School Law for Administrators

Headlines on School Law

States and districts flex muscles around Common Core Standards

By Rob Taylor, PhD

Six years ago 45 states signed on to the Common Core Standards for English/language arts (ELA) and math, pledging to assess student progress with common tests that would be developed primarily by two consortia of test-crafters, Partnership for Assessment of Readiness for College and Careers (PARCC) and Smarter Balanced Assessment Consortium (SBAC). Now only 20 states and the District of Columbia still plan to go this assessment route, according to a recent *EdWeek* article.

The Common Core initiative was created in 2010 by the National Governors Association and the Council of Chief State School Officers, with $360 million in grants thrown in by the U.S. Department of Education (ED). But much as changed. The two national teachers' unions—backed by a large portion of the country's teachers—rose up against the mandates and policies of ED, and Secretary Arne Duncan is gone. Parents and teachers led an opt-out movement questioning the validity and frequency of high-stakes testing. And Congress finally passed a reauthorization of NCLB—called the Every Student Succeeds Act (ESSA)—with a key plank being greater local authority for states and districts in the realm of education planning.

Part of the push-back to the Common Core, and especially its testing and curriculum development regime, resulted from the widely-held belief that publishing giants such as Pearson had gained too hefty a foothold in developing curriculum. As John White, Louisiana's state superintendent of education, put it, publishers have "in many cases, been relentless about an unwillingness to change and a desire for maximizing profits on old materials that are not helping students."

While Common Core Standards are still being used by 40 states, more and more states have begun to look for their own methods of developing curriculum and assessments, frequently seeking teacher-developed materials online, such as the hugely popular EngageNY curriculum library.

Research coming from *EdWeek's* annual national survey of classrooms has revealed some telling findings:

- PARCC, once favored by about 30 states, has dwindled in support to a mere six states plus the District of Columbia;
- Twenty-seven states are using tests developed internally or purchased online;
- Three states are now blending consortium questions with locally-crafted questions;
- Nine states now plan to use some consortium questions only in grades 9 and lower, with other tests such as the ACT or SAT aimed at high school students; and
- Twelve states now use the SAT or the ACT in their federally mandated accountability reports.

One suspects that the shifting landscape toward greater state and district leadership has resulted also from the attitudes sometimes displayed by Common Core administrators. For example, David Coleman, once head of the English/language arts portion of the Common Core, addressed a group of educators in 2011 saying in justification of a new emphasis on evidence-based writing as opposed to personal narrative, that "as you grow up in this world, you realize people really don't give a shit about what you feel and what you think."

This was a quote from an *Education Week Teacher* article focused on how teachers were struggling with the Core shift to a heavy dose of textual evidence and analysis in student writing. Mr. Coleman, who now leads the College Board, also said in 2011, "It is rare in a working environment that someone says 'Johnson, I need a market analysis by Friday, but before that, I need a compelling account of your childhood.'"

Despite Coleman's not particularly well-received sarcasm, there was a legitimate debate at the start of the Core over whether student writing had become too focused on recounting personal stories, perhaps too little focused on argument, textual analysis, and punctuation and mechanics.

Some, such as Robert Pondiscio, an ex-teacher and senior fellow at the conservative Thomas B. Fordham Institute, stated his belief that pendulum needed to swing back toward "grammar, sentence structure, and mechanics" because the heavy emphasis on "personal writing" was "profoundly idealistic, seductive, and wrong."

Others were wary of the shift pushed by the Common Core, such as Joel Zarrow, chief executive officer of the Children's Literacy Initiative, a nonprofit which works mainly with teachers helping low-income children learn to write. Mr. Zarrow argued, "You've got these high-stakes assessments going on, and teachers are too focused giving writing prompts that don't really give students the time to explore the beauty of writing because they're trying to link it so tightly to cited evidence from the text."

There are obviously good points to be made on both sides of this kind of debate, but many teachers have felt that their

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You Be the Judge
Would court stay hearing officer's order over district's claims of irreparable harm?

The Facts

An elementary-school aged autistic student's parents expressed concerns on several occasions about the best special education program for their daughter. During the 2013-2014 school year, for example, the parents objected to the fact that their daughter's desk in her second grade classroom was separated from and faced away from her classmates. The district viewed this placement as a necessary compromise, allowing the child to focus on her special needs curriculum without completely removing her from her peers.

Disputes continued throughout the 2013-2014 school year, and her parents believed their daughter's behavioral regressions—head butting, screaming, attempting to bite herself and others, and other self-injurious behavior—had to do with inappropriate services provided by the district. The parents also disputed the conclusions reached in the periodic evaluations of their daughter, which caused the district to propose placing her in a self-contained autism class, a proposal the parents rejected.

In the summer of 2014, the child's doctor and nurse practitioner both recommended that she receive "home and hospital instruction" rather than going back to school, due to her self-injurious behavior that seemed to be provoked by her fear of attending school. The district declined to pursue this route, on the ground that the child did not have a medical condition that prevented her from attending school and recommended instead a private placement.

Her parents declined the private placement on the ground that the bus ride would be too lengthy to accommodate their daughter's frequent need to use the bathroom, which was sometimes as often as every 20-minutes. On August 17, 2014, they withdrew their daughter from the district and began home schooling her. During the 2014-2015 school year, the parents home-schooled her using "Applied Behavioral Analysis" (ABA) methods.

In February 2015, the parents requested an impartial due process hearing arguing that the district failed to provide their daughter with a "free appropriate public education" (FAPE)—required under the law—by: 1) failing to provide the full continuum of required services; 2) failing to provide a researched-based, peer-reviewed program and services when it recommended placement at the private school; 3) improperly recommending a placement that was significantly distant

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professional experience and daily classroom work were largely ignored as the Common Core was being developed. That is why the recent experience in Louisiana, where teachers have been asked to put together a revised curriculum, can be instructive. Teacher Emily Howell, from the Lincoln Parish school district in Ruston, La., touts the Louisiana experience by saying of the teacher-crafted curriculum, "These are suggestions. These are things to help you. If you look at it that way you don't have to feel like someone's telling you what to do."

A quick look at the Louisiana experience

Officials at the Louisiana Department of Education did not like the ELA curriculum designed by Common Core consultants and decided to create their own. Assistant superintendent of academic content Rebecca Kockler explained, "There were some Common Core programs with real strength, but none that were meeting our bar. We felt we had no choice," as quoted from an *EdWeek* piece.

So, the state decided to partner with LearnZillion, a website brimming with Common Core resources created by teachers and freely available to the public. From Learn Zillion's online materials, 30 Louisiana teachers were brought together by state officials in 2014 to flesh out detailed study units, which were called guidebooks.

Essentially, working with LearnZillion, the state put together its own curriculum for grades 3-12 and then placed the units on a cloud-based platform. There are one to four units for each grade level, with each unit consisting of 30 to 50 individual lessons. The curriculum was then piloted in about 150 classrooms across the state by teachers who were not part of the development team.

While state officials saw the curriculum work as laborious but very successful, Jay Diskey, executive director of the Association of American Publishers pre-k-12 learning group, said publishing companies were already exploring new avenues to help states and districts. "They've been doing custom projects for school districts for quite some time," he said.

Eric Westendorf, CEO of LearnZillion, took a strong stance on the renewed role of states and districts in guiding their public education system: "Really states and districts can be the publishers. They're realizing, 'We can publish something that is more powerful than what we would buy off the shelf.'"

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from their home and under investigation by the Department of Children and Family Services for alleged wrongdoing; and 4) failing to provide proper notice and parental participation when it recommended a placement without disclosing information about the DCFS investigation.

The parents later voluntarily dropped the first issue, and the hearing officer ruled in favor of the parents on the second and third, but not the fourth. He ordered the district to reimburse the parents $10,435.62 for their costs incurred, to pay for continued in-home ABA therapy for at least six months, and to develop, by August a new IEP providing for continuing ABA therapy and an eventual transition back to the school. The district appealed to the federal court seeking a preliminary injunction and stay of the order. The parents agreed to a temporary stay of the reimbursement order and order to pay the ongoing ABA fees to that the court could consider the preliminary injunction request. Meanwhile, during the appeal the district's IEP team continued to meet to develop an IEP. The district argued that the court should issue a preliminary injunction because it faced irreparable harm if it was forced to pay for the ABA services and transition the student back to school and the court over-turned the hearing officer's order.

The Question

Did the district have a right to a preliminary injunction given the possibility that it would win on its appeal but have no means for recovering money from the parents or undoing the transition impacts? (See the answer below.)

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You Be the Judge (Answer)

Would court issue a preliminary injunction against the hearing officer's order based on district's claims of irreparable harm?

The court denied the district's request for a preliminary injunction, finding that while true that there is no mechanism for a school district to recover reimbursement money from parents if the district succeeds on appeal, the balance still weighed in favor of the parents receiving the reimbursement and the child continuing to receive needed in-home therapy services while an appropriate placement was developed.

To prevail on a request for a preliminary injunction, the district had to establish: 1) that it was likely to prevail on the merits; 2) that it was likely to suffer irreparable harm without an injunction; 3) that the harm it would suffer was greater than the harm the other party would suffer if the injunction were granted; and 4) that the injunction was in the public interest. On the merits of an appeal from a hearing officer's decision in IDEA cases, a court bases its decision on the preponderance of the evidence, giving due weight to the hearing officer's decision.

As a first matter, the court addressed the parties' arguments with respect to the "stay put" placement, agreeing with the parents that the hearing officer's decision in their favor made the relevant "status quo" the private placement with ABA therapy that the parents had instituted when they withdrew their child from school. In deciding this, the court rejected the school district's argument that the stay put placement should have been the public school, which was the last agreed-upon placement between the parties. In fact, the court ruled, the hearing officer's order in favor of the parents served as an agreement between the parents and the state as to the placement, and therefore made the private placement the stay put placement during the pendency of the appeal process.

Turning to the district's request for a preliminary injunction, the court considered each of the four factors described above.

Likelihood of success on the merits

On the likelihood of success on the merits of the claim, the court found that it could not say the district had a strong likelihood of success on the merits, noting that the student had "innumerable behavioral problems throughout the 2013-2014 school year, and all parties struggled to find an effective means of providing her with a free appropriate public education." The court concluded that the hearing officer did not err in ruling that because the child needed very frequent bathroom breaks, it was more likely than not that the distant private placement was an inappropriate placement, and based on the behavioral problems, the ABA home therapy was necessary before any return to public school. Further, the court noted that given the deference courts are required to give to a hearing officer's decision, the district's likelihood of success on the merits was low.

The court added that even if the district were to have a strong likelihood of success on the merits on its appeal of the order, the issuance of a preliminary injunction staying the district's obligation to pay for ongoing private school and therapy ses-

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You Be The Judge (Answer). . . *(Continued from page 3)*

sions would be improper given the stay put provision of the IDEA and the conclusion that the private placement was the relevant stay put placement during the appeal.

Irreparable harm

Turning to the question of irreparable harm, the court found that there were factors that did suggest the school district (or possibly other students) could suffer irreparable harm related to the hearing officer's order. As a first matter, there is no mechanism for school district's to recover funds awarded to parents for reimbursement of services in the event that the district is ultimately successful on appeal. The court noted additionally that numerous courts have found that parents cannot be forced to reimburse a school district for private tuition expenses after a hearing officer affirms the student's private placement. While the court questioned whether the payments for the ongoing ABA therapy really constituted "irreparable harm" as opposed to "discharging of a statutory requirement," the court assumed without deciding that the payments would represent irreparable harm to the district if it were to win on appeal.

The court also concluded that based on the district's argument that it would have to significantly shift staffing and other student assignments in order to transition the child back to her school, this part of the hearing officer's order would also cause irreparable harm, if not to the district, then to the other children in the district that would be impacted.

Balance of harms

Reviewing the balance of harms and taking into account that the parents were unsure if they could continue to pay for the home schooling and ABA therapy given her father was unemployed and her mother was uncertain of her health insurance, the court concluded that staying the hearing officer's order could cause obvious and significant harm to the child. The court found that the district's threat of monetary harm was clearly outweighed by the threat to the child. However, the court also acknowledged that the disruption predicted by the district that would occur for other students if the child was transitioned back in was also severe. But the court questioned if the district needed to take such drastic action as it described (which would involve moving all other autistic students to a new location and significant staffing changes), noting that the hearing officer's order required only that the child be returned to the same school and teachers. "How to effectuate that," the court wrote, "is a question left to the District's IEP team." Moreover, the litigation could conclude before the child was even transitioned back to the school so this harm was partially mitigated.

Public interest

Finally turning to the question of public interest, the court noted that the public interest favored denying the request for preliminary injunction, because the public interest favors "disabled students' receiving a free and appropriate public education." More importantly, the court found that the district did not argue that the public interest will be harmed by denying a preliminary injunction.

With all of this in mind, the court denied the district's request for a preliminary injunction.

This scenario is based on *Board of Education of Jacksonville School District v. C.P. and O.P., 2016 WL 164987 (C.D. Ill. 2016).*

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