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FORMAL OPINION	)	
	)	No. 14-02
OF	)	
	)	August 12, 2014
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This opinion, requested by Robert Hammond, Commissioner of Education of the Colorado Department of Education, concerns the implementation of the READ Act, § 22-7-1201 *et seq.,* C.R.S., among English Language Learner students in those districts utilizing literacy instruction in both English and Spanish.

QUESTIONS PRESENTED AND CONCLUSIONS

Question: Is it permissible under the READ Act to determine whether a child has a "Significant Reading Deficiency" by testing that child using the State Board of Education-approved interim assessments normed for students who speak Spanish as their native language?

Answer: Yes.

DISCUSSION

I. Background

The question presented in this opinion request is whether, by passing the READ Act in 2012, the General Assembly altered long-standing Colorado law regarding educational programs for English Language Learner students. Traditionally, two approaches have been used by Colorado school districts in educating English Language Learners; the first and most prevalent utilizes programs relying primarily or only on English language instruction; the second utilizes programs that offer instruction in both English and Spanish. The latter are designed to support language development and literacy in both languages. Under Colorado law, school districts have discretion to adopt and implement either

approach.[1] The question at issue here is whether the READ Act effectively prohibits dual language programs by requiring reading proficiency to be developed in English only.

The Colorado Reading to Ensure Academic Develop Act (the "READ Act") was passed by the General Assembly and signed by the Governor in 2012. The READ Act focuses on early literacy development for all students, and especially for students at risk of not achieving third grade reading proficiency. Thus, the READ Act focuses on kindergarten through third grade literacy development, literacy assessment, and individual READ plans for each student reading significantly below grade level.

To that end, the READ Act requires that all children in kindergarten through the third grade be assessed using one of several interim assessments approved by the State Board of Education to determine whether a student has a Significant Reading Deficiency. If a Significant Reading Deficiency is indicated, the READ Act requires the use of a diagnostic assessment to determine the areas of deficiency and to develop a READ Plan individualized for that student.

Within this system, confusion has arisen regarding the use of interim assessments used to identify a Significant Reading Deficiency in English Language Learners. This confusion arises because there are two different types of literacy programs used by Colorado school districts for English Language Learners; those that utilize primarily or only English language literacy instruction, and those that utilize literacy instruction in both English and Spanish. Specifically, the question presented is whether those school districts utilizing literacy instruction in both English and Spanish must assess whether their students have a Significant Reading Deficiency in English only, or whether the assessments and determination can be made in Spanish as well.

II. Analysis

The purpose of the READ Act is to ensure that students become proficient in the skill of reading. There are other provisions of law that seek to encourage and

[1] *See* Colo. Const., art. IX, § 15 (establishing local control of instruction in the public schools of their respective districts); *see also* English Language Proficiency Act, §§ 22-24-101, C.R.S. *et seq*., establishing English language proficiency programs in public schools and providing moneys to school districts to help defray the costs of such program; § 22-24-104(6), C.R.S. (2012), stating "[n]othing in this article shall be construed to prohibit use of moneys made available under this article by a district, the state charter school institute, or a facility school for bilingual programs, English-as-a-second-language programs, or any other method of achieving the purposes of this article. Districts, the state charter school institute, and facility schools conducting such programs shall receive moneys made available under this article only on the basis of the number of students with limited English proficiency enrolled in such programs.

test proficiency in understanding the English language, but the READ Act's focus is on the skill, not the language in which it is employed.

The key to the READ Act is the required reading assessments. The Act charges the State Board of Education with adopting the list of approved reading assessments that school districts may use to meet the requirements of the Act. § 22-7-1209(1)(b), C.R.S. Notably, the READ Act requires that "[a]t least one of the recommended reading assessments for kindergarten and first, second, and third grades is normed for the performance of students who speak Spanish as their native language, which assessment is available in both English and Spanish." § 22-7-1209(2)(a)(II)(D), C.R.S.

Further, the Act preserves local discretion to choose which assessments they will use from the list approved by the State Board:

> Each local education provider shall select from the list of approved reading assessments those reading assessments that it will administer to students in kindergarten and first, second, and third grades. Each local education provider is encouraged to use the instructional programming in reading and professional development programs included on the advisory lists…

§ 22-7-1209(2)(e), C.R.S. These provisions strongly indicate that the READ Act allows for assessments both in English and Spanish.

No other provisions in the Read Act are to the contrary. The READ Act defines the term "Significant Reading Deficiency" as meaning "that a student does not meet the minimum skill levels for reading competency in the areas of phonetic awareness, phonics, vocabulary development, reading fluency, including oral skills, and reading comprehension established by the state board pursuant to § 22-7-1209 for the student's grade level." § 22-7-1203(15), C.R.S. The definition is silent on the language in which Significant Reading Deficiency is to be determined. Nor do the minimum skill levels established by the State Board pursuant to § 22-7-1209, C.R.S. mention in which language the determination should be made.

Finally, the READ Act also directly addresses English Language Learners in the provisions governing the determination on grade advancement. This provision states that:

> Beginning no later than the 2013-14 school year, if, within forty-five days before the end of any school year

> prior to a student's fourth grade year, a teacher finds that a student has a significant reading deficiency, personnel of the local education provider [i.e., the school district] shall provide to the student's parent the written notice described in subsection (2) of this section; except that the provisions of this section shall not apply if:…
>
> (b) the student is a student with limited English proficiency, as defined in section 22-24-103, and the student's significant reading deficiency is due primarily to the student's language skills…

§ 22-7-1207(1)(b), C.R.S. The rest of this section of the Act goes on to outline the process used by the school district in meeting with the parent, and determining whether the student identified with the Significant Reading Deficiency should be advanced to the next grade level. Thus, if a student is identified as having a Significant Reading Deficiency and that deficiency is due primarily to that student's language skills, then that student is exempt from consideration of withholding advancement under the Act. Significantly, this provision would not apply if a student is not identified as Significantly Reading Deficient due to being able to read at or near grade level as determined by a Spanish language assessment.

Reading these provisions as a whole, I conclude that those school districts that have adopted literacy instructional programs utilizing both English and Spanish instruction are not required by the READ Act to assess whether their students have a Significant Reading Deficiency using only the English reading assessments. Rather, school districts falling into this category may, under § 22-7-1209(2)(e), C.R.S., decide to administer the Spanish language reading assessments and make the determination of a Significant Reading Deficiency based upon the students results on the Spanish language tests.

It should be noted that while the READ Act is focused on assessing and improving proficiency in the skill of reading rather than in reading the English language, other provisions of state and federal law do address English proficiency. Under the English Language Proficiency Act ("ELPA"), section 22-24-101 *et seq.,* C.R.S., for example, each school district is required to identify students who may have limited English proficiency, to assess such students on an annual basis for English proficiency using an assessment approved by the Department, and to administer and provide programs for such students to gain proficiency in the English language. Section 22-24-105(1) and (2), C.R.S. Bilingual programs, as well as English-as-a-second-language programs, are expressly approved for funding under ELPA. Section 22-24-104(6), C.R.S. The annual English proficiency assessments required under ELPA, as well as the other English proficiency program requirements in state and federal law, are completely independent of the provisions

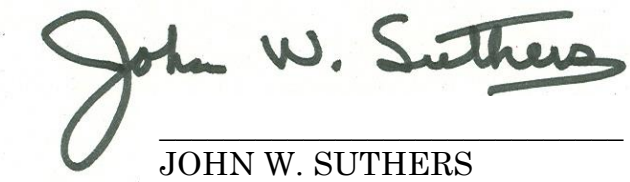
of the READ Act, and thus are in no way impacted by this legal opinion. *See also* 20 U.S.C. section 7011(8)(definition of federally-mandated English language instructional program); 20 U.S.C. section 6311(b)(7) (federal requirements for annual assessments of English language proficiency).

In sum, Colorado law provides for different mechanisms for trying to test and encourage proficiency in reading and in understanding the English language. The READ Act is focused on the former, and gives each school district discretion, based upon its specific approach to instructional programming in reading, to make the determination as to which assessment to select from an approved list including both English and Spanish assessment tools. The Act appears to have been deliberately written to accommodate the fact that literacy programs utilizing primarily or only English and literacy programs utilizing instruction in both English and Spanish are in use in Colorado, and, consistent with local control, *see* Colo. Const., Art. IX, sec. 15, to give authority to the local school districts to determine which assessment strategy best fits its local programmatic approach.

CONCLUSION

For the foregoing reasons, I conclude that school districts may, in their discretion and based upon the literacy program in use in the district, determine whether a child has a "Significant Reading Deficiency" by testing that child using only the State Board of Education-approved interim assessments normed for students who speak Spanish as their native language.

Issued this 12th day of August, 2014.



JOHN W. SUTHERS
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