

SCHOOL EMPLOYEES' RIGHTS REGARDING OPTING OUT OF TESTING

California is one of a handful of states that has a law allowing all parents to opt out of state-mandated testing for their child. The new federal law, Every Student Succeeds Act (ESSA), affirms the right of parents to excuse their child in states that have opt-out laws. However, California also has specific regulations regarding what an educator can say to parents about opting out of testing.

The information below from the California Teachers Association (CTA) is designed to let educators and other school employees know their rights related to parents opting out of high-stakes testing for their children.

What is the CAASPP System?

California Assessment of Student Performance and Progress (CAASPP) is the state's system of mandated and optional assessments. It currently includes three mandated tests: Smarter Balanced Assessments, California Alternate Assessments, and California Science Assessments. The Smarter Balanced Assessments are in English language arts and mathematics for grades 3 through 8 and 11. For more information on CAASPP, visit <http://www.cde.ca.gov/ta/tg/ca>.

What are my rights as an educator? As a teacher, may I inform parents about their right to excuse their child from CAASPP state testing?

A California regulation allows educators to *inform* parents of their right to opt out of high-stakes testing for their child, but *prohibits* them from soliciting or encouraging the parent to do so. [Section 852 of Title 5 of the California Code of Regulations](#) provides that: "An LEA (local education agency) and its employees **may discuss the CAASPP assessment system with parents and may inform parents of the availability of exemptions** under [Education Code section 60615](#). The LEA and its employees **shall not solicit or encourage any written exemption** request on behalf of any child or group of children." 5 C.C.R. § 852(c)

Questions inevitably arise about the difference between informing parents about opting out and encouraging them to opt out. Each situation must be evaluated on an individual basis, but the clearly permissible end of the spectrum would be simply to inform parents of their right to excuse their child from the Smarter Balanced Assessment of the CAASPP system without offering any opinion about the test itself, or the effect the test would have on their individual child. Responding to questions from parents or guardians about opting out without actively encouraging such questions would also be acceptable. At the opposite end of this spectrum would be actively criticizing the test in a parent conference or back-to-school night and urging or soliciting parents to opt out. In addition, such criticism may not be protected under the First Amendment since a school district could reasonably view this as disruptive to test administration.

So what about an educator's First Amendment rights regarding testing and a parent's right to opt out of testing for their child? Don't educators have free speech? Can I speak out in a public forum?

Government employees are not obliged to completely relinquish their First Amendment rights. Education issues such as student testing (including opt-out policies), educational curricula and teacher evaluation systems are, in general, matters of public concern. So when a public employee speaks as a *citizen* on a matter of public concern, that speech may be protected under the First Amendment. However, the public school employer can still discipline or dismiss the employee if the employer has reason to believe the speech would disrupt school operations.

- As long as it is not disruptive to school operations, educators may generally express their views on educational issues in public forums – for example, by writing letters to newspaper editors and other media outlets, testifying before the Legislature, participating in nondisruptive demonstrations, and participating in public forums.
- Educators may also advocate for a change in law or policy governing the right to opt out, as long as they do so as citizens rather than in the scope of their duties as public employees.
- When a public employee makes a statement because their official duties require them to do so, they are speaking as an employee, not as a citizen. Public school employers are permitted to discipline employees for such employment-related speech.

Has any educator ever been disciplined for letting parents know their rights around opting out?

To CTA's knowledge, the California regulation has not been applied by a district against an employee who has spoken out on the issue of opting out, or challenged in a court. Thus, it is unclear whether the regulation could violate the First Amendment. If a school district uses the regulation to discipline you for a statement you make as a citizen about opting out of high-stakes testing, immediately bring the issue to your union representative so that CTA can consider the constitutionality of the district's application of the regulation.

What about administering the test? Are educators required to give the state-mandated tests to students? And can an educator be disciplined if they tell a student or a parent not to take the test?

Yes, and yes. Neither the First Amendment nor state law will protect an educator who refuses to administer a state standardized test, refuses to follow district procedures for such testing, tells students not to take that state test, or speaks out against the test while teaching a class.

- The more an employee's duties require him or her to implement a disputed policy, the less protected the employee will be in voicing opposition to it. For example, a school administrator may have less freedom to oppose state testing than a classroom teacher does.
- Speech and advocacy with other employees about the impacts of state tests or other educational policy initiatives on terms and conditions of employment are protected under California's Educational Employment Relations Act (EERA), [Government Code § 3543\(a\)](#). Under EERA, school employees may, for example, discuss with their co-workers during nonwork time whether their union should adopt a resolution regarding standardized testing.

CTA produced a flyer to let parents know their rights regarding opting out. Can educators hand that flyer to parents?

Yes. The flyer simply informs parents of their right to excuse their child from state-mandated testing. Educators may also direct parents to the CTA website, www.cta.org/optout, for additional information about the importance of learning over testing.

What is CTA's position on testing? CTA believes assessments should be used to inform instruction and improve student learning. They are not meant to label students or schools. State tests must be age and subject appropriate, and must be free from cultural, racial, gender, socioeconomic and linguistic biases. A true reflection of student achievement and improvement is always done through multiple measures and can never focus on just one test score.

What is CTA's position on opting out? CTA believes that educators shall be allowed, without penalty, to inform parents, guardians, and students of their legal rights to be exempted from standardized tests and assessments. Further, CTA believes parents, guardians, students, teachers, administrators, schools and school districts shall not be penalized when parents/guardians exempt their students from standardized tests and assessments.

If you have questions about these rights and obligations, please contact your primary contact staff.