

**FIRST JUDICIAL DISTRICT COURT
SANTA FE COUNTY
STATE OF NEW MEXICO**

**MARY MACKIE, AMANDA SHORT,
MICHELLE PEREZ, SHELLY ROSE,
ANNA SOEIRO, and ANITA DOORNBOS, individually,
and on behalf of her child, H.D.,**

Plaintiffs,

v.

No.

**NEW MEXICO PUBLIC EDUCATION
DEPARTMENT,**

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

The New Mexico Public Education Department (NMPED) requires New Mexico public school students to take numerous standardized tests each year. These standardized tests have been the subject of considerable public scrutiny and concern in New Mexico and throughout the country. The concerns are serious, touching on one of the most basic functions of government: public education. They include criticisms that government officials have prioritized profit and politics over public education; have fundamentally changed education, as teachers now must devote significant hours to teaching to the tests, not to their students' actual educational needs; and have ignored that the tests are often developmentally inappropriate and traumatic for some students with disabilities.

This action is brought by five Albuquerque Public Schools (APS) teachers, one Santa Fe Public Schools (SFPS) teacher, and one parent of a public school student, all of

whom are subject to onerous restrictions on their constitutional rights as a result of Section 6.10.7.11(C)(8) NMAC, a regulation promulgated by NMPED (hereafter referred to as “the non-disparagement regulation”), which prohibits teachers from “disparag[ing] or diminish[ing] the significance, importance or use of the standardized tests.” The non-disparagement regulation only prohibits “disparagement”, but in no way restricts a teacher’s ability to praise the standardized tests they must give their students. Parents are dependent on teachers—the only ones uniquely positioned to speak to the impact of standardized testing on both individual students and the educational system as a whole—to make informed decisions about their children’s education. Yet PED’s non-disparagement regulation creates a secretive Star Chamber wherein teachers are not permitted to voice any concerns, but are permitted to provide praise. Parents and students suffer as a result of this regulation because parents are unable to obtain honest and accurate information about the impact these tests have on their children. Further, students are forced to take developmentally inappropriate tests and their education is primarily focused on teaching to those tests.

The Plaintiffs seek a declaration, pursuant to the Declaratory Judgment Act (NMSA 1978, Sections 44-6-1 through 44-6-15) that Section 6.10.7.11(C)(8) is a facially unconstitutional, viewpoint-based restriction that chills speech and therefore violates both the free speech rights of New Mexico public school employees and the rights of parents to receive information pursuant to Article II, § 17 of the New Mexico Constitution. Plaintiffs also seek a declaration that Section 6.10.7.11(C)(8) is unconstitutionally vague and overbroad and therefore violates the Plaintiff teachers’ due process rights pursuant to Article II, § 18 of the New Mexico Constitution. Plaintiffs further seek a declaration that the NMPED violates New Mexico public school students’ fundamental right to education pursuant to Article XII, § 1 of the New Mexico Constitution by silencing teachers through the non-disparagement regulation. Finally, Plaintiffs seek an injunction prohibiting NMPED from further enforcing Section 6.10.7.11(C)(8).

Jurisdiction and Venue

1. This Court has jurisdiction of the subject matter of this action pursuant to the New Mexico Constitution, Art. VI, Section 13 and NMSA 1978, Section 38-3-1 (1988). This Court has personal jurisdiction over Plaintiffs and Defendant.

2. Venue is proper in this Court pursuant to Section 38-3-1, because Defendant's principal office is located in Santa Fe County.

Parties

3. Mary Mackie is a teacher at Montezuma Elementary School in Albuquerque, New Mexico. She has been teaching for 20 years. She has a Level III teaching license from the State of New Mexico. She is a reading specialist and is currently the technology teacher at Montezuma Elementary School.

4. Amanda Short is a fourth-grade teacher at Montezuma Elementary School in Albuquerque, New Mexico. She has been teaching for ten years and has a Level III teaching license from the State of New Mexico.

5. Michelle Perez is a second-grade teacher at Montezuma Elementary School in Albuquerque, New Mexico. She has been teaching for ten years and has a Level III teaching license from the State of New Mexico.

6. Shelly Rose is a kindergarten teacher at Montezuma Elementary School in Albuquerque, New Mexico. She has been teaching for 14 years and has a Level II teaching license from the State of New Mexico.

7. Anna Soeiro is a special education teacher at Kearny Elementary School in Santa Fe, New Mexico. She teaches students from kindergarten through third grade. She has been teaching for three years and has an internship teaching license from the State of New Mexico.

8. Anita Doornbos is the parent of H.D., an APS student.

9. NMPED is the state agency that promulgated Section 6.10.7.11(C)(8) and has authority to discipline teachers who violate this regulation.

General Allegations

10. The use of standardized testing as a means of evaluating student achievement has played a role in public school curriculum for decades. However, its use skyrocketed after the passage of the federal law known as “No Child Left Behind” in 2002, which mandated annual testing of public school children in all 50 states.

11. Standardized testing has become a controversial subject in educational policy on both the national and state levels, New Mexico being no exception. The testing has been the subject of intense debate among teachers, parents, students, and the general public.

12. Because public-school teachers administer standardized tests, they are in the unique position of seeing the tests and analyzing how testing affects students. They can provide firsthand input as to how testing affects students and education. Their input is critical to the public discourse on this matter of great public concern.

13. Defendant NMPED promulgated the non-disparagement regulation (Section 6.10.7.11(C)(8)), which prohibits “administrators, teachers, volunteers and office personnel” from “disparag[ing] or diminish[ing] the significance, importance or use of [] standardized tests”.

14. Violation of this rule has serious consequences. It can lead to “suspension or revocation of a person’s educator or administrator licensure or other PED licensure...” Section 6.10.7.14(E) NMAC.

15. The Teacher Plaintiffs in this lawsuit, who cumulatively have over 57 years of experience teaching, have concerns about the use of standardized testing that are based on: (1)

intimate knowledge of the tests and (2) the Teacher Plaintiffs' observations of the effects of the tests on students. These concerns include the opinion that tests inhibit teachers from actually teaching, placing pressure on them instead to focus solely on ensuring that their students know how to take a standardized test; impede students' emotional, physical, and academic development when they perform poorly on the tests; that repeated testing causes students to dislike school; that the tests do not actually reflect student ability; that poor test scores can result in students and schools being unfairly labeled as failures; that tests take money away from traditional instruction and transfer it to the purchase of testing materials and computers on which the tests are administered; and that they utilize a one-size-fits-all model that does not account for the varied developmental, cognitive, linguistic, and cultural differences in New Mexico's public school student population.

16. Both APS and SFPS allow parents to opt their children out of any standardized test. Both school districts provide test opt-out forms on their websites.¹ Despite this, many APS and SFPS teachers are afraid to inform parents about their right to opt their children out of the tests or to provide the opt-out forms, for fear that providing this information will be considered "disparaging" and violate the Defendant's "non-disparagement" regulation.

17. The Parent Plaintiff in this lawsuit, as well as all other parents with children in the New Mexico public education system, have a right to receive honest, straightforward, and complete information from their children's teachers about the effects, negative or positive, that any given standardized test will have on their children. Parents often ask teachers to share

¹See Albuquerque Public Schools, High School Opt Out Form 2015-16, <http://www.aps.edu/assessment/parents-documents/opt-out-form-15-16-hs> (last visited March 29, 2016); Albuquerque Public Schools, Middle School Opt Out Form 2015-16, <http://www.aps.edu/assessment/parents-documents/opt-out-form-15-16-ms> (last visited March 29, 2016); Albuquerque Public Schools, Elementary School Opt Out Form 2015-16; <http://www.aps.edu/assessment/parents-documents/opt-out-form-2015-2016-es> (last visited March 29, 2016); Santa Fe Public Schools, Test Invalidation Form, Parent/Guardian Refusal to Test, <http://sfps.info/DocumentCenter/View/10786> (last visited March 29, 2016).

whether they think a specific test is beneficial or harmful and whether or not they should opt their children out. However, due to teachers' fears of being disciplined for "disparaging" the test, many do not feel comfortable providing the candid responses parents need to make informed decisions about opting out.

18. The non-disparagement regulation prevents parents from receiving critical information about their children's education. The regulation only permits teachers to provide a one-sided, positive view of standardized testing to parents, which undermines their ability to be fully informed as to their child's education.

19. Standardized tests can be particularly harmful for children with cognitive impairments, learning disabilities, behavioral issues, and certain medical and physical problems and/or disabilities. Teacher Plaintiffs and all teachers must be free to speak with parents about these harms without fear of discipline.

20. Plaintiff Mary Mackie provides an example of why standardized tests are inappropriate for cognitively impaired children. She had a student who has trouble speaking and cannot read or even hold a pencil. Despite this, the young girl was forced to take a standardized test required by Defendant. Plaintiff Mackie, the teacher administering the test to the young girl, was prohibited from reading her the test questions. To answer each question on the test, Plaintiff Mackie was forced to put up her hand and ask the student to point to a finger which stood for a corresponding letter (A, B, C, D) on the testing bubble sheet. Plaintiff Mackie identified whichever finger the student pointed to and then recorded the corresponding letter on the bubble sheet. It did not matter that the student could not read the questions or that the student had no idea that she was answering standardized test questions; she was still forced to take it. Plaintiff Mackie did not believe it was appropriate for this child to undergo this particular standardized

test, yet did not feel like she could raise these concerns due to potential discipline for “disparaging” the test.

21. Plaintiff Anita Doornbos had concerns about whether the Partnership for Assessment of Readiness for College and Careers (PARCC) would be appropriate for her child, who is dyslexic. She wanted to know whether the test was beneficial and worried about the amount of time her child would spend taking the tests. She attempted to speak with H.D.’s teacher about whether she should opt her child out of the PARCC exam. However, H.D.’s teacher told her that she could not talk about the test. The teacher could only advise Plaintiff Doornbos that she would have to decide on her own what is best for her child. Plaintiff Doornbos trusted the professional judgment of H.D.’s teacher and wanted more information regarding the teacher’s assessment of whether the test would be appropriate for H.D., but because her child’s teacher did not feel that she could speak about the test, Plaintiff Doornbos could not receive this important information.

22. Plaintiff Anna Soeiro provides another example of how teachers’ voices have been stifled by the “non-disparagement” regulation. To provide her special education students with the best education, she must be able to speak frankly with her students’ parents regarding her assessment of how a particular standardized test could affect her individual students. However, administrators at her school have made it clear that she does not have permission to do so. On or around August 27, 2015, Plaintiff Soeiro and other special education teachers from Kearny Elementary School in Santa Fe attended a mandatory test security training in anticipation of the upcoming PARCC test. At this meeting, the school’s instructional coach told teachers that they were not permitted to protest, assemble, or speak negatively about the PARCC test. The following day, two of Plaintiff Soeiro’s fellow Kearny Elementary School teachers who attended

a different test security training informed her that, in addition to the prohibitions on protesting and speaking negatively about the test, they were also told they could not post anything negative about the PARCC exam on their personal Facebook accounts, as those accounts were being monitored by PED.

23. In addition to speech between teachers and parents, testing is a topic that comes up when teachers talk to each other and to school administrators. Teachers fear that having discussions in which they voice their concerns about standardized testing could also violate the non-disparagement regulation.

24. Defendant's non-disparagement regulation is an unconstitutional viewpoint-based restriction on teachers' rights to free speech and parents' rights to receive information. It is also unconstitutionally vague and overbroad as teachers have no idea what is considered "disparaging" or "diminishing the significance" and because it encompasses protected speech. The law, by silencing teachers from providing critical input into what is best for their students, also violates New Mexican students' right to education. Further, parents have a fundamental right under the state constitution to make child-rearing decisions concerning the care, custody, and control of their children

COUNT I
Violation of New Mexico Constitution, Art. II, § 17
Unconstitutional viewpoint-based regulation

25. Plaintiffs incorporate by reference the preceding paragraphs as though they were stated fully herein.

26. Section 6.10.7.11(C)(8) prohibits all public school administrators, teachers, volunteers, and office personnel from disparaging or diminishing the significance, importance or use of the standardized tests. This is an unconstitutional, viewpoint-based regulation that

prohibits speech that is critical of standardized tests, yet allows favorable speech regarding the tests, thus chilling public educators' right to free speech. This prohibition on teachers' speech, which involves a matter of public concern, bears no rational relationship to any legitimate state interest, does not further any important government interest, and is not the least restrictive means of advancing any compelling state interest.

27. PED, as the entity that promulgated and enforces this regulation, is liable for this constitutional violation.

COUNT II
Violation of New Mexico Constitution, Art. II, § 18
Denial of Due Process of Law – Vagueness

28. Plaintiffs incorporate by reference the preceding paragraphs as though they were stated fully herein.

29. Section 6.10.7.11(C)(8), which prohibits school administrators, teachers, volunteers, and office personnel from “disparag[ing] or diminish[ing] the significance, importance or use of the standardized tests,” is unconstitutionally vague as it does not allow individuals of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited. Further, the regulation does not set out standards or guidelines to avoid arbitrary and discriminatory enforcement and therefore deprives the Plaintiffs due process of law in violation of the Due Process Clause of the New Mexico Constitution.

30. PED, as the entity that promulgated and enforces this regulation, is liable for this constitutional violation.

COUNT III
Violation of New Mexico Constitution, Art. II, § 18
Denial of Due Process of Law – Overbreadth

31. Plaintiffs incorporate by reference the preceding paragraphs as though they were stated fully herein.

32. Section 6.10.7.11(C)(8), which prohibits school administrators, teachers, volunteers, and office personnel from “disparag[ing] or diminish[ing] the significance, importance or use of the standardized tests,” is unconstitutional as its language is overbroad and substantially deters protected speech.

33. PED, as the entity that promulgated and enforces this regulation, is liable for this constitutional violation.

COUNT IV
Violation of New Mexico Constitution, Art. II, § 17
Unconstitutional Restriction on Right to Receive Information

34. Plaintiffs incorporate by reference the preceding paragraphs as though they were stated fully herein.

35. Parents have a constitutional right to receive information that is protected by Article II, § 17 of the New Mexico Constitution. Section 6.10.7.11(C)(8), prohibits all public school administrators, teachers, volunteers, and office personnel from disparaging or diminishing the significance, importance, or use of the standardized tests. This unconstitutional regulation prohibits parents from receiving information regarding their children’s education, a matter of public concern. This prohibition bears no rational relationship to any legitimate state interest, does not further any important government interest, and is not the least restrictive means of advancing any compelling state interest.

36. PED, as the entity that promulgated and enforces this regulation, is liable for this constitutional violation.

COUNT VII
Violation of New Mexico Constitution, Art. XII, § 1
Violation of New Mexico public school students' fundamental right to education

37. Plaintiffs incorporate by reference the preceding paragraphs as though they were stated fully herein.

38. Students have a fundamental right to a sufficient education under Article XII, Section 1 of the New Mexico Constitution.

39. Defendant's non-disparagement regulation prevents teachers from advising parents about the individual needs of a particular child and the available options for addressing the needs of the child.

40. Defendant's non-disparagement regulation prevents parents from making informed choices about testing for their children and, as a result, each child does not receive a sufficient educational opportunity.

41. Defendant's non-disparagement regulation prevents teachers from providing critical input to administrators, supervisors, parents, and the community regarding the efficacy of the standardized tests they administer, the time spent testing instead of teaching, how testing affects students, and how testing affects their students' overall education. This information is essential to shape the testing requirements and educational policies that ensure that students receive a sufficient education.

42. PED, as the entity that promulgated and enforces this regulation, is liable for this constitutional violation.

Prayer for Relief

WHEREFORE, the Plaintiffs respectfully seek the following relief:

- A. A declaration that Section 6.10.7.11(C)(8) NMAC is an unconstitutional viewpoint-based prohibition on public school administrators, teachers, volunteers, and office personnel and is void as a matter of law;
- B. A declaration that Section 6.10.7.11(C)(8) NMAC is unconstitutionally vague because it does not allow individuals of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited and further declaring the regulation void as a matter of law;
- C. A declaration that Section 6.10.7.11(C)(8) NMAC is unconstitutionally overbroad because its language is overbroad and substantially deters protected speech and further declaring the regulation void as a matter of law;
- D. A declaration that Section 6.10.7.11(C)(8) NMAC violates the New Mexico Constitution, Art. II, § 17 by interfering with a parent's right to receive information from public school staff regarding standardized testing and is void as a matter of law;
- E. A declaration that Section 6.10.7.11(C)(8) NMAC violates the New Mexico Constitution, Art. XII, § 1, by interfering with students' right to an education and is void as a matter of law;
- F. An injunction prohibiting PED from disciplining any teacher for violation of Section 6.10.7.11(C)(8) NMAC;
- G. Costs of this lawsuit, including, but not limited to, attorneys' fees; and
- H. Such further relief as the Court deems proper and the law allows.

By /s/ Alexandra Freedman Smith 3/30/16

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