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March 27, 2015

GUIDANCE MEMORANDUM #15-01

TO: All School Districts and Charter Schools

FROM: Dale A.R. Erquiaga
Superintendent of Public Instruction

SUBJECT: Opting Out of Criterion-referenced Tests and Revisions to Portions of Guidance Memoranda #13-01 and #13-02

This memorandum is issued pursuant to the authority provided in NRS 385.175(5), directing the Superintendent of Public Instruction to enforce the observance of Title 34 of Nevada's statutes and all other statutes and regulations governing public education.

Several parents have requested to have their children "opt out" of the criterion-referenced tests (CRTs) required by NRS 389.550 in grades 3 through 8. Because no provisions exist in current state law to establish such an opt-out procedure, prior non-regulatory guidance from this office (see Guidance Memoranda #13-01 and #13-02) advised in part that "students present during the administration of the examinations may not 'opt out' of taking the test". More recently, some parents have stated an intention to have their children refuse to participate in the tests, which seems to be somewhat different from a formal "opt out" procedure. Recognizing the diverse views on this subject and the concerns of parents who have written to this office, in December 2014, I requested the opinion of Nevada's Attorney General on the question of opting out. The resulting Attorney General's Opinion (AGO) received by my office is attached. The key point of the AGO is this:

"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."

The Attorney General notes the underlying statute that once would have prohibited any opt-out action (NRS 389.560) was repealed by the Nevada Legislature through a bill this office has determined to have been requested by the local school districts in 2013.¹

(continued)

¹ SB 442, 77th Regular Session, minutes of the Senate Committee on Education, dated April 8, 2013.

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In noting the impact of the repeal of NRS 389.650, the AGO states:

“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.”

Therefore I am able to consider both the full scope of the opinion – in short, that requests to remove students from participation in the CRTs may be considered – and the proper venue for making such a determination.

I am hereby revoking those portions of Guidance Memorandum #13-02 pertaining to criterion-referenced tests.² This office will not prohibit opting out of the CRTs. Further, pursuant to the AGO, I am giving the discretion as to whether the 2014-15 CRTs are mandatory or optional to individual school districts and charter schools. School Districts and charter schools are advised to respond to a request to opt out of criterion-referenced tests, and any refusal to participate in such tests, as they deem appropriate and/or as they are advised by legal counsel. [NOTE: This office has requested legislative action on the question of opting out in future school years.]

It must also be noted that some parents have expressed concern about testing at the high school level as well. However, the Attorney General is clear in his opinion that there can be no allowable opt-out provisions for high school graduation requirements related to end-of-course examinations (NRS 389.805). Students must still participate in these tests or they will be ineligible for a high school diploma. The AGO states:

“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”

School districts and charter schools are advised that any federal and state requirements concerning the required participation rates of students at individual schools and district-wide are not alleviated by this guidance memorandum. The Superintendent of Public Instruction has no authority to waive or otherwise dispense with these requirements; consequences may still apply if schools and/or districts experience significant numbers of students opting-out or refusing to participate.



² Guidance Memorandum #13-02 also addresses a desire on the part of some parents to opt out of educational data systems. The Attorney General’s Opinion does not address this matter. Therefore, that portion of my original guidance remains; student data cannot be withheld or removed via any opt-out provision. Similarly, Guidance Memorandum #13-01 still requires the teaching of Common Core standards; the AGO has no impact on that issue.