STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

July 2, 2014

Opinion No. 14-68

Authority to Waive Requirements of Tenn. Code Ann. § 49-1-617

QUESTIONS

1. Does the Commissioner of Education have authority to waive the requirements of Tenn. Code Ann. § 49-1-617, under which Tennessee school districts must include Tennessee Comprehensive Academic Progress (TCAP) test scores as a percentage of a student's final grade?

2. If the TCAP test scores required to be used by school districts are withheld by the Department of Education, would that constitute a violation of the law?

3. Would "recalibrating" TCAP test scores by the Department of Education constitute "compromising the integrity of the testing process" in violation of Tenn. Code Ann. § 49-1-607?

OPINIONS

1. The Commissioner of Education has authority under Tenn. Code Ann. § 49-1-201(d)(1) to waive the requirements of Tenn. Code Ann. § 49-1-617, which do not relate to "[f]ederal and state student assessment and accountability" under § 49-1-201(d)(1)(J).

2. No federal or state law would be violated by a delay in releasing TCAP test scores so long as the results were provided as soon as practicable and no later than June 30.

3. The "post-equating" process conducted by the Department of Education for every TCAP examination would not "compromis[e] the integrity of the testing process" and thus would not violate Tenn. Code Ann. § 49-1-607.

ANALYSIS

1. Tenn. Code Ann. § 49-1-201(d)(1), as amended by 2014 Tenn. Pub. Acts, ch. 672,[1] provides as follows:

[1] The 2014 amendment brought this subdivision substantially in line with the waiver provision for charter schools in Tenn. Code Ann. § 49-13-105(b).

> (1) Upon application by the LEA for one (1) or more of its schools, the commissioner of education may waive any state board rule or statute that inhibits or hinders the LEA's ability to meet its goals or comply with its mission. However, the commissioner may not waive regulatory or statutory requirements related to:
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> (A) Federal and state civil rights;
> (B) Federal, state and local health and safety;
> (C) Federal and state public records;
> (D) Immunizations;
> (E) Possession of weapons on school grounds;
> (F) Background checks and fingerprinting of personnel;
> (G) Federal and state special education services;
> (H) Student due process;
> (I) Parental rights;
> (J) Federal and state student assessment and accountability;
> (K) Open meetings;
> (L) Educators' due process rights; and
> (M) Reductions in teachers' salaries.
> (N) Employee rights, salaries and benefits; and
> (O) Licensure of employees.

The Commissioner of Education thus has authority to waive certain statutory requirements, but the authority is limited, and under subdivision (d)(1)(J), the Commissioner may not waive requirements related to "[f]ederal and state student assessment and accountability."

Tenn. Code Ann. § 49-1-617 requires TCAP test scores to be included, in grades three through eight, as a percentage of a student's final grade.

> Each local board of education shall develop a policy by which student scores on the Tennessee comprehensive assessment program's grades three through eight (3-8) achievement tests shall comprise a percentage of the student's final grade for the spring semester in the subject areas of mathematics, reading/language arts, science and social studies. The percentage shall be determined by the local board from a range of no less than fifteen percent (15%) and no more than twenty-five percent (25%). The policy shall utilize performance levels determined by the state board of education and be developed and implemented for the spring semester of 2011.

The answer to the question whether the Commissioner has authority under § 49-1-201 to waive the requirements of § 49-1-617 thus depends on whether the latter

statute's requirements are related to "[f]ederal and state student assessment and accountability."

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *In re Adoption of A.M.H.*, 215 S.W.3d 793, 808 (Tenn. 2007). If the statutory language is plain and unambiguous, courts will apply its plain meaning. *Brown v. Erachem Comilog, Inc.*, 231 S.W.3d 918 (Tenn. 2007). Where, however, a statute employs terminology that has a specific technical meaning within the field that the statute addresses, a court would be likely to adopt and employ that specialized use. *See Barber v. Gonzales*, 347 U.S. 637, 641 (1954) (quoted with approval in *Bilski v. Kappos*, 561 U.S. 593, 130 S.Ct. 3218, 3247 (2010) ("While it is true that statutory language should be interpreted whenever possible according to common usage, some terms acquire a special technical meaning by a process of judicial construction.")

Within the educational arena, "student assessment and accountability" are terms of art that serve as a primary focus of the federal "No Child Left Behind Act," 20 U.S.C. §§ 6301 to 6578. *See, e.g.,* 20 U.S.C. § 6301(1) (identifying the role that "academic assessments" and "accountability systems" play in accomplishing the purpose of the law); *id.* § 6311(b)(2), (3) (imposing state-plan requirements for a "single, statewide State accountability system" and "high-quality, yearly student academic assessments"). "Assessment" refers to the process of assessing student (both individual and group) performance and progress. *See* 20.U.S.C. § 6311(b)(3); 34 C.F.R. §§ 200.2, .3. "Accountability" refers to the evaluation of the performance of schools and school districts (LEAs) over time. *See* 20 U.S.C. § 6311(b)(2); 34 C.F.R. §§ 200.7, 200.12. Both student assessment and school accountability rely upon the annual TCAP examinations, which measure both student performance and the performance of schools and LEAs. State educational assessment and accountability programs are central to the mandate of federal educational statutes and cannot be waived. The TCAP examinations themselves, in turn, cannot be waived because the State's assessment and accountability programs rest primarily upon the results of those tests.

Students' final course grades, on the other hand, do not play a role in the State's student-assessment or school-accountability efforts. The inclusion of TCAP scores as part of a student's final grade, which is required by Tenn. Code Ann. § 49-1-617, is not required by federal education law, nor does federal law require the use of students' final grades as an "assessment" or "accountability" tool. And this Office can find no indication that the State uses student grades for student-assessment or school-district/school-accountability purposes.[2] The Tennessee Department of

[2] Pursuant to a 2012 waiver of the federal No-Child-Left-Behind requirements, Tennessee's accountability system places primary focus on school districts rather than individual schools. *See* Tenn. Dep't of Educ., *Statewide Accountability System* 1, *available at* http://www.state.tn.us/education/data/accountability/docs/acct_info_sheet.pdf. (Tennessee waiver

Education's website indicates that "[s]tudents' skills and academic progress are measured by a set of statewide assessments called the Tennessee Comprehensive Assessment Program, or TCAP" and that students in grades three to eight take the TCAP Achievement Test. http://www.state.tn.us/education/assessment/index.shtml (last visited June 22, 2014). Accountability measures for schools and school districts are based on student achievement, *see* Tenn. Code Ann. § 49-1-602, which is based, at least for grades three through eight, on TCAP test results. *See* Tenn. Dep't of Educ., *District Accountability: Frequently Asked Questions*, Q5 (Summer 2013).[3] While final course grades certainly determine a student's academic performance within his or her school, they appear not to determine student or school performance at the State level.[4] The requirements of Tenn. Code Ann. § 49-1-617, therefore, *can* be waived; they are not statutory requirements related to "[f]ederal and state student assessment and accountability" under Tenn. Code Ann. § 49-1-201(d)(1)(J).[5]

2. No state or federal law mandates the immediate release of TCAP scores to LEAs. A federal regulation, 34 C.F.R. § 200.5(c), states:

> Timing of results. Beginning with the 2002-2003 school year, a State must promptly provide the results of its assessments *no later than before the beginning of the next school year* to LEAs, schools, and teachers in a manner that is clear and easy to understand.

(Emphasis added.) *See also* 20 U.S.C. § 6316(a)(2) ("The State educational agency shall ensure that the results of State academic assessments administered in that school year are available to the local educational agency before the beginning of the next school year."). Tenn. Code Ann. § 49-1-606(b) provides that the Department "shall provide raw test score data" from the TCAP examinations to LEAs "as soon as practicable after receipt of the data, but in no case later than June 30."[6] Section 2 of 2001 Tenn. Pub. Acts, ch. 243, which added this requirement, stated that "[i]t is the intent of the legislature for the Department of Education to provide such score data to local education agencies before the end of the school year." But any delay by the

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documents can be found here: http://www2.ed.gov/policy/elsec/guid/esea-flexibility/map/tn.html (last visited June 25, 2014)).

[3] *Available at* http://www.state.tn.us/education/data/accountability/docs/acct_faq_2013.pdf.

[4] By way of illustration, the "2013 Report Card" provides assessment and accountability data for the 2012-13 school year. http://www.state.tn.us/education/data/report_card/2013.shtml (last visited June 21, 2014).

[5] No penalty or similar consequence would flow from the Commissioner's granting such a waiver, since federal law does not impose similar requirements.

[6] Tenn. Code Ann. § 49-1-605 also requires that TCAP test data be used to provide certain educational-progress estimates by July 1 of each year.

Department in releasing test results to LEAs would not violate this statute so long as the results were provided as soon as practicable and no later than June 30.

3. This Office understands that after every year's TCAP test, the Department conducts a "post-equating" process that compares student performance on that year's test with results from previous years. Every TCAP examination contains questions held over from previous years' tests. Examining the results for these questions that are repeated provides an insight into whether student performance was higher or lower than in previous years. The process is devoted to ensuring that the TCAP tests, and the results of those tests, are valid indicators of student achievement and can properly be compared to a previous year's test results. *See* Joseph Ryan & Frank Brockmann, *A Practitioner's Introduction to Equating* 1 (Revised 1st Ed. 2011)[7] ("[Equating] is an important aspect of establishing and maintaining the technical quality of a testing program by directly impacting the *validity* of assessments—the degree to which evidence and theory support the interpretations of test scores.") (emphasis in original).

Tenn. Code Ann. § 49-1-607 states:

> Any person found to have not followed security guidelines for administration of the Tennessee comprehensive assessment program (TCAP) test, or a successor test, including making or distributing unauthorized copies of the test, altering a grade or answer sheet, providing copies of answers or test questions *or otherwise compromising the integrity of the testing process* shall be placed on immediate suspension, and such actions will be grounds for dismissal, including dismissal of tenured employees. Such actions shall be grounds for revocation of state license.

(Emphasis added.) This statute is directed at the administration of TCAP tests and essentially protects against cheating. In any event, the post-equating process described above would not violate this statute because it would not "compromis[e] the integrity of the testing process"; indeed, it seems calculated to protect it. *See* Ryan & Brockmann, *supra*, at 1 ("Equating is an essential tool in educational assessment due [to] the critical role it plays in several key areas: establishing validity across forms and years; fairness; test security; and, increasingly, continuity in programs that release items or require ongoing development.").

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[7] *Available at* http://www.ccsso.org/Documents/Equating%20Handbook-CoverANDinterior.pdf.

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