decision involved a dispute over evaluations related to cheerleader tryouts, the decision applies to all teacher and staff evaluations that determine a grade or whether a student may participate in a school-related program. Byard v. Clear Creek Indep. Sch. Dist., Comm’r Dec. Docket No. 020-R5-1001 (2002).

C. Parental Consent

1. Written parental consent must be obtained before any school employee may conduct a psychological examination or treatment.

- Consent is not required when the examination or treatment is conducted pursuant to a child abuse investigation or a state or federal special education requirement.

2. School employees may not make or authorize the videotaping or voice recording of any child without parental consent.

- However, consent is not required if the videotape or recording is made for the purpose of safety and the maintenance of order, if the videotape or recording is related to an extracurricular activity or classroom instruction, or for news media purposes.


3. Parents must approve a student’s entry into, exit from, or placement in a limited English proficiency program.

- Parents may appeal a decision regarding a limited English proficiency program.


4. The Protection of Pupil Rights Amendment (PPRA) requires that school districts notify parents and obtain written consent prior to allowing minor children to participate in certain surveys, evaluations, or analyses. Parents must also be permitted to opt their children out of participation in these activities. 20 U.S.C. § 1232h.

5. Don’t Forget: School districts must notify parents of these policies at the beginning of every school year, and must provide notice within a reasonable time of any substantive changes during the school year.

6. State law allows school districts to administer corporal punishment unless the school district has received a written objection from the parent. Texas Attorney General Greg Abbott issued an opinion several years ago which indicated that school districts could adopt a policy permitting corporal punishment that does not require parent consent. However, most school districts that do still administer corporal punishment only choose to use corporal punishment with students for whom they have received annual written parental consent.

D. Partners in Education

While it may not always feel like it, parents are your “partners in education.” Obtaining the support of the parents amidst a student conflict is absolutely necessary to addressing and correcting student behaviors. Involve the parents early and often, seek input in finding the solution, and communicate to the parents your concern and understanding.

As discussed above, misinformed parents may misdirect their concerns at school districts or school personnel. We recommend reminding those parents that your school district does not create the laws or testing procedures.
Example Response to STAAR testing procedures:

“For any student who is present at school on the day the STAAR test is administered, including makeup days, please be advised that the student will be directed to his/her testing room and given an opportunity to test. If the student refuses to enter the testing room or otherwise refuses to take the test, he/she will participate in a conference with the campus test coordinator, campus administrator, and/or parent to document the refusal to test. The student’s test will be marked “scored” per TEA instructions.”

Example Response to STAAR score:

On April XX, 2015 I spoke with [NAME AND TITLE] at TEA, who again verified that this is TEA’s prescribed procedure. Accordingly, student’s answer sheet will be marked pursuant to TEA instructions. Your requests for us to provide a statute or administrative regulation is misplaced. Texas Education Code 39.023 requires the Texas Education Agency to adopt and develop assessment instruments and rules. Sanger ISD is not provided the latitude to develop separate procedures apart from those prescribed by the TEA. You should direct your correspondence to TEA. If TEA provides you written correspondence to the contrary, we will be happy to handle in whatever manner TEA suggests.

*The information in this handout was prepared by Walsh, Anderson, Gallegos, Green and Treviño, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.*