

EDUCATION

STATE BOARD OF EDUCATION

Notice of Receipt of Petition for Rulemaking

N.J.A.C. 6A:32

Petitioner: Penny M. Venetis, Clinical Professor of Law, on behalf of The Rutgers

Constitutional Rights Clinic, Rutgers School of Law-Newark

Take notice that on December 30, 2013, the New Jersey State Board of Education received a petition for rulemaking from the above Petitioner requesting that the State Board of Education adopt regulations set forth below relating to the administration of the Armed Services Vocational Aptitude Battery Career Exploration Program (“ASVAB-CEP”). The ASVAB-CEP is an aptitude test that measures academic ability and helps predict success in a wide variety of occupations including the military. Sponsored by the Department of Defense, it is administered by guidance counselors to public and non-public high school students on a voluntary basis and at no cost to high schools throughout the country. The assessment provides a composite score of verbal, math, science, and technical aptitudes, as well as a Military Entrance Score that may be used if an individual subsequently enlists.

Petitioner requests regulations requiring that: (1) the ASVAB-CEP not be administered to students unless parents of minors, emancipated minors, or students 18 years of age and

older¹ complete release forms giving permission for students to take the test; and (2) “Option 8” be the mandatory score reporting option selected by guidance counselors and/or school administrators. Petitioner asserts that such State regulations will protect student and parental privacy.

To fully comprehend the significance of Petitioner’s request, the Department referred the matter for further deliberations. That Notice of Action was filed with the Office of Administrative Law on February 28, 2014. Upon duly considering the petition, the relevant information, and applicable law, the Department concluded its review and determined that the proposed regulations are neither necessary nor prudent “to protect student and parental privacy” and that no repeal of or amendments to current regulations are warranted.

I. Prior Written Parental Consent to Administer the ASVAB-CEP

The Department disagrees with Petitioner that a regulation must be adopted requiring high schools in New Jersey to distribute a test release form to parents and obtain written parental permission prior to the administration of the ASVAB-CEP to protect student and parental privacy.

State law does not prohibit schools from administering the ASVAB-CEP without prior written parental consent. Absent from the petition is any reference to a State statute or regulation mandating schools to obtain parental consent before such aptitude tests are administered. At most, Petitioner refers to N.J.A.C. 6A:32-7.1(d), which requires school

¹ References made herein to “parent(s)” or “parental” are intended to include parents of minors; emancipated minors; and students 18 years of age and older.

districts to provide annual notice to parents about student participation in “educational, occupational, and military recruitment programs.” As is plain from the language, the regulation requires notice at some time in a given year, but not prior written parental consent, even if the ASVAB-CEP itself is considered a military recruitment program. Therefore, in the Department’s view, the administration of the ASVAB-CEP neither requires parental notification nor consent under the only regulation cited by Petitioner.

Current law sufficiently addresses any privacy concerns by requiring written parental consent only before schools administer certain *sensitive* assessments. Specifically, N.J.S.A. 18A:36-34 requires school districts to obtain written parental consent prior to the administration of surveys, assessments, analysis or evaluations that pertain to eight specific categories of information. Noticeably absent from this list are career exploration or interest inventory assessments, such as the ASVAB-CEP. As such, it is reasonable to conclude that these types of assessments were purposely left off the list to allow school districts the flexibility to assist students with college and career planning without the burden of requiring prior written parental consent. Indeed, the facilitation of college and career planning in this regard enables high schools to provide an appropriate education to students in the State.

School districts regularly collect information on students to assist with career planning and exploration and to help prepare their students become college and career ready. One method currently available to school districts to assist their students in exploring potential career options includes career aptitude and interest assessments, including the ASVAB-CEP. Like the ASVAB-CEP, these other preference and aptitude assessments do not

require school districts to obtain written parental consent prior to their administration. Therefore, requiring school districts to obtain written consent prior to administering the ASVAB-CEP, when the same step is not required for other career exploration assessments, is unnecessarily burdensome and incongruent. It is important that school districts have the ability to administer the ASVAB-CEP to complement the information available to guidance counselors in assisting students in finding an appropriate college or career path without imposing the additional administrative burden of obtaining prior written parental consent.

In addition, current regulations also satisfy any privacy concerns by allowing parents to prohibit schools from giving access to any student information, or even the school facility itself, to military recruiters, pursuant to State and federal law. Specifically, N.J.A.C. 6A:32-7.1(g)(6) requires school districts to have a policy providing parents a 10-day period to submit a written statement prohibiting the school from allowing access to student information and access to school facilities to educational, occupational, and military recruiters. Given that parents currently have the ability to prohibit military recruiters from accessing student information and having contact with a student in a school facility, the proposed rule is an unnecessary, additional precaution.

II. Prior Parental Consent to Release of ASVAB-CEP Results

The Department disagrees with Petitioner's additional request that the Department must promulgate regulations mandating guidance counselors to select "Option 8" when administering the ASVAB-CEP, thereby withholding results from military recruiters

unless and until parents contact recruiters and give their consent, in order to protect the privacy rights of students and parents.

As explained by Petitioner, when school administrators administer the ASVAB-CEP, they must select one of eight options for releasing student test scores. The most restrictive option, referred to as “Option 8,” prohibits the disclosure of student test scores to the military unless consent is received from the parent.² If guidance counselors fail to select “Option 8,” the default option is “Option 1,” which releases the aptitude results and student contact information to military recruiters. “Options 2 through 6” are additional options that allow the release of student contact information to the military. “Option 7” applies if an individual student’s score needs to be invalidated. Petitioner does not propose rulemaking for Options 2 through 7.

The proposed rule to effectively forbid the release of ASVAB-CEP results without parental consent is an unnecessary precaution. As discussed above, current regulations address any privacy concerns by giving parents the opportunity to prohibit schools from giving military recruiters access to students inside the school facility and access to student information. N.J.A.C. 6A:32-7.1(g)(6). Federal and state law require school districts to comply with such requests from parents. In effect, this measure allows parents to stop, not just limit, the administration of the ASVAB-CEP and the release of its scores to military recruiters. Thus, the Department disagrees with Petitioner that “[t]he only way to remedy current test administration deficiencies is to make ‘Option 8’ the mandatory Score Reporting option,” and finds that the proposed rule is superfluous.

² Although Petitioner seeks to “protect aptitude test results from all third parties,” ASVAB-CEP results are released only to the military and the school, regardless of which Option is selected.

The Department recognizes that decisions regarding the selection of various Options are best left to guidance counselors at the local level, and that the Department should not, as a matter of policy, regulate such decisions state-wide. Petitioner's assertion that three states mandate "Option 8" is unpersuasive. If anything, the fact that an overwhelming majority of states do not have such a law or regulation confirms the view that such rulemaking is unnecessary and imprudent.

Moreover, the privacy concerns expressed by Petitioner must be viewed in their appropriate, limited context. The release of ASVAB-CEP results to military recruiters does not result in the enlistment of minor-students without parental consent. Quite the opposite, military regulations for all branches of service, for example, currently require parents or guardians to sign a minor's application for enlistment. AR 601-270:3-11; OPNAVINST 1100.4C; AFI36-2003 (I); MCO 1100.75D; COMDTINST M 1100.2E. For these reasons, the Petitioner's request is denied.