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Ms. MaryEllen Elia
Commissioner of Education
New York State Education Department
89 Washington Avenue
Albany, New York 12234

Dear Commissioner Elia:

I am writing to register NYSUT's strong objections to the treatment of opt outs and collective bargaining rights in the emergency regulations to implement ESSA that are currently in a second public comment period. Through ESSA, we have an opportunity to create a better accountability system and help restore trust in the field. Unfortunately, SED has chosen to add provisions to the regulations that will further alienate teachers and parents and undermine the credibility of the new system.

Right to Opt-Out of State Assessments

The emergency regulations penalize schools that have high opt-out rates from state assessments in several ways.

- First, the regulations reduce the performance level that schools with opt-outs will obtain in two key academic indicators, the Composite Performance Achievement indicator and the Academic Progress Index. This has the effect of lowering a school's overall performance in these schools and places them at a greater risk for identification as a low performing school.
- Second, the regulations provide that a school cannot exit Comprehensive Support and Improvement (CSI) or Targeted Support and Improvement (TSI) status (classifications for low performing schools) if the school has a participation rate below 95 percent, regardless of all other performance indicators. This will block schools from exiting CSI or TSI status that otherwise have met performance targets set by SED.
- Third, the regulations allow the Commissioner to place a school with high opt-out rates under preliminary registration review (SURR). This gives the Commissioner the unilateral authority to close schools that have high opt-out rates but are otherwise high performing.
- Fourth, the regulations include provisions that allow the Commissioner to impose a financial penalty by requiring districts to set aside Title I funds if the participation rate on state tests do not improve after three years. This would redirect Title I funds that otherwise would be used for services for economically disadvantaged children.

None of these actions are required by ESSA. SED is choosing to imposing these penalties on schools where parents exercise their right to opt out of state assessments. This also marks a major change in policy for the state, since in the past schools with high opt-out rates have not been penalized by the state accountability system.

The ESSA law is clear that states (as opposed to the USDOE) determine how participation rates will be incorporated into the state accountability system.

First, ESSA provides that parents have the right to opt their children out of state tests and schools must inform parents of those rights. SED has taken the position that if state law is silent regarding a parental right to opt their children out of the state tests there is no obligation to allow or inform parents of this right. The provision below from ESSA clearly provides parents with the right to opt-out of state assessments.

[ESSA section 1111(c)(4)(E)] *“(A) IN GENERAL.—At the beginning of each school year, a local educational agency that receives funds under this part shall notify the parents of each student attending any school receiving funds under this part that the parents may request, and the local educational agency will provide the parents on request (and in a timely manner), information regarding any State or local educational agency policy regarding student participation in any assessments mandated by section 1111(b)(2) and by the State or local educational agency, **which shall include a policy, procedure, or parental right to opt the child out of such assessment, where applicable.**”*

Second, ESSA provides that each state must determine how opt out data will be factored into the state accountability system. ESSA Section 1111(c)(4)(E)(iii) stipulates that each state must -
“Provide a clear and understandable explanation of how the State will factor the requirement of clause (i) of this subparagraph [the 95% participation rate requirement] into the statewide accountability system.”

Third, USDOE cannot compel a state to adhere to any specific plan for addressing participation rates. Section 1111 (e)(1)(B)(iii)(XI) of ESSA expressly prohibits the Secretary of Education from prescribing -

“the way in which the State factors the requirements under subsection (c)(4)(E)(i) [the 95% participation rate requirement] into the statewide accountability system under this section.”

These provisions make it clear that individual states, not USDOE, determine how opt-outs will factor into the accountability system. SED has claimed that USDOE made the state include these opt-out penalties into the state regulations. If so, then USDOE has exceeded their authority as this flies directly in the face of a specific Congressional mandate as specified above.

Collective Bargaining Rights

ESSA protects collective bargaining rights and existing collective bargaining agreements. Sadly, the emergency regulations do not protect collective bargaining rights in a similar manner.

Section 1111 Construction Rule, the ESSA law specifically states that provisions of ESSA are not to be construed to “*alter or otherwise affect the rights, remedies, and procedures afforded to school or local educational agencies employees under Federal, State, or local laws (including applicable regulations or court orders) or under the terms of collective bargaining agreements, memorandum of understanding, or other agreements between such employers and their employees.*”

However, these emergency regulations include several provisions that undercut collective bargaining rights.

- The regulations require any new collective bargaining agreement to limit teachers transferring into a CSI school to those rated Effective/Highly Effective.
- Districts that create a new school to replace a closed and restructured SURR/CSI school must select staff that consists “primarily” of experienced teachers (at least three years) who have been rated Effective/Highly Effective in each of the past three years and are not currently assigned to the school.

The committee that is established to develop the corrective action plan in schools with high opt-out rates must include teaching and support staff. However, beginning with the third year of a corrective action plan, only half the staff members can be selected by the bargaining unit. **All staff should be selected by the respective bargaining units.** It is inappropriate for the administration to select employees to serve on such committees.

SED has taken the position that by requiring districts to include these limitations in a successor contract, not the current contract, they are not impinging on collective bargaining. This assertion demonstrates a lack of understanding of collective bargaining, which requires that terms and conditions of employment must be negotiated, and not be a forgone conclusion.

Thank you in advance for your review and consideration of these important issues. We strongly encourage you to modify the emergency regulations to reflect the issues raised in this correspondence.

Sincerely,



Jolene DiBrango
Executive Vice President

cc: Members of the New York State Board of Regents