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TO: Paul Toner, MTA President
Tim Sullivan, MTA Vice President
Ann Clarke, MTA Executive Director-Treasurer

FROM: Lee Weissinger, MTA General Counsel
Matt Jones, MTA Staff Counsel

RE: PARCC OPT-OUT

The Partnership for Assessment of Readiness for College and Careers (PARCC) is a consortium of 17 states, plus the District of Columbia and the U.S. Virgin Islands, developing a common set of assessments for grades 3-11 in English language arts (ELA) and math that are aligned with the Common Core State Standards (CCSS). PARCC is chaired by Massachusetts Commissioner of Elementary and Secondary Education Mitchell D. Chester. The CCSS have been adopted by 45 states, including Massachusetts, plus the District of Columbia in response to financial incentives under the U.S. Department of Education's Race to the Top program, which, among other things, awarded significant points in the competitive grant process for states that adopt college and career readiness standards.

PARCC's goal is to implement PARCC assessments. The Board of Elementary and Secondary Education will vote in the fall of 2015 on whether PARCC will replace the MCAS ELA and math tests. As part of the development of PARCC, prototype PARCC assessments are being field-tested this spring in PARCC states, including Massachusetts. The field testing will be conducted in a representative sample of school districts and classrooms. The field tests are designed to examine the quality of the test items and to pilot and assess the procedure for the administration of the test. Students who are selected for the PARCC field testing are not required by the state to participate in MCAS testing, although some districts are "double testing" students in both PARCC and MCAS. The results of the PARCC field tests will not be reported.

The role and impact of standardized testing, and PARCC specifically, on public education have become a subject of public debate. A national group called "United Opt Out" is urging that parents "opt out" their children from standardized testing, which it views as contributing toward a shift to market-based education and the eventual privatization of the public education system.

The PARCC field tests have become the focus of "opt-out" activity, which has been met with a sympathetic response from some education stakeholders and opposition from others. The

Worcester School Committee and Norfolk School Committee have both passed resolutions stating that they will permit students to "opt out" of PARCC. The Board of Directors of the Educational Association of Worcester has passed a resolution expressing "'no confidence' in the current planned implementation of the PARCC assessments." The Department of Elementary and Secondary Education (DESE) takes a different view and, in an opinion from its general counsel, has stated that opting out of PARCC is not permitted. DESE based its conclusion on the fact that the Legislature gave it authority to "adopt a system for evaluating on an annual basis the performance of both public school districts and individual public schools," G.L. c. 69, § 1I, and made no provision for students opting out of standardized testing.

To assess the question of "opting out," it is necessary to consider the roles of DESE, the school district and other potentially applicable state laws in regulating the behavior of students, in conjunction with the rights and obligations of parents.

There can be little doubt that DESE has the authority to require *school districts* to field-test PARCC. As already noted, G. L. c. 69, § 1I directs that "[t]he Board [of Elementary and Secondary Education] shall adopt a system for evaluating on an annual basis the performance of public school districts and individual public schools," and then goes on to set various requirements for that system. Until the PARCC field testing program, this mandate was implemented through the MCAS test, which has become a fixture of public education in Massachusetts. The Supreme Judicial Court has held that DESE has broad discretion in implementing this mandate to evaluate school performance and to implement the Education Reform Act generally. *See, Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Bd. of Educ.*, 436 Mass. 763, 774, 767 N.E.2d 549, 559 (2002) ("When the Legislature delegates to an administrative agency a broad grant of authority to implement a program of reform or social welfare, the administrative agency generally has a wide range of discretion in establishing the parameters of its authority pursuant to the enabling legislation (citation and internal quotation omitted)."); *Student No. 9 v. Bd. of Educ.*, 440 Mass. 752, 762, 802 N.E.2d 105, 113 (2004) (Applying, in part, § 1I, Court states "[a]n administrative agency, like the board [of education], has considerable leeway in interpreting a statute it is charged with enforcing.")

However, the authority of DESE to require school districts to field-test PARCC is entirely distinct from the question whether *parents* may "opt out" their children from PARCC testing. While, as DESE has pointed out, there is no statutory provision that specifically authorizes "opting out" from the annual performance assessment (or, in the case of PARCC, field tests of a possible replacement), the absence of a specific authorization to opt out does not, in our view, lead to the inevitable conclusion that school districts are prohibited from permitting students to opt out, that opting out is prohibited for parents and students, or that there are any actual negative consequences for parents or students for refusing to participate in PARCC field testing. However, a district that allows students to opt out is still required to field-test PARCC; the district may not implement the opt-out option in a way that would systemically undermine its legal obligation.

General Laws, c. 71, § 37 gives school committees "the authority to establish educational goals and policies for the schools in the district and the responsibility for hiring or terminating a school superintendent (internal quotations and citations omitted)." *Sch. Comm. of Pittsfield v. United Educators of Pittsfield*, 438 Mass. 753, 760, 784 N.E.2d 11, 17 (2003). General Laws c. 71, § 37H sets forth certain requirements for dissemination and enforcement of the policies governing student conduct, which are set by the school committee under the authority conferred by § 37. The district must publish the rules for student conduct in a handbook and follow certain due process requirements in the enforcement of the rules. In addition, certain specific rules, relating to assault on school personnel and carrying drugs or weapons onto school premises or to school sponsored events, are mandated by the statute. But notably, § 37H contains no mandated rule regarding participation in testing or absence from school. The Supreme Judicial Court has interpreted § 37H as conferring "broad disciplinary authority" on local school districts. *Doe v. Superintendent of Sch. of Worcester*, 421 Mass. 117, 126 – 128, 653 N.E.2d 1088, 1094 – 1095 (1995).

School attendance up to age 16 is mandated by G.L. c. 76, § 1. The statute also provides that "[t]he superintendent or teachers insofar as authorized by him or by the school committee, may excuse cases of necessary absence for other causes not exceeding seven day sessions or fourteen half-day sessions in any period of six months." Failure to attend school was decriminalized by St. 1973, c. 1073, although it may result in a non-criminal adjudication that the child is in need of services under G.L. c. 119, § 24. *Com. v. Santos*, 47 Mass. App. Ct. 639, 643, 715 N.E.2d 455, 458 (1999). The failure of parents to ensure that their children attend school (or are home schooled) could also contribute to a finding of "neglect" under G.L c. 119, §§ 51A & 51B and 110 CMR 2.00 ("Neglect means failure by a caretaker, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate . . . supervision, emotional stability and growth, or other essential care . . . .")

In our opinion, it becomes apparent from these provisions that the basic allocation of authority over standardized testing established by the Legislature is that DESE has the authority to require school districts to administer the tests, but that any consequence to a student or parent for "opting out" would depend on the school district's rules for student conduct. General school attendance and child protection laws also set limits on the conduct of parents and children, but only in relatively extreme situations that are unlikely to be implicated by non-participation in a standardized test. This leads to the following conclusions:

- Under their considerable discretion to regulate student behavior, school districts may permit, or choose not to punish, student non-participation in PARCC testing.

- The school committees of Worcester and Norfolk are probably acting within their authority under §§ 37 and 37H when, as a matter of district policy, they permit parents to "opt out" their children from PARCC testing.

- Even in the absence of a policy permitting "opt out," it is not certain that students would suffer negative consequences for not participating in PARCC testing. Currently, the only consequence linked to students passing a test is that the 10th grade MCAS is designated by the Board of Elementary and Secondary Education as the tool to make the "competency determination" for high school graduation under G.L. c. 69, § 1D. School districts may, or may not, have student conduct rules in place that impose consequences for opting out of PARCC.

This leaves a final question of whether parents have a constitutional right to "opt out" their children from PARCC testing. In a model letter for parents to request a PARCC opt-out on its website, United Opt Out cites *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923), and *Prince v. Massachusetts*, 321 U.S. 158, 159, 64 S. Ct. 438, 439, 88 L. Ed. 645 (1944) for the proposition that a person's ability to direct the upbringing and education of his children is a "fundamental right" protected against state interference by the Fourteenth Amendment of the United States Constitution. In its model letter, United Opt Out asserts that constitutionally protected parental rights give parents the specific right to direct that their children not participate in PARCC testing.

The cases cited by United Opt Out are quite old. While this in itself does not mean that they are no longer "good law," it does raise a question of whether they provide much guidance for a very specific and modern issue: whether the Constitution gives parents the right to opt out of a standardized test that was never contemplated when the cases were decided. The issues at stake in these cases confirm the conclusion that they are inapposite to the "opt-out" question. The relevant question in *Pierce* was whether the state could mandate attendance only at public schools, to the exclusion of private schools; *Meyer* involved a statute that categorically criminalized instruction in any language other than English, by any teacher in any setting, to students prior to eighth grade (which was found to violate a parent's right to direct the education of his child); and *Prince* upheld the application of a statute that criminalized hiring children to sell magazines on the street.

As already noted, each of these cases recites the general principle that parents have the right to direct the upbringing and education of their children. But, as the Court noted in *Prince*, "neither rights of religion nor rights of parenthood are beyond limitation." *Id.* at 321 U.S. 166. Thus, the general proposition that parents may direct the education of their children does necessarily lead to the specific conclusion that parents have a constitutional right to "opt out" their children from PARCC testing.

Recent cases that balance parental rights against the state's interest in the welfare of children suggest that the assertion that there is a constitutional right to opt out of standardized testing is dubious. For example, a state may require children to attend school, *Wisconsin v. Yoder*, 406 U.S. 205, 213, 92 S. Ct. 1526, 1532, 32 L. Ed. 2d 15 (1972), although, as *Pierce* says,

a state may not require attendance exclusively at a public school. Parental rights do not trump a school district's authority to make condoms available in junior and senior high schools, *Curtis v. Sch. Comm. of Falmouth*, 420 Mass. 749, 652 N.E.2d 580 (1995), *cert. den.* 516 U.S. 1067 (1996), and the Legislature may constitutionally authorize school committees to regulate home schooling within certain bounds, *Brunelle v. Lynn Pub. Sch.*, 428 Mass. 512, 702 N.E.2d 1182 (1998). Given these examples of limits to the right to direct the upbringing and education of children, we cannot conclude that, when parents elect to send their child to the public schools, the Fourteenth Amendment requires that they be permitted to "opt out" their child from a specific test.

We hope that this opinion is helpful. Please do not hesitate to contact us if there are any further questions.

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