

**MARYLAND OPT OUT LETTERS (contact [mcdermottmax@yahoo.com](mailto:mcdermottmax@yahoo.com))**

**First legal precedent in Maryland for opting out decides in favor of the parent, Match 2014: Legal precedents**

**First legal precedent in Maryland set in March 2014: <http://www.examiner.com/article/md-parent-files-suit-over-msa-opt-out-and-sets-precedent-for-future-assessments>**

**Three stages of letter writing.**

THESE LETTERS WERE WRITTEN IN STAGES OF MY OPT OUT PROCESS

**I. LETTER ONE: THE FIRST MAKES MY FIRST REFUSAL CLEAR. IT STATES LEGAL PRECEDENT FOR MY PARENTAL RIGHTS.**

Dear XXX County Administrators,

My child XXX is in XYZ grade. I am writing to inform you that I refuse to have XXX take part in the MSA's, DIBELS, PARCC, MAP, or any other form of high stakes standardized testing during the 20---20-- school year. My children love being at XYZ School because of the vibrant and supportive community created in the school, and they love and dedication shown by each of the faculty. We support the school, and we appreciate being active members of this learning community. I do not believe that the increasing pressure on children and teachers to participate in high stakes standardized testing either reflects or supports the school, its teachers, its students, or its vision for public education.

Ten years of research and analysis by academic experts working at universities from Penn State to Harvard conclusively prove that high stakes like the XXX testing harms children, undermines and restricts curricula, and punishes schools that serve the most vulnerable members of our society — children with special needs and children in poverty.

Additionally, participating in these tests 1) negatively affects my child's social-emotional well being, 2) kills her curiosity and love for learning, 3) places developmentally inappropriate and undue and unhealthy stress on her, 4) reduces her capacity for attaining new knowledge, 5) replaces her higher order thinking with a "drill and kill" curriculum, 6) diminishes opportunities for socialization, 7) shares large volumes of my child's private information to data collection agencies, data which I choose not to share beyond her school, and 7) diverts funding that could go to fund programs in my child's school to testing companies and publishing companies.

According to the U.S Constitution, specifically the 14th Amendment, parental rights are broadly protected by Supreme Court decisions (Meyer and Pierce), especially in the area of education. The Supreme Court has repeatedly held that parents possess the "fundamental right" to "direct the upbringing and education of their children." Furthermore, the Court declared that "the child is

not the mere creature of the State: those who nurture him and direct his destiny have the right coupled with the high duty to recognize and prepare him for additional obligations.” (Pierce v. Society of Sisters, 268 U.S. 510, 534-35) The Supreme Court criticized a state legislature for trying to interfere “with the power of parents to control the education of their own.” (Meyer v. Nebraska, 262 U.S. 390, 402.) **In Meyer, the Supreme Court held that the right of parents to raise their children free from unreasonable state interferences is one of the unwritten “liberties” protected by the Due Process Clause of the Fourteenth Amendment.** (262 U.S. 399). In recognition of both the right and responsibility of parents to control their children’s education, the Court has stated, **“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for the obligations the State can neither supply nor hinder.”** (Prince v. Massachusetts, 321 U.S. 158)

I have the highest confidence in WES teachers, and their professional abilities to determine Molly’s levels of proficiency in any content area using alternative forms of assessment. In lieu of the high stakes standardized tests I request that my child be given alternative forms of assessment to include but not limited to teacher-made assessments, projects, and portfolio, to be determined at the discretion of Molly’s teachers. During testing periods Molly will continue to attend school, as is her legal Constitutional right to do, and will participate in any activities or assignments deemed appropriate by her teachers and the school administrators.

We are looking forward to a positive and successful school year for her. Molly has a joy of learning and innate curiosity. I believe in preserving that joy and curiosity for her, and to support her love for her teachers and her interest in school by taking this action.

Sincerely,

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**If you are told “there is no opt out clause” or receive any generalized formal response of any kind from MSDE stating they MUST administer the tests:**

- II. LETTER TWO in RESPONSE TO MSDE IDENTIFIES CLEARLY WHAT LEGAL ACTIONS I WILL TAKE IF MY CHILD IS EITHER PUNISHED OR DENIED ACCESS TO HIS SCHOOL OR MEANINGFUL ALTERNATIVES TO THE TESTS.**

Dear Dr. Johnson,

I received a letter (see attached) from my child's school in response to my decision to **refuse** to allow my child to participate in either the **XXX grade** MSA or PARCC field testing.

**Until MSDE can demonstrate precisely where it states in MSDE written policy that my child can be forced to complete these tests I do not consider your letter to be legally binding in any way, nor am I compelled to comply with it. While it may be MSDE policy that my child is required to be assessed, I demand that my child be assessed using alternative**

**multiple measures including a portfolio evaluation or project-based assessment in lieu of MSA.**

I am well aware that there are numerous cases of opting out/refusing the MSA and other tests over the past few years in Maryland. There is existing precedent from numerous counties. I am aware of the statement made by Board member Andrew Pruski, in 2011 who works as Baltimore County schools' supervisor of assessment, who said "it was up to parents whether their students participated in testing." (2011): <http://broadneck.patch.com/articles/parents-threaten-boycott-of-msa-testing-over-heterogeneous-grouping>

I am also well informed about the opt out movements in Seattle, Chicago, New York and other places, and my actions reflect solidarity with thousands of teachers and children who are part of the broader national movement to end abusive testing practices.

My refusal to participate in MSA is in part because I believe standardized high stakes testing take away time from the instructional experiences my child might otherwise receive. I want more teaching and learning, and less testing! The state seems to believe that my child is obligated to participate in testing because the state or the policy makers demand it, when in fact the social contract of public schooling is grounded on the premise that the state and policy makers are obligated to the needs of children.

Parental rights are broadly protected by Supreme Court decisions (Meyer and Pierce), especially in the area of education. The Supreme Court has repeatedly held that parents possess the "fundamental right" to "direct the upbringing and education of their children." Furthermore, the Court declared that "the child is not the mere creature of the State: those who nurture him and direct his destiny have the right coupled with the high duty to recognize and prepare him for additional obligations." (Pierce v. Society of Sisters, 268 U.S. 510, 534-35) The Supreme Court criticized a state legislature for trying to interfere "with the power of parents to control the education of their own." (Meyer v. Nebraska, 262 U.S. 390, 402.) **In Meyer, the Supreme Court held that the right of parents to raise their children free from unreasonable state interferences is one of the unwritten "liberties" protected by the Due Process Clause of the Fourteenth Amendment.** (262 U.S. 399). In recognition of both the right and responsibility of parents to control their children's education, the Court has stated, "**It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for the obligations the State can neither supply nor hinder.**" (Prince v. Massachusetts, 321 U.S. 158)

Furthermore, it is my child's right to remain in his PUBLIC school during the testing windows whether he is sitting quietly and reading a book IN the testing room **or** his right to engage in other meaningful activities *outside* of the testing room, as determined by his teachers; or as a last resort to remove my child from the school during the testing windows. However, it is my child's right as a public school student to receive instruction daily so I will file a discrimination report with the district and consult an attorney. I am a taxpayer, and you do not have the authority to bar my child from accessing this public good of which I contribute in the form of tax payment.

Should you prove to me in writing that this last alternative is *legally required* and sanctioned, then I respectfully request to both see that policy as stated in writing so that I may show it to my attorney, and I require *written documentation* that my child and his parents WILL NOT be punished for "delinquency" –and that we are **exempt** from the usual county attendance policies.

If my child is forced to sit in the testing room and stare at the wall for upwards of 70 minutes in total silence and stillness, without being allowed to leave the test room, nor move nor speak, while refusing to test, or is intimidated in any way, this will be seen as tantamount to corporal punishment. If you attempt to force my child to do so, I will report you to the child abuse authorities. If anyone places their hands on my child after he/she has respectfully declined to report to a test site, he/she has been instructed to call the police and file charges.

I have a tremendous respect for my child's teachers and his school. They do a tremendous job and I wish to continue to send my son to a school where he looks forward to participating every day. Do not believe that a letter such as the one sent from XXX and delivered to my school administrators will force a rift between us. I will continue to work with them to be accommodating and transparent in my communication with them, even during my refusal process. My school's teachers and administrators understand that this action is no way a reflection of my feelings towards them nor is it intended as an attack toward them or the great work that they do every day. My issue is with high stakes standardized testing and the harm it does to children and our public schools.

And my refusal stands.

Respectfully yours,

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**IN RESPONSE TO LETTER #2, I RECEIVED A LETTER FROM MR. JOHNSON AT MSDE**

Dear XXXX,

Thank you for your e-mail of (date), 2014. The letter you reference, concerning "opting out" of statewide assessments, represents the position of the Maryland State Department of Education. The letter itself is not a new policy or regulation, but merely a summary of the Department's current law, regulations, and policies, drafted in consultation with legal counsel. It is the voice of the Department, not any single individual. The letter was recently written in response to inquiries from the public. Although the letter itself is not a legal document, we believe that it accurately states current state law, regulations, and policies as adopted by the General Assembly, State Board of Education, and State Department of Education.

As you may be aware, state law requires that all children attend public school, a nonpublic school, or be educated at home. For students who attend public school, state regulations permit parents to have their children opt out of only a few specific aspects of the public school curriculum. See COMAR 13A.04.18.01F(5)(a) and I(2)(a) ("Family Life and Human Sexuality" and "HIV/AIDS Instruction.").

The Code of Maryland Regulations and the Education Article of the Maryland Code contain no provisions for “opting out” of statewide assessments, and we are aware of no legal right to do so. The Maryland State Board of Education recently expressed its opinion as to the legality of a county board policy that prohibited parents from opting children out of specific classes in *Yasmear W. v. Howard County Board of Education*, MSBE Op. No. 13-56 (2013). The State Board quoted with approval the following language of the Sixth Circuit Court of Appeals in *Blau v. Fort Thomas Public School District*, 401 F.3d 381, 395-96 (6th Cir. 2005):

The critical point is this: While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally ‘committed to the control of state and local authorities.’

**Many of your concerns center on how your son’s school will address your stated refusal to have him participate in statewide math assessments. We believe these questions are best directed to your local school system and we encourage you to work constructively with them. Thank you for your concerns.**

### **MY REPLY TO CHILD’S SCHOOL BASED ON HIS LETTER (above):**

#### **III. Letter Three:**

Dear (school admins),

I am sending this to all of you simply to include everyone in the same “loop” of our ongoing conversation.

**Per the instructions from Henry Johnson of MSDE which indicates: *Many of your concerns center on how your son’s school will address your stated refusal to have him participate in statewide math assessments. We believe these questions are best directed to your local school system and we encourage you to work constructively with them*** (see full letter attached) I am writing to re-emphasize our family’s decision regarding XXXX’s refusal to participate in both MSA and PARCC field testing for spring 2014. I wish to work constructively with the school to ensure that his refusal will not result in any form of punishment to him (which includes forcing him to sit silently and not moving, or unable to leave, in the testing room) nor an insistence that he be removed from school during the testing weeks (which violates his civil and Constitutional right to attend public school, and may result in attendance/truancy policy sanctions against us).

I am aware that there is no “opt out” clause in the state of Maryland. But the state has yet to provide any legal documentation that my child may not exercise his right to **refuse** the tests. Please be aware that when XXXX is asked to test (as per MSDE rules), XXX will then verbally refuse the test and will be sent into school with an accompanying note signed by me. In the case of PARCC field testing, since this is only a “field” test year, as such is not within the required

testing mandates put forth by MSDE, nor will it have any instructional value for my child, but serves only the testing company to “improve” the quality of their tests. It is not within any MSDE-sanctioned facet of the essential curriculum or his learning.

In regards to the MSAs, there are *numerous precedents* happening right now and in previous years in Baltimore County and neighboring counties in which children are refusing to participate in MSAs; and I am willing to use those as legal precedent along with a history of Supreme Court cases that have been used in all 50 states to successfully defend a student and parents right to refuse participation in standardized testing.

The schools I mentioned in the previous paragraph have exercised Dr. Johnson’s recommendation to be the final decision-maker, and are allowing those children who refuse to remain either in the testing room completing a quiet activity, or to be placed elsewhere (such as the main office) where they are to complete a quiet and self-directed activity.

XXX is prepared to come to school every day with alternative meaningful self-directed learning activities that support the essential curriculum for his reading/language and math content for his XY grade classes.

**I believe we can work *constructively together* to ensure that XXX will not be negatively affected in any way, and that successful alternatives that are neither punitive nor require further legal complications are indeed possible.**

Thank you.

Respectfully yours,

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#### **A BRIEF HISTORY OF LEGAL PRECEDENTS FOR REFUSING HIGH STAKES STANDARDIZED TESTING**

**“Meyer v. Nebraska** upheld parents' rights by affirming “the natural duty of the parent to give his children education suitable to their station in life...” Clearly the preferences of the parents in educational matters outweighed those of the government. The court further emphasized, “The Fourteenth Amendment guarantees the right of the individual ... to establish a home and bring up children, to worship God according to his own conscience.”

**Pierce v. Society of Sisters** confirmed **Meyer v. Nebraska** and parents’ right to direct the upbringing of their children with regard to religions matters and to direct their children's education. The decision in Pierce, struck down an Oregon education law which, required all children ages eight and sixteen to be educated in public schools. The Court stated: "Under the doctrine of Meyer v. Nebraska, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children. The Pierce decision also upheld parents' rights to protect their children from government standardization, making it clear that children "are not the mere creature of the state..."

The Supreme Court's decision in **Prince v. Massachusetts** clearly admitted that parents held the highest responsibility and right to control the upbringing of their children, not the State.

"It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder."

**Griswold v. Connecticut**, emphasized that the state cannot interfere with the right of a parent to control his child's education, and that the right to educate one's child as one chooses is guaranteed in the Bill of Rights. The Court further stated that this right was applicable by the First and Fourteenth Amendments.

**In 1972, Wisconsin v. Yoder** upheld the Pierce decision by declaring:

"This case involves the fundamental interest of parents, as contrasted with that of the state, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring tradition."

The 1996 decision in *M.L.B. v. S.L.J.* firmly voiced that the choices about marriage, family life, and the upbringing of children were ranked as "of basic importance in our society," again emphasizing that the rights sheltered by the 14th Amendment against the government's "unwarranted usurpation, disregard, or disrespect." This particular case involved the State's authority to permanently sever a parent-child bond. The Court's decision unequivocally upheld parents' rights in general.

The Supreme Court in **Reno v. Flores in 2000 states:** "There is a presumption that fit parents act in their children's best interests, there is normally no reason or compelling interest for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children," and **Troxel v. Granville**, "The state may not interfere in child rearing decisions when a fit parent is available."

In 1978, Congress enacted the **Protection of Pupil Rights Act**, which gives parents the right to inspect educational material--ALL educational material, which would include anything used in the course of providing instruction to our children.....A parent has the right to remove a child from objectionable classroom instruction and/or activity. **Three clauses in two different amendments** lay the solid foundation for these constitutional provisions: **the Fourteenth Amendment's Due Process Clause, and the First Amendment's Free Speech and Free Exercise Clauses.**

**The First Amendment Free Speech and Free Exercise Clauses**, combined with the Fourteenth Amendment's fundamental liberty interest of parents to direct the education and upbringing of their children, form a strong foundation upon which parents can assert their right to opt their children out of objectionable school material or activities. The higher the degree of coercion on students to participate in, or otherwise endorse the classroom activity, the stronger the constitutional argument in favor of a parental opt-out right. "

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## QUESTIONS TO CONSIDER

### Regarding the cases mentioned by Dr. Johnson:

*Thoughts from a parent who is also a lawyers (in personal correspondence):*

"Neither the ones cited by those of us who oppose the testing, nor the ones which the schools cite for the right to impose the testing. For example, the school relies on one that deals with a Muslim parent that wants to exempt her daughters from music classes for religious reasons, which is a **curriculum based**

question, not testing, not on point. (It is not even a judicial case, by the way, it is an affirmed decision of a local school board by the state school board.)The Sixth Circuit case is about a child's challenge to a school dress code. Not on point. The only thing in these cases is a great deal of "dicta". Dicta is verbage that has nothing to do with what the court is ruling on and therefore is not precedent."

### **Can you access MSDE or county testing policies through Freedom of Information Act?**

Yes. The state of Maryland has a Public Information Act- which basically requires all governmental entities to release those documents unless protected. If there is a violation of law, civil and criminal penalties apply to supervisors and staff. A charge applies for the retrieval and production of the information. Clarify on the public information request, when you request information clearly state " Pursuant to the Maryland Public Information Act, I am requesting XYZ..... Failure to produce documents that are not afforded any confidential protection is a violation of the MPIA and subject to criminal and civil penalites.....etc." Also, when you send a public records request, you have to be sure that it is directed to the appropriate person for that entity.

See: <http://www.examiner.com/article/parentshb-can-opt-out-of-maryland-standardized-assessments>