



CYNTHIA H. COFFMAN  
 Attorney General  
 DAVID C. BLAKE  
 Chief Deputy Attorney General  
 MELANIE J. SNYDER  
 Chief of Staff  
 FREDERICK R. YARGER  
 Solicitor General

RALPH L. CARR  
 COLORADO JUDICIAL CENTER  
 1300 Broadway, 6th Floor  
 Denver, Colorado 80203  
 Phone (720) 508-6000

STATE OF COLORADO  
 DEPARTMENT OF LAW

FORMAL	)	
OPINION	)	
	)	
of	)	No. 15-04
	)	
CYNTHIA H. COFFMAN	)	04/08/2015
Attorney General	)	

This Opinion, requested by the Colorado Department of Public Health and Environment (“CDPHE”), analyzes whether the Healthy Kids Colorado Survey (“HKCS” or “Survey”), when administered in accordance with specifically defined “passive consent” or “opt-out” procedures, complies with federal and state statutes regarding student privacy.

**QUESTIONS PRESENTED AND SHORT ANSWERS**

*Question 1:* Does 20 U.S.C. § 1232h(b), a federal statute that governs administration of student surveys that are part of federal Department of Education programs, apply to the Healthy Kids Colorado Survey?

*Short Answer 1:* No, 20 U.S.C. § 1232h(b) does not apply when the HKCS is administered in compliance with the passive consent procedures discussed in this Opinion, for two reasons. First, the federal statute applies only to “applicable programs,” *i.e.*, federal programs administered or funded by the United States Department of Education. The HKCS is neither funded nor administered by the U.S. Department of Education; it is instead funded by the federal Centers for Disease Control and the State of Colorado, and it is administered solely by the State, the State’s School Districts, and local teachers.

Second, § 1232h(b) is triggered only if participation in a school survey is “required[ ] as part of any applicable program.” When the HKCS is administered in accordance with the particular passive consent procedures described in this Opinion, participation in the Survey is voluntary rather than “required,” and so the federal statute does not apply.

*Question 2:* Does the administration of the HKCS under passive consent procedures that clearly and unambiguously communicate the voluntary nature of the Survey to educators, parents, and students trigger the provisions of § 22-1-123(5), C.R.S.?

*Short Answer 2:* No, the particular passive consent procedures described in this Opinion do not trigger § 22-1-123(5), C.R.S. By its terms, this statutory provision is triggered only if participation in a school survey is “required . . . in a public school’s curriculum or other official school activity.” When the HKCS is administered in accordance with the passive consent procedures described in this Opinion, participation in the Survey is voluntary, not “required,” and so the state statute does not apply.

The State Board of Education and the Colorado Department of Education have discretion to clarify specific factual circumstances under which participation in a survey such as the HKCS would be “required” and thus subject to the parental-consent provisions of § 22-1-123(5)(a), C.R.S. This discretion does not include adopting a position that is contrary to the language of the statute, including the “required” limitation.

## BACKGROUND

### A. The Healthy Kids Colorado Survey.

The HKCS is jointly funded by the Centers for Disease Control (“CDC”) and the State, and is administered by the Colorado Department of Human Services (“DHS”), the Colorado Department of Education (“CDE”), and CDPHE. It is administered every other year in a randomly selected sample of Colorado middle and high schools. Classrooms within selected schools are, in turn, randomly selected for participation. The HKCS is conducted during school hours and takes approximately 45 minutes for students to complete.

The Survey is designed to monitor behaviors that contribute to the leading causes of death and disability among youth. To that end, the HKCS uses multiple-choice questions to gather information regarding risk-related topics including alcohol use, tobacco use, substance abuse, unintentional injury, sexual behavior, family relations, and physical health. Students complete the HKCS using pencil-and-paper survey forms, recording their answers on the kind of “bubble sheet” used for standardized tests.

The HKCS is anonymous. No personally identifiable information is collected from students as part of the Survey, and none of the information collected by the Survey can be traced to any individual student.

The data collected through the Survey is not designed to be used, nor can it be used, to track individual student behavior over time. Instead, the data is aggregated so that it may demonstrate trends among groups of students by age, grade level, and

school district. This aggregated data is used to support programs designed to enhance the health and well-being of Colorado students as a whole. For example, the aggregated data is used to: (1) support grant applications that bring more funding to local school districts; (2) identify and monitor trends in student behaviors that increase the risk for negative health outcomes; and (3) design and target local and state student health programs.

## **B. The Passive Consent Procedure for Administering the HKCS.**

Administration of the HKCS is governed by specific written procedures and standardized forms, which are developed by CDPHE with input from the HKCS Steering Committee (which, along with CDPHE staff, includes representatives from CDE and DHS). CDPHE offers two methods for administering the Survey—an “active consent” or “opt-in” method and a “passive consent” or “opt-out” method. School districts may choose either method. This Opinion analyzes only the latter method, “passive consent,” because under that method schools do not obtain written parental consent before the HKCS is administered.

*Notification to Superintendents and Principals.* The Survey process begins when written notification is distributed to the superintendents of school districts chosen for participation, as well as to the principals of individual selected schools. School districts retain discretion regarding the HKCS and may decline to participate without penalty.

*Notification to Parents.* If a school district chooses to participate in the Survey, written notice of the HKCS is sent to parents of students in classrooms selected to be surveyed. This notice comes in the form of a “Parent Information Letter,” which is developed at the state level by CDPHE, with input from the HKCS Steering Committee. Historically, participating schools were instructed to provide this letter to parents at least three days before the HKCS is given to students. According to CDPHE, that protocol will change before the next HKCS is administered; schools will now be required to give parents at least two weeks’ notice.

The letter describes the purpose of the HKCS and explains that it is anonymous. It also states in several places that participation is voluntary and parents or students may decline to participate without penalty. Specifically, the letter states,

The paper and pencil survey is voluntary and takes about 45 minutes to complete in a chosen classroom. No information is collected that can identify individual students. Only your child will know how he or she answers the questions. Students do not get school credit for completing the survey, and there is no penalty for not participating. Students who take part in the survey may choose not to answer any question.

The letter explains how parents can learn more about the survey. It invites them to visit a website that includes information about the Survey or instead “call the Healthy Kids Colorado Survey Director” at a telephone number included in the letter.

For school districts that choose the passive consent method of administration, the letter explains that if a parent wishes his or her child to participate in the Survey, no further action is needed. It reiterates that the Survey is voluntary: “Students will receive the survey in class and are instructed to answer the questions or leave the survey blank. Students who are not completing the survey will do other schoolwork at their desk during the survey period.”

If, on the other hand, a parent wishes to opt his or her child out of the Survey, the parent may check a box indicating “I do *not* want my child to complete the survey” (emphasis in original), sign the letter, and return it to the school. Because the Survey is voluntary, parents may also instruct their children not to participate in the Survey or to leave the Survey blank.

***Classroom Procedures.*** Teachers who administer the survey are given specific and detailed instructions regarding confidentiality, student anonymity, and the voluntary nature of the Survey. Again, these instructions are developed at the state level by CDPHE, with input from the HKCS Steering Committee.

An instruction form entitled “Steps for Administering HKCS In Your Classroom” requires teachers to review the Parent Information Letter and ensure it is sent home to parents within the required time period. It further requires teachers to read and sign a Confidentiality Agreement, which states in relevant part,

Student participation is voluntary and I will not encourage or discourage participation. The choice to participate or abstain is confidential and survey responses are confidential. To protect confidentiality and anonymity, I will collect surveys immediately after administration and handle them according to survey administration procedures. Completed surveys and responses will not be viewed by me or anyone in my classroom or school.

Before distributing Survey booklets to students, teachers are instructed to note that “*Students may choose to complete the survey or leave it blank and work quietly at their desks*” (emphasis in teacher instruction form) and are required to read aloud a specific set of Oral Survey Administration Instructions to students. Those oral instructions include the following:

Completing the survey is voluntary. Whether or not you answer the questions will not affect your grade in this class. If you do not want to answer a question, just leave it blank. Please read every question and answer honestly. There are no wrong answers. This is not a test.

Teachers distribute Survey booklets to only those students whose parents did not return the opt-out form. The booklets themselves contain written instructions that again emphasize the voluntary nature of the survey: “Completing the survey is voluntary. Whether or not you answer the questions will not affect your grade in this class. If you are not comfortable answering a question, just leave it blank.”<sup>1</sup>

Students are further instructed, both orally and in writing, not to put any personal identifying information on the survey. When the Survey booklets are complete, students are asked to place them in an envelope, which teachers must seal “**in front** of students.” (Emphasis in teacher instruction form.) Teachers then return the sealed envelopes, together with their signed teacher Confidentiality Agreements, to school Survey coordinators.

## ANALYSIS

### A. The HKCS Is Not Administered by the Federal Department of Education, Making 20 U.S.C. § 1232h(b) Inapplicable.

A federal statute entitled “Protection of pupil rights,” prohibits a student from being “required, as part of any applicable program, to submit to a survey” asking about certain categories of private information “without the prior written consent of the parent.” 20 U.S.C. § 1232h(b). This statute applies only to surveys that are “part of any applicable program.” In the context of this federal statute, “applicable program[s]” are limited to those administered by the federal Department of Education. Specifically, “applicable program” is defined to mean “any program for which the Secretary or the Department [of Education] has administrative responsibility as provided by law or by delegation of authority pursuant to law.” 20 U.S.C. § 1221(c)(1); *see also id.* § 1221(b)(1) (“Except as otherwise provided, this title applies to each applicable program *of the Department of Education.*” (emphasis added)).

As explained above, the HKCS is neither funded nor administered by the U.S. Department of Education. It is funded by the CDC and the State, and it is

---

<sup>1</sup> In schools that use the passive consent method of administering the HKCS, student participation rates never reach 100%. In the context of the procedures described in this Opinion, this further indicates that the Survey is administered in a voluntary manner. *Cf. C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 175 (3rd Cir. 2005) (noting that a survey participation rate of 100%, in combination with other evidence demonstrating involuntariness, made it “permissible to infer . . . that the survey was administered as involuntary”).

administered solely by the State, school districts, and local teachers. For that reason, 20 U.S.C. § 1232h(b) does not apply to the HKCS.

**B. Under the Passive Consent Procedure, Participation in the HKCS Is Not “Required” Under the Relevant Statutes.**

The Colorado statute governing the protection of student data, § 22-1-123(5)(a), C.R.S., is modeled after 20 U.S.C. § 1232h. Section 22-1-123(5) includes a parental consent provision that uses language essentially identical to the federal statute:

A school or school district employee who *requires participation* in a survey . . . in a public school’s curriculum or other official school activity shall obtain the written consent of a student’s parent or legal guardian before giving the student any survey . . . intended to reveal [certain categories of private] information . . . .

§ 22-1-123(5)(a), C.R.S. (emphasis added); *see also* 20 U.S.C. § 1232h(b) (stating that prior written consent is mandatory only when a student is “*required* . . . to submit to a survey” (emphasis added)).

The relevant language of the federal and state statutes—specifically, the term “required”—and the regulations and case law interpreting that language, indicate that, when administered under the passive consent procedures described in this Opinion, the HKCS does not trigger the provisions mandating prior written parental consent.<sup>2</sup> As explained below, when the HKCS is administered in accordance with these passive consent procedures, participation in the Survey is voluntary rather than “required.” This Opinion assumes that school districts, schools, and teachers comply with the described procedures and takes no position on Survey administration that may deviate from those procedures.

**1. Statutory Language.**

Statutory language must be given its ordinary and commonly accepted meaning. *White v. Anderson*, 394 P.2d 333, 336 (Colo. 1964). Further, meaning must be given “to every word” of a statute; no word may be “render[ed] . . . superfluous.” *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005) (internal quotations omitted). It is improper to presume the legislature “used language idly and with no intent.” *Id.* In addition, consideration

---

<sup>2</sup> Section 22-1-123(5)(a) incorporates the provisions of the federal statute and makes the federal statute enforceable by the Colorado Department of Education. *See* § 22-1-123(5)(a), C.R.S. (“A school district shall comply with 20 U.S.C. § 1232h.”). As explained above, the federal statute is limited in scope and applies only to surveys that, unlike the HKCS, are administered by the federal Department of Education. Section 22-1-123(5)(a) does not appear to remove that limitation. Nonetheless, even if the federal statute, by virtue of § 22-1-123(5)(a), does apply to the HKCS, that statute is not triggered because, as explained below, participation in the HKCS is not “required.”

must be given to the statutory scheme as a whole to give a “consistent, harmonious, and sensible effect to each individual section.” *Zab, Inc. v. Berenergy Corp.*, 136 P.3d 252, 255 (Colo. 2006). “If the statute is clear and unambiguous on its face,” then it should be applied “as written because it may be presumed that the General Assembly meant what it clearly said.” *In re Marriage of Chalat*, 112 P.3d 47, 54 (Colo. 2005) (internal quotations omitted). If a statute is ambiguous, the court may consider, among other things, its legislative history, if any, as well as the legislative declaration or purpose. § 2-4-203, C.R.S.

The plain language of both 20 U.S.C. § 1232h(b) and § 22-1-123(5)(a), C.R.S., makes clear that prior written parental consent is not mandatory for *all* student surveys that seek private information. Instead, prior written parental consent is mandatory only when students are “required” to participate in such a survey. Additionally, if the term “required” is to be given legal effect, as it must, *Colo. Water Conservation Board*, 109 P.3d at 597, the inverse must also be true—prior written parental consent must *not* be mandatory when participation in a survey is voluntary rather than “required.” Other state statutes are not limited in this manner; in at least three other states, legislatures have enacted parental-consent statutes that do not include the “required” limitation.<sup>3</sup> But neither 20 U.S.C. § 1232h(b) nor § 22-1-123(5)(a), C.R.S., are written as broadly as these other statutory provisions.

When used in its ordinary sense, the term “require” connotes a lack of choice or indicates that declining to engage in “required” conduct will result in negative consequences. Webster’s Third New International Dictionary<sup>4</sup> includes the following definitions of the term “required”: “to ask, request, or desire (a person) to do something”; “to ask for authoritatively or imperatively”; and “to demand as necessary or essential (as on general principles or in order to comply with or satisfy some regulation).” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1929 (2002). Black’s Law Dictionary defines ‘require’ as “[t]o direct, order, demand, instruct, command, claim, compel, request, need, exact.” BLACK’S LAW DICTIONARY 1304 (6th ed. 1990). And the American Heritage College Dictionary defines “require” as “to

---

<sup>3</sup> See ALASKA STAT. § 14.03.110(a) (providing that school officials “may not administer or permit to be administered in a school a questionnaire or survey, whether anonymous or not, that inquires into personal or private family affairs . . . unless written permission is obtained from the student’s parent or legal guardian.”); N.J. STAT. § 18A: 36-34.a (“Unless a school district receives prior written informed consent from a student’s parent or legal guardian . . . the school district shall not administer to a student *any academic or nonacademic survey . . .*” (emphasis added)); UTAH CODE ANN. § 53A-13-302(1) (requiring school districts to adopt policies that “include prohibitions on the administration to a student of . . . *any survey . . .* without the prior written consent of the student’s parent or legal guardian” (emphasis added)).

<sup>4</sup> Dictionary definitions are often used to construe statutory language. See, e.g., *Colo. Dep’t of Revenue v. Hibbs*, 122 P.3d 999, 1004 (Colo. 2005) (citing Webster’s Third New International Dictionary and Black’s Law Dictionary); *Sooper Credit Union v. Sholar Grp. Architects, P.C.*, 113 P.3d 768, 772 (Colo. 2005) (citing the American Heritage Dictionary); *Curtis v. Hyland Hills Park & Rec. Dist.*, 179 P.3d 81, 84 (Colo. App. 2007) (citing Webster’s Third New International Dictionary).

call for as obligatory or appropriate; demand” or “to oblige; compel: *Students are required to attend classes.*” AM. HERITAGE COLLEGE DICTIONARY 1182 (4th ed. 2004).

These concepts are not implicated by the passive consent procedures described above. Schools do not “demand” or “compel” students to complete the HKCS, and no negative consequences flow from a parent’s or student’s refusal to answer any of the Survey’s questions. To the contrary, all parties—students, parents, and teachers—are repeatedly advised that the Survey is voluntary. And there are multiple ways parents and students may decline to participate. Parents may submit the opt-out form, or they may instruct their children not to take the Survey. Students, in turn, may leave all or a portion of the Survey blank and may work quietly at their desks rather than participate in the Survey. In this context, reading 20 U.S.C. § 1232h(b) and § 22-1-123(5)(a), C.R.S., to mandate prior written parental consent before administering the HKCS would render the term “required” superfluous. *Contra Colo. Water Conservation Bd.*, 109 P.3d at 597.

## 2. Regulations and Case Law Interpreting the Term “Required.”

The term “required” is not specifically defined in § 22-1-123(5)(a), C.R.S., and no court decisions have interpreted that statute. But because both 20 U.S.C. § 1232h(b) and § 22-1-123(5)(a), C.R.S., use that same term to determine whether prior written parental consent is mandatory, federal cases analyzing whether school surveys were “required” under particular circumstances are persuasive as to the meaning of the Colorado statute. *See Flood v. Mercantile Adjustment Bureau, LLC*, 176 P.3d 769, 772 (Colo. 2008) (“In construing a statute, we may consider persuasive authority of another jurisdiction—for example, when Colorado’s statute is closely patterned on a related federal statute, as here.”); *Furlong v. Gardner*, 956 P.2d 545, 551–52 (Colo. 1998) (“In interpreting a state statute, we often turn to the analogous federal statute and related case law.”).

Two federal court decisions demonstrate the considerations relevant to determining whether participation in a student survey is “required.” These cases highlight that if survey administrators fail to adhere to survey procedures designed to ensure voluntariness, the survey may be considered “required” under applicable law.<sup>5</sup>

In *C.N. v. Ridgewood Board of Education*, 430 F.3d 159 (3rd Cir. 2005), school officials administered a survey to students in the 7th through 12th grades, funded in part by the U.S. Department of Education. The survey sought information about

---

<sup>5</sup> The U.S. Department of Education reads the term “required” in 20 U.S.C. § 1232h(b) as a substantive limitation on that statute’s scope and has explained that whether a survey is “required” depends on the facts and circumstances under which the survey is administered. *See Protection of Pupil Rights*, 60 Fed. Reg. 44696, 44697 (proposed Aug. 28, 1995) (“[T]he Department will determine on a case-by-case basis in light of all the circumstances whether a student has been required to submit to a survey.”). This is consistent with the case law analyzed here.



personal topics including drug and alcohol use, sexual activity, and personal relationships. *Id.* at 161. Three students and their mothers sued, alleging that although the survey may have been intended as voluntary, deficiencies in the way it was administered made it involuntary. The Third Circuit ultimately found in favor of the school district, but in the course of its analysis, the court concluded that the record could have permitted an inference, based on specific deficiencies in the survey's administration, that "students were required to participate in the survey." *Id.* at 175 n.18.<sup>6</sup> Specifically, the Third Circuit noted that:

- At least one teacher "admitted he may not have told his class the survey was voluntary, and could not recall his superiors giving him instruction as to actual administration."
- There was evidence of "a loud speaker announcement . . . warn[ing] that anyone not taking the survey would receive 'a cut,' *i.e.*, a penalty for missing class."
- The survey instructions "did not inform students that the survey was voluntary."
- "[N]o consent form was distributed to parents nor were parents ever instructed how to avoid their child's participation if a parent objected to the survey."

*Id.* at 175.

Another case, *Rhoades v. Penn-Harris-Madison School Corporation*, 574 F. Supp. 2d 888 (N.D. Ind. 2008), similarly concluded that the specific circumstances under which a survey is administered determines whether the survey is "required." *Id.* at 903 (holding that there was a "question of fact . . . as to whether the [survey] was effectively required for the students whose parents had not returned the opt-out form"). At issue in *Rhoades* was a state statute that mirrored 20 U.S.C. § 1232h(b), including the "required" limitation. Like the court in *C.N.*, the *Rhoades* court concluded that because there were deficiencies in the manner in which a survey was conducted, participation was arguably not voluntary and was instead "required."<sup>7</sup> For example, the plaintiff "had no prior knowledge of the purpose of the test"; the plaintiff "thought that she had to sign [a consent] form and take the test"; she "was told that she needed to hurry when reading and signing [a consent] form"; and the consent form itself was defective because it directed "further questions about [the

---

<sup>6</sup> Although the *C.N.* plaintiffs alleged a claim under 20 U.S.C. § 1232h(b) in the trial court, they did not raise this claim on appeal and instead pursued only their constitutional claims. *C.N.*, 430 F.3d at 170 n.13. The *C.N.* opinion is nonetheless instructive because the Court analyzed whether participation in the survey at issue was "required." *Id.* at 175 n.18.

<sup>7</sup> The court ultimately concluded that the state statute did not provide the plaintiffs with a cause of action and so granted summary judgment on the plaintiffs' statutory claim in favor of the school. *Id.* at 904-05. The court allowed the plaintiffs' state tort claims to proceed to trial. *Id.* at 907.

survey]” to a “project coordinator” without informing students who the project coordinator was or how he or she could be reached. *Id.*

In contrast to the specific factual circumstances at issue in *C.N.* and *Rhoades*, the HKCS, if administered under the passive consent procedures described in this Opinion, is subject to multiple sets of standardized instructions developed at the state level, which teachers have no authority to alter. These instructions make clear that the HKCS is voluntary and students will not suffer any adverse consequences, such as a “cut,” if they decline to participate. Parents receive written notice two weeks in advance of the Survey through Parent Information Letters, which contain information about the Survey and provide information regarding whom parents may contact if they have questions. These letters state in clear terms that the Survey is voluntary and explain how parents and students may opt out. Moreover, the written and oral instructions that accompany the Survey are standardized and consistent, with students being informed repeatedly that the Survey is voluntary. Assuming these procedures are followed, the HKCS would not suffer from the mixed messages and confusion that existed in *C.N.* and *Rhoades* and, thus, participation in the HKCS would remain voluntary and would not be considered “required.”<sup>8</sup>

### **3. The Colorado Department of Education Has Discretion to Interpret and Apply § 22-1-123(5)(a), C.R.S., in Individual Cases.**

As explained above, administration of the HKCS under the passive consent procedures described in this Opinion does not trigger the provisions of 20 U.S.C. § 1232h(b) or § 22-1-123(5)(a), C.R.S., that mandate prior written parental consent. However, the State Board of Education and CDE retain discretion to interpret and apply § 22-1-123(5)(a), C.R.S., and have power to clarify specific factual circumstances under which participation in a survey such as the HKCS would be “required” and thus subject to the parental-consent provisions of that statute.

For example, the State Board of Education exercises “general supervision over the public schools of the state” as well as the “educational programs maintained and operated by all state governmental agencies concerning individuals who have not completed the twelfth-grade level of instruction,” and has the power to “promulgate and adopt policies, rules and regulations” necessary to exercise this general

---

<sup>8</sup> The CDC, Division of Adolescent and School Health, issued guidance in 2014 entitled “Parental Permission and the Youth Risk Behavior Survey (YRBS).” The HKCS is a part of the YRBS program. CDC guidance instructs that a passive consent procedure may be used for the YRBS because participation in the YRBS is not “required”: “[A]lthough the YRBS contains questions about the protected areas described in the law, a YRBS . . . never requires student participation. Consequently, the YRBS does not require active permission under [20 U.S.C. § 1232h(b)] . . . .” This provides additional support for the conclusion that if the HKCS is administered in a voluntary manner under the passive consent procedures described in this Opinion, prior written parental consent is not mandated by the relevant statutes.

supervisory authority, including regulations implementing the state statute at issue here. See COLO. CONST. Art. IX, § 1(1); §§ 22-2-106(1)(a), 22-2-107(1)(c), & 22-1-123(11), C.R.S.<sup>9</sup>

Additionally, the State Board is specifically authorized to suspend or revoke an individual teaching license, certificate, or authorization for “a period not less than ninety days” for knowing, intentional violations of the statute. § 22-1-123(11) & (12), C.R.S. Because the statute authorizes the State Board to both implement this statute by regulation and enforce it through the teacher and administrator licensing system, it follows that the State Board’s interpretation of whether a survey is “required” under particular facts and circumstances, through rules or adjudications, would be entitled to deference. See *El Paso Cnty. Bd. of Equalization v. Craddock*, 850 P.2d 702, 704–05 (Colo. 1993).

In exercising this authority, however, the State Board cannot adopt a position that is “inconsistent with or contrary to” § 22-1-123(5)(a), C.R.S. *Schlapp ex rel. Schlapp v. Colo. Dep’t of Health Care Policy and Fin.*, 284 P.3d 177, 182 (Colo. App. 2012); see also *Huber v. Colo. Mining Ass’n*, 264 P.3d 884, 890 (Colo. 2011) (“[T]he Department must . . . promulgate regulations that do not conflict with statutory directives.”). Thus, the State Board could not, by regulation or otherwise, nullify the term “required” in § 22-1-123(5)(a), C.R.S., or impose “a new condition” inconsistent with that limitation on the statute’s scope. *Sanger v. Dennis*, 148 P.3d 404, 413 (Colo. App. 2006) (holding that a regulation may not “effectively add [to], [ ] modify, and [ ] conflict” with governing law by “imposing a new condition”); see also *Gessler v. Colo. Common Cause*, 327 P.3d 232, 237–38 (Colo. 2014) (invalidating a regulation because it “directly conflict[ed]” with governing law).

## CONCLUSION

The federal statute governing school surveys, 20 U.S.C. § 1232h(b), applies only to surveys administered by the federal Department of Education. Because the HKCS is not administered by the federal Department of Education, that statute does not apply.

Additionally, both 20 U.S.C. § 1232h(b) and § 22-1-123(5)(a), C.R.S., mandate prior written parental consent only if student participation in a school survey is “required.” The plain meaning of that term connotes a lack of choice or indicates that declining to engage in a required activity would result in negative consequences. Further, federal case law and other persuasive authorities indicate that in determining whether a survey is “required,” all relevant circumstances should be reviewed on a case-by-case basis. This analysis includes a factual inquiry into what students are told prior to taking a survey, whether notice to parents


---

<sup>9</sup> To date, the State Board has declined to exercise its rule-making authority with respect to this statute.

includes information about how to opt-out of a survey, and whether the opt-out request would be honored with no negative consequences to the student. Assuming that participating school districts, schools, and teachers abide by the passive consent procedures described in this Opinion, the HKCS is, in fact, a voluntary survey, and written parental consent is not required under either statute. If a school or Survey administrator were to deviate from the required protocol, a different conclusion could be warranted.

The State Board and CDE have discretion to clarify specific factual circumstances under which participation in a survey such as the HKCS would be “required” and thus subject to the parental-consent provisions of § 22-1-123(5)(a), C.R.S. In exercising this discretion, however, the State Board and CDE cannot adopt a position that is contrary to the language of the statute or that nullifies any of its provisions, including the “required” limitation.

Issued this 8<sup>th</sup> of April, 2015.

  
\_\_\_\_\_  
CYNTHIA H. COFFMAN  
Colorado Attorney General