

# State Legislatures Opting in to Opting Out

BY: MICHELLE CROFT AND RICHARD LEE

Despite (or because of) the federal requirement that all students in certain grades participate in statewide achievement testing, stories of parents opting their student out of the testing gained national attention in the media in the spring of 2015.<sup>1</sup> Ultimately, twelve states—California, Colorado, Connecticut, Delaware, Idaho, Maine, New York, North Carolina, Oregon, Rhode Island, Washington, and Wisconsin—received a notice from the

U.S. Department of Education that they needed to create a plan to reduce opt-outs due to low participation rates.<sup>2</sup> When statewide testing came in spring 2016, there were more stories of opt-outs, and information about districts failing to meet participation requirements will follow in the coming months.<sup>3</sup> Early reports from New York indicate that 21% of students in grades 3–8 opted out in 2016, which was slightly more than the prior year.<sup>4</sup>

## Participation Rate Requirements

The Elementary and Secondary Education Act (both the No Child Left Behind and the Every Student Succeeds authorizations) requires that all students annually participate in statewide achievement testing in mathematics and English in grades 3–8 and high school as well as science in certain grade spans. Ninety-five percent of students at the state, district, and school level must participate; otherwise there is a range of consequences.

Under the No Child Left Behind authorization, the school would automatically fail to meet Adequate Yearly Progress if the school—or subgroups of students within the school—did not meet the participation rate requirement.<sup>5</sup> The Every Student Succeeds Act (ESSA) provides states with greater flexibility to determine how to incorporate the participation rate into the state's accountability system.<sup>6</sup> However, in proposed regulations, the state will need to take certain actions such as lowering the school's rating in the state's accountability system or identifying the school for targeted support or improvement, if all students or one or more student subgroups do not meet the 95% participation rate.<sup>7</sup>

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The prevalence of opt-outs is particularly interesting as the majority of states (30 states and the District of Columbia) have statutes that require all students to participate.<sup>8</sup> The majority of the remaining states allow opt-outs in limited exceptions, such as family emergencies;<sup>9</sup> give districts the autonomy to set their own policy;<sup>10</sup> or generally permit opt-outs.<sup>11</sup> In these states, the state does not promote opt-outs, and some of the states, such as Oklahoma, explicitly state that students are not immune from consequences if they opt out.<sup>12</sup> Finally, there are two states—Oregon and Utah—with laws enacted in 2015 that not only allow for opt-outs but also require the state and/or schools to inform parents of the right to opt out.<sup>13</sup> These recently enacted laws illustrate the shift from either banning opt-outs on one hand or allowing them with potential consequences for students (and schools) on the other, to formalizing the opt-out process and removing consequences.

The remainder of this report discusses opt-out legislation introduced in the 2015 and 2016 legislative years. Although most of the bills introduced will not become law, they serve as an important means toward a broad understanding of the issue, given that legislative language is often shared across states.

## Method

To identify legislation we used CQ StateTrack, a database that monitors state legislation, as well as the National Conference of State Legislatures' College & Career Readiness Standards Legislation Dashboard for 2015 and 2016. The study includes bills filed from the start of the 2015 legislative year through May 31, 2016.

The existing laws and introduced legislation fall into five categories: (1) notification of the right to opt out; (2) description of the opt-out process; (3) what the opt-out student does during testing; (4) consequences for the student; and (5) consequences for the schools.

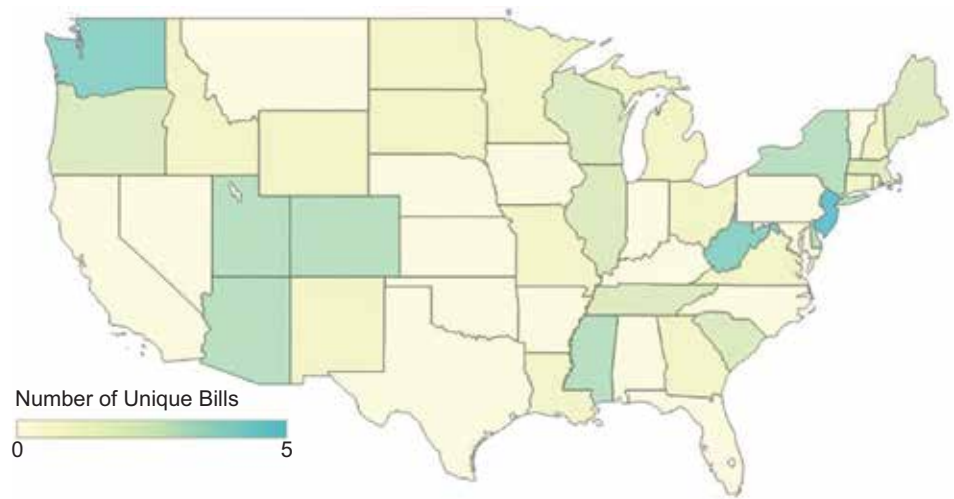
## Results

Eighty-seven opt-out bills were filed in 2015 and 2016, and of those, 65 were unique assessment opt-out bills (Figure 1).<sup>14</sup> As of June 2016, five states have signed opt-out bills into law. Four (Oregon, Utah, Colorado, and Wisconsin)<sup>15</sup> were signed in 2015 and one in 2016 (Georgia).<sup>16</sup> In addition, two states—New Jersey and Virginia—have enacted opt-out-related bills. The New Jersey bill prohibits the withholding of state school aid from a school district based on its student participation rate in state assessments.<sup>17</sup> The Virginia bill

prohibits schools from including opt-outs when calculating the passage rate for the purpose of state accountability unless the exclusion would result in the school not meeting state or federal participation rate requirements.<sup>18</sup>

Nearly all of this legislation provides all students with the unrestricted right to opt out.<sup>19</sup> In some cases, however, the bills were limited to a particular group of students, such as students with disabilities.<sup>20</sup> In nine cases, the bills permitted opt-outs only from particular tests, generally tests based on the Common Core State Standards.<sup>21</sup>

**Opt-out process.** The purpose of most of the bills was to detail the opt-out process. The process typically had two components: informing parents of their right to opt out and describing how parents could request the opt-out.



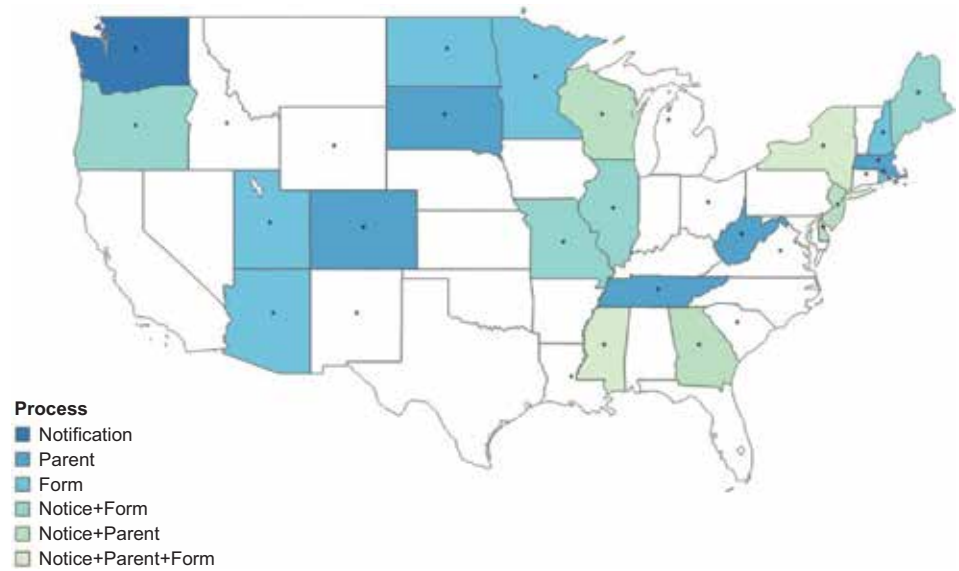
Note: Alaska and Hawaii are not pictured. Alaska had a set of companion bills; Hawaii had multiple sets of bills.

**Figure 1.** 2015–2016 Introduced Opt-Out Legislation

**Parent notification.** Nineteen bills in 12 states required the school, district, or state to notify parents of their right to opt out (Figure 2). Some of the legislation specified the type of information that must be included in the notice. For example, Michigan H.B. 2315 and Oregon H.B. 2655 required notice about the administration of the assessments, the time frame for administration, and the right to excuse a student from participation. In Washington, S.B. 6476 required notification of the right to opt out that included identifying aspects of the high school state standardized test that “could positively affect students if they take or pass the test.” Some bills also provided a time frame for notification. For instance, the Missouri bill (H.B. 2315) required notification at the beginning of the school year as well as 30 days prior to testing. New York A.B. 6025/S.B. 4161, on the other hand, required informing parents seven to 14 days prior to testing.<sup>22</sup>

**Opt-out requests.** Although 13 bills in 10 states simply required parents to write a note of refusal to the school, 17 bills in 13 states required the creation of an opt-out form for parents to complete and return. The bills differed on which entity was responsible for creating the form. Three bills included the form in the bill. Eleven required the state department of education to create the form. Two bills assigned creation of the form to districts, and one to a special commission.

The required content of the form varied. At one extreme, Missouri (H.B. 2315) and Oregon (H.B. 2655) required that an explanation of the purpose and value of assessments accompany the explanation of the right to excuse the student. At the other extreme, Rhode Island



Note: Asterisked states are those with some type of opt-out legislation. Alaska and Hawaii are not pictured; Hawaii had legislation requiring parental notification.

**Figure 2. Legislation Describing Opt-Out Process**

S.B. 736 required the form to specify that the student would be provided an alternative setting during testing, that no disciplinary action would be taken against the student, and that the student’s academic record would not be adversely affected.

One challenge with the use of the parent form is confirming that it was the parent who completed the form. Utah S.B. 204 sought to address this concern by allowing local education agencies (LEAs) to request to speak with a parent about the parent’s request to exclude the student. The bill allowed the LEAs to both speak with the parent generally about the request as well as to verify that it was the parent who authorized the request.

A potential benefit of the form is that it could specify, or require clear identification of, which assessments the student would not take. For example, West Virginia

H.B. 4383 allowed parents to submit a refusal in writing to the school at any time during the school year, but “[w]here the refusal is not specific as to what standardized assessment it is intended to apply, it shall apply to any and all standardized testing unless and until said refusal is withdrawn by the parent or legal guardian in writing.”

**What the opt-out student does during testing.** Eighteen bills in 14 states specified offering educational activities, or some other type of activity such as study time, reading, or ungraded alternatives, to students who have opted out of a state test administration (Figure 3).

Some of the states provided further definitions of such activities; for example, South Carolina H.B. 4330 required “meaningful alternative activities or assignments that will continue to promote academic and intellectual growth during

the standardized testing window.” Another bill, New Hampshire H.B. 1338, required that the district and parent agree on the activity.

Most of the bills were silent about where the activities would take place. Bills in two states acknowledged the test security implications of having some students test and others participate in alternative activities.<sup>23</sup> Georgia S.B. 355, instead of specifying the types of activities, prohibited the use of “sit and stare” policies where students would be in the same room as the tested students but would not be doing anything. Likewise, a set of bills filed in New Jersey (A.B. 2981, A.B. 3331, and A.B. 4165/S.B. 2767) prohibited any educational activities from taking place in the same room as testing.

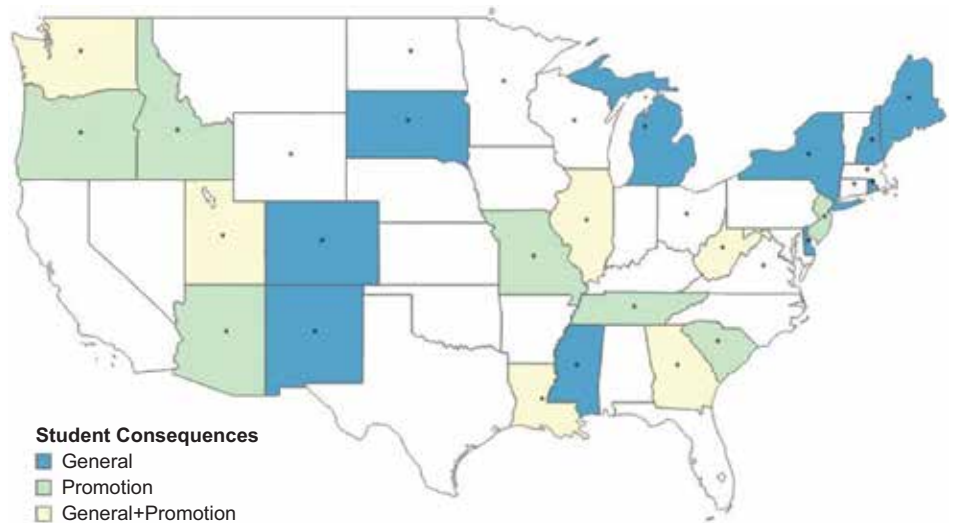
**Consequences for the student.** Unlike existing opt-out statutes in which students bear the consequences of not testing, the legislation filed since 2015 generally specified that there be no penalty against students for opting out. Twenty-one bills in 15 states included such provisions (Figure 4).

To address cases in which assessment results are used in decisions about promotion to or placement in the next grade (e.g., a third-grade reading requirement) or to graduation, states created a few different models. One model required the school or LEA to develop some type of an alternative. The types of alternatives varied: “sufficient” (Arizona H.B. 2246), “comparable in rigor and skill” (Washington H.B. 2167), and “not more rigorous” (Utah H.B. 164). Georgia S.B. 355 took a different approach, in which the placement and promotion procedures would be the same as if the student did not reach grade level expectations on the assessment, but students could appeal if their retention was based solely on non-participation.



Note: Asterisked states are those with some type of opt-out legislation. Alaska and Hawaii are not pictured. Neither state had legislation related to educational activities during testing.

**Figure 3. Legislation Requiring Educational Activities**



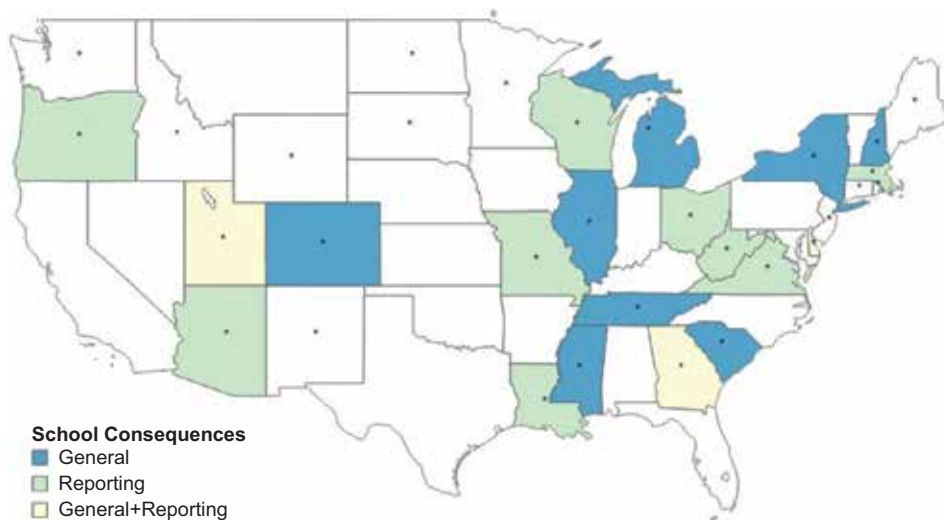
Note: Asterisked states are those with some type of opt-out legislation. Alaska and Hawaii are not pictured; neither state had legislation related to student consequences.

**Figure 4. Legislation Detailing Consequences for Students**

Eighteen bills in 13 states stated that there would be no consequences related to promotion.<sup>24</sup> Only one set of bills in New Jersey (A.B. 4165/S.B. 2767) and one bill in North Dakota (H.B. 1283) explicitly stated that students were not exempt from local graduation requirements requiring testing.

**Consequences for the school.**

**General.** Similar to consequences for students, 16 bills in 13 states generally prohibited consequences for the school (Figure 5). These bills are potentially problematic because they may conflict with some of the proposed ESSA regulations requiring that the state



Note: Asterisked states are those with some type of opt-out legislation. Alaska and Hawaii are not pictured. Neither state had legislation related to school consequences.

**Figure 5. Legislation Detailing Consequences for Schools**

take action such as lowering a school’s performance rating if a school fails to meet necessary participation rates.<sup>25</sup>

*Reporting and data maintenance.* Fifteen bills in 12 states related to how results are publicly reported. For instance, Utah S.B. 204 required rulemaking that would prevent negative impacts of opt-outs on school grades or employee evaluations. Using more neutral language, Ohio H.B. 420 and Wisconsin A.B. 239/S.B. 193 excluded testing refusals when calculating a district’s rating. Virginia S.B. 427 prohibited schools from including opt-outs when calculating the pass rate unless the exclusion would result in the school not meeting state or federal participation rate requirements. Other bills simply required notations on the school report card if the opt-outs affected a school’s rating (Missouri H.B. 2315 and Oregon H.B. 2644). Only Delaware H.B. 50 required the state to maintain a data system to track opt-outs and report the results.<sup>26</sup>

## Discussion

Prior to 2015, very few states had a formal opt-out law. Opt-outs were limited to students unable to complete the assessment during the testing window due to medical or family emergencies; otherwise, students would face consequences for not participating. In states that allowed opt-outs, districts were generally permitted to create the policy and process. Legislation introduced in the last two years moves toward formalizing the opt-out process and removing consequences for both students and schools. This shift has a number of implications, discussed below.

### 1. Conflicting messages about the importance of testing

The parental notification requirement sends mixed messages to parents about the importance of standardized testing. It places state departments of education and local districts in the awkward position of explaining why it is important for a student to participate in testing while

giving parents notice of the right not to participate.

An example of this conflict can be found in Oregon. In the fall of 2015, Oregon first implemented its notice requirement and required parents to attest the following: “I understand that by signing this form I may lose valuable information about how well my child is progressing in English Language Arts and Math. In addition, opting out may impact my school and district’s efforts to equitably distribute resources and support student learning.”<sup>27</sup> After the notice was released, opt-out advocates accused the Department of Education of overselling the value of testing, and some parents stated that they would refuse to submit the state-created form.<sup>28</sup>

### 2. Burden on the districts

The legislation includes a number of implementation challenges at the local level, the greatest of which is requiring local districts to develop alternatives to the statewide assessments for graduation and promotion purposes. Particularly when high-stakes decisions are attached, such as high school graduation or promotion to the next grade, it is important that the assessments accurately and fairly measure student knowledge, and states spend a significant amount of resources to ensure that their state tests are of high quality.<sup>29</sup> It would be challenging and resource intensive for districts to create comparable assessments for a small number of opt-out students.

Further, having to provide alternative educational activities is problematic from a staffing perspective and can become even more so if the district and the parent must agree on an appropriate activity. There may also be test security implications

depending on where the alternative activities take place. For example, if activities take place in the same room as testing, there is a greater chance that test content may be exposed or that disruptions may occur during testing which could affect test scores.<sup>30</sup>

### 3. Conflict with ESSA

States with laws prohibiting consequences against the schools for low participation rates may struggle to meet the ESSA requirement that states take action against schools that fail to meet the participation-rate threshold.<sup>31</sup> The first two actions included in the proposed regulations—a lower summative rating and being categorized in the lowest performance level—would likely violate the state law. States would need to determine if the proposed third action (identifying a school for targeted support and improvement) constituted a penalty under the state law or, if not, whether (per the fourth proposed action) they would instead need to develop “another equally rigorous State-determined action” that meets both federal and state requirements.

### 4. Public reporting

Most of the legislation does not sufficiently address the validity implications related to public reporting. If there are questions about the validity of the scores, states should require a notation on the school report card. Further, to help identify schools or districts where opt-outs may be distorting the aggregated test scores, states should require tracking of the opt-outs to better monitor which and how many students are opting out. ■

## Notes

1. For example, Erin Richards, “Parents Opting Kids Out of New Badger Exam,” *Milwaukee Journal Sentinel*, April 21, 2015, p. A1. Carl Campanile, “Test Foes Aren’t So Common,” *The New York Post*, April 13, 2015, p. 4. John Higgins, “School-Test Backlash Rippled Across State,” *The Seattle Times*, July 10, 2015, p. A1. Madeline R. Conway, “Parents, teachers protest exams,” *The Philadelphia Inquirer*, July 8, 2015, p. B02.
2. Alyson Klein, “Ed. Dept. to States: Even Under ESSA, You Need a Plan for High Opt-Out Rates,” *Education Week* (Dec. 22, 2015), [http://blogs.edweek.org/edweek/campaign-k-12/2015/12/ed\\_dept\\_to\\_states\\_under\\_essa\\_need\\_plan\\_for\\_opt-Outs.html](http://blogs.edweek.org/edweek/campaign-k-12/2015/12/ed_dept_to_states_under_essa_need_plan_for_opt-Outs.html)
3. For example, Brittany Shammass, “Third-Graders Who Skip Test may be Held Back,” *Fort Lauderdale Sun-Sentinel*, June 19, 2016, p. 1. Corbett Smith, “Opting Out an Option,” *The Dallas Morning News*, May 30, 2016, p. A01. Maureen Magee, “San Diego Schools Try to Reduce Standard Testing,” *The San Diego Union Tribune*, May 5, 2016, p. B1. Allison Ross, “Some Parents Opting Out of K-PREP,” *The Courier-Journal*, May 5, 2016, p. A4. Eric Stirgus, “Some Kids Pulled From Testing,” *The Atlanta Journal Constitution*, May 2, 2016, p. 1B.
4. Daarel Burnette II, “A Fifth of New York Students Opted Out of This Year’s Common Core State Exams,” *Education Week*, August 1, 2016.
5. No Child Left Behind, 20 U.S.C. §1111(b)(2)(l)(3).
6. S.B. 1177-6 to be codified as 20 U.S.C. §1111(c)(4)(E).
7. The four identified actions include: (1) assigning the school a lower summative rating in the State’s accountability system; (2) ranking the school in the lowest performance level on the State’s Academic Achievement indicator; (3) identifying the school for targeted support and improvement; or (4) taking “another equally rigorous State-determined action, as described in its State plan . . . that will result in a similar outcome for the school in the system of annual meaningful differentiation and will lead to improvements in the school’s assessment participation rate so that it meets the 95% participation requirements.” 81 Fed. Reg. 104 (May 31, 2016) (to be codified at 34 C.F.R. pts. 200.15).
8. Sarah-Jane Lorenzo, *Responding to Opt-Out Requests: The Opportunity for State Boards* (Opt-Out Guidance By State Supplement) (Alexandria, Virginia: National Association of State Boards of Education, 2015), [http://www.nasbe.org/wp-content/uploads/Lorenzo\\_opt-out-guidance-table.pdf](http://www.nasbe.org/wp-content/uploads/Lorenzo_opt-out-guidance-table.pdf). Michelle Croft & Richard Lee, *Opting Out of Statewide Assessments: Current Law and Recent Legislation*, Presentation at the Education Law Association Annual Conference (2016). Of the twelve states identified by the U.S. Department of Education for failing to meet participation requirements, five—Connecticut, Delaware, New York, North Carolina, and Rhode Island—do not have state or district opt-out statutes illustrating that states do not need opt-out laws in order for there to be opt outs.
9. The states include Kansas, Kentucky, New Mexico, and Rhode Island. Pennsylvania, allows exemptions based on religious beliefs. 22 Pa. Stat. § 4.4(d)(4). Croft & Lee, *Opting Out* (2016).
10. The states include: Idaho, Montana, Nevada, North Dakota, and South Dakota. Croft & Lee, *Opting Out* (2016).
11. The states include: California, Colorado, Maine, Minnesota, Nebraska, Oklahoma, Washington, and Wisconsin. Croft & Lee, *Opting Out* (2016).
12. Lorenzo, *Responding to Opt-Out Requests* (2015).
13. H.B. 2655, 78th Leg. Assembly (Or. 2015) (codified Or. Rev. Stat. § 326.565) and S.B. 204, 2015 General Session (Utah 2015) (codified Utah Code Ann. § 53A-15-1403).

14. There were sets of identical companion bills or bills that were reintroduced in 2016 from 2015. For purposes of this report they are only counted once. Also, because this report is limited to discussing opt-out from statewide testing, other bills, such as bills related to parent opt-out from surveys (e.g., Alabama H.B. 267, Regular Session 2016 (Ala. 2016) and Arizona H.B. 2088, 52nd Legislature, Second Regular Session (Az. 2016)), are not discussed here.
15. H.B. 2655, 78th Leg. Assembly (Or. 2015). S.B. 204, 2015 General Session (Utah 2015). H.B. 1323, First Regular Session, 70th General Assembly (Co. 2015), S.B. 21, 2015-2016 Legislature (Wi. 2015). Utah also enacted a law that would allow districts to waive certain assessment requirements for students in grade 11. H.B. 200, 2016 General Session (Utah 2016) (to be codified § 53A-1-603).
16. S.B. 355 2015-2016 Regular Session (Ga. 2016).
17. A.B. 4485 and S.B. 2881, 216th Legislature (N.J. 2015).
18. S.B. 427, 2016 Session (Va. 2016).
19. Four bills did not permit opt-outs but provided additional information related to opt-outs. The enacted New Jersey and Virginia bills were described above. South Carolina H.B. 5156/S.B. 1193, 121st Legislative Session (2016) would have approved the updating of test security regulations related to opt-outs. The regulations would clarify language related to “failing to test and exempting students from being assessed” related to opt-outs. The other bill was Maine H.B. 471/L.D. 695, which would have required the state department of education to create a report outlining state and federal laws related to the right to opt out and update the report annually.
20. See New York’s S.B. 6337, 2015-2016 Session (N.Y. 2016). In Tennessee there was a bill that proposed limiting opt-outs to high school students who met certain grade point average, absence, and conduct requirements. H.B. 2462/S.B. 215, 2016 General Assembly (Tn. 2016).
21. Massachusetts H.B. 311, 189th General Court (Mass. 2015-2016); Mississippi S.B. 2468, Regular Session 2015 (Miss. 2015); Mississippi S.B. 2547, Regular Session 2016 (Miss. 2016); New Jersey A. 2981, 217th Legislature (N.J. 2016); New Jersey A.B. 4165, 216th Legislature (N.J. 2015); New York A.B. 6025/S.B. 4161, 2015-2016 Session (N.Y. 2015), Rhode Island S.B. 736, 2015 General Assembly (R.I. 2015) and South Carolina H.B. 4330/S. 872 121st Legislative Session (2015).
22. The notification one to two weeks prior to testing can be problematic from a test administration perspective, particularly if there are paper-and-pencil booklets, which must then be stored during the testing window.
23. John Fremer & John Olson, *TILSA Test Security: Lessons Learned by State Assessment Programs in Preventing, Detecting, and Investigating Test Security Irregularities* (Washington, District Of Columbia: CCSSO, 2015), [http://www.ccsso.org/Resources/Publications/TILSA\\_Test\\_Security\\_Lessons\\_Learned\\_by\\_State\\_Assessment\\_Programs\\_in\\_Preventing\\_Detecting\\_and\\_Investigating\\_Test\\_Security\\_Irregularities\\_.html](http://www.ccsso.org/Resources/Publications/TILSA_Test_Security_Lessons_Learned_by_State_Assessment_Programs_in_Preventing_Detecting_and_Investigating_Test_Security_Irregularities_.html)
24. Three bills also discussed the use of incentives. Utah’s S.B. 402, which was enacted into law, prohibits additional incentives/rewards for taking an assessment. In New York, A.B. 6025/S.B. 4161, prohibited incentives for participation. A.B. 6025/S.B. 4161, 2015-2016 Session (N.Y. 2015). Similar to Washington S.B. 6476 discussed earlier, a pair of companion bills also filed in Washington (H.B. 2670/S.B. 6458) required information about the types of incentives that could positively affect students if they take and pass the high school tests to be included in a notice to parents. S.B. 6476, 64th Legislature (Wash. 2016); H.B. 2670/S.B. 6458, 64th Legislature (Wash. 2016).
25. 81 Fed. Reg. 104 (May 31, 2016) (to be codified at 34 C.F.R. pts. 200.15).
26. New York A.B. 6025/S.B. 4161 required that the state classify an opt-out student as a “refusal” instead of as “absent” within the state’s student information system, but did not require public reporting of the information. A.B. 6025/S.B. 4161, 2015-2016 Session (N.Y. 2015).
27. Oregon Department of Education, “2015-16 Notice for Statewide Tests,” <http://www.ode.state.or.us/superintendent/priorities/opt-out-final.pdf>
28. Betsy Hammond, “Testing Opponents Furious about Oregon’s Opt-Out Notice for Parents,” *The Oregonian*, November 11, 2015, [http://www.oregonlive.com/education/index.ssf/2015/11/testing\\_opponents\\_furious\\_abou.html](http://www.oregonlive.com/education/index.ssf/2015/11/testing_opponents_furious_abou.html)
29. Designing test items takes a significant amount of resources. After items are written by trained staff, the items undergo internal reviews as well as external reviews by experts to evaluate for content and fairness. Items are also piloted by examinees so that data can be reviewed prior to being used as part of a student’s score. See Michelle Croft, Gretchen Guffy, and Dan Vitale, *Reviewing Your Options: The Case for Using Multiple-Choice Test Items* (Iowa City, Iowa: ACT, 2015).
30. The likelihood of item exposure would increase if opt-out students seated close enough to see content. John F. Olson and John Fremer, *TILSA Test Security Guidebook; Preventing, Detecting, and Investigating Test Security Irregularities* (Washington, District Of Columbia: CCSSO, 2013).
31. 81 Fed. Reg. 104 (May 31, 2016) (to be codified at 34 C.F.R. pts. 200.15).