



Thomas Mayes
President of the National Council
of State Education Attorneys

NCOSEA Voice

This issue of the *State Education Standard* provides a wealth of information for state boards of education and other education leaders to consider in designing systems for assessment. Here, I provide the common legal framework that courts will use in reviewing decisions about assessment. As a general rule, state boards have latitude—both in selection of assessment instruments and in using assessment data to inform their leadership decisions. Reviewing courts will not disturb a board’s decision regarding assessment unless the decision is “arbitrary, capricious, or unreasonable.” *Chappell v. Commissioner of Education*, 343 A.2d 811, 814 (N.J. Super. Ct. App. Div. 1975). A decision will be upheld unless no reasonable person could find it to be correct, based on the facts and the law. If reasonable minds could differ about assessment policy, a court will not substitute its judgment for the board’s.

In decisions about whether to conduct a statewide assessment in the first place, a state board has considerable latitude unless the law requires assessment of a particular content matter or grade level. For example, the Elementary and Secondary Education Act (ESEA) requires assessments of students in certain grades and subjects. While a board’s decision not to assess a required grade and subject would certainly be unreasonable, its decision about whether to add grades (first grade) or subjects (social studies) would be left undisturbed unless entirely without legal or factual foundation.

In decisions about what assessment instruments to use, courts will defer to state boards’ substantive judgments. This accords with the long-standing principle of administrative law that requires deference to matters within an agency’s specialized expertise. See *Porter v. Seattle School District No. 1*, 248 P.3d 1111 (Wash. Ct. App. 2011), which held that adoption of a mathematics textbook

was not an abuse of discretion. State boards, not courts, are the “experts” on assessment. A court would be extremely hesitant to invalidate the selection of an assessment on substantive grounds—but might do so on nonsubstantive grounds, such as violations of state bidding law.

Once the state board has assessment data—about the state, a subgroup, a school district, or a school building—it has latitude in how to respond. Some responses may be required (such as by ESEA), but most responses are within the board’s discretion. Boards must be wary, however, of failing to act when data would suggest that a reasonable person would take some action. For example, at some point, statewide declining achievement scores in math would suggest some board action would be reasonable, such as by engaging in a root cause analysis about the decline, by providing additional statewide professional development in mathematics, or by raising teacher licensure requirements in mathematics. Failure to take some action when a reasonable person would do so may be an abuse of discretion. See, e.g., *Litterer v. Judge*, 644 N.W.2d 357 (Iowa 2002).

In sum, boards have significant latitude regarding assessment. When it is used wisely, courts will defer to boards. More important, good decisions will be made for students and educators. ■