

OPT-OUT OF STATE TESTS



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As the next round of state tests approach, it is important to review the facts around opting out of state tests. Each year misinformation about the impact of opt outs is presented as fact. Since this fact sheet was last updated, the federal requirements around opt out have changed twice. As this fact sheet points out, The Every Student Succeeds Act adopted by Congress continued the 95 percent participation requirement but placed responsibility for how to address it in the hands of the states. During federal rulemaking, former Secretary King tried to re-assert federal authority for holding schools and districts accountable by requiring states to have a plan that included punitive measures for any school or district not meeting the 95 percent participation requirement. NYSUT sent a public comment letter opposing efforts to re-assert this authority. While the regulations were set to take effect as the Trump administration took office, Congress has interceded to begin repealing the regulations leaving the law to guide state plans. The House and Senate have already repealed the regulations and the President is expected to sign the repeal. With this change the remainder of this fact sheet stands as the best information available on opting out of state tests.

Parents and teachers share deep concerns about the standardized tests used by New York state for accountability purposes. Those include: stress on students, in-appropriateness and lack of validity of the Common Core-aligned tests, loss of learning time, misuse of tests for high-stakes decisions, erosion of local control over school decisions and lack of transparency on state test content. Parents who decide it is not in their children’s best interests to take these assessments are part of an “Opt-Out” movement that is growing nationally and in New York state. Despite recent changes that eliminate certain consequences of the state tests for students and teachers, the tests will still be administered and used for “advisory” purposes. NYSUT fully supports parents’ right to choose what is best for their children— including NYSUT members who decide as parents to opt their child out of state tests.

Some school districts have provided parents with inaccurate information on the consequences of opting out. This NYSUT Fact Sheet attempts to clear up the misinformation by reviewing the federal requirements for participation in the state assessments and potential consequences of opting-out for districts, students and teachers.

ADVICE FOR LOCAL LEADERS

We recognize that many members have strong feelings about this issue. Teachers are trying to reconcile their own roles as public school educators, private citizens and as parents too. As an organization, NYSUT has been clear that students should not be subjected to over-testing or burdened with field tests that are conducted for the main purpose of benefitting test makers. We are on record supporting districts that choose to opt out of field tests. Additional action is recommended at the local level:

- NYSUT encourages members to exercise their rights as citizens and professionals to speak out against the harmful effects of high-stakes tests in general and to consider refusing the tests for their own children. NYSUT will defend teachers against disciplinary action if a district pursues 3020-a charges. (See page 5, below)
- Students should not be subject to harmful “sit and stare” policies. Encourage the district to work with stakeholders to develop appropriate policies for students who choose to opt out.
- Ensure that there are processes in place to track students who refuse part of an assessment and teachers of these students are notified.

FEDERAL ACCOUNTABILITY

The state assessments are required by the Federal Elementary and Secondary Education Act (ESEA) and were originally intended to evaluate district programs. Each state was required to establish annual measurable objectives (AMOs) for determining adequate yearly progress (AYP) to ensure that all students meet or exceed the State’s proficient level of academic achievement on the State’s assessments in English language arts (ELA) and mathematics.

- Statewide assessments must measure the proficiency of students in each of grades three through eight in, at a minimum, mathematics, and reading or language arts, and to measure the proficiency of all students in science not less than one time during grades three through five; six through nine; and grades 10 through 12.
- Districts and schools must meet both participation and performance criteria to make AYP. To meet the participation criterion, districts/schools must have at least 95 percent of students tested in each accountability group with 40 or more students (ESEA section 1111(b)(2)(I)(ii)).

In December 2015, ESEA was reauthorized as amended by the Every Student Succeeds Act (ESSA). Under ESSA, the Federal role in state accountability systems was severely limited; most of the decisions regarding the design and consequences of the accountability system become the states’ responsibility. Key provisions related to test administration include:

- Maintains program for administration of statewide standardized tests but removes AYP, states are responsible for establishing long-term goals for college-career readiness.
- Maintains the requirement that 95 percent of all students and subgroups be assessed annually but prohibits the Federal government from taking any action against states or districts that do not meet the 95 percent participation rate. States must provide a clear and understandable explanation of how the State will factor the requirement into the statewide accountability system. [ESEA section III(c)(4)(E)]
- Requires school districts to inform parents and guardians of opt-out policies, and affirms a parent’s right to have their children opt out of statewide standardized tests where state and local policies permit. [ESEA III2 (e)(2)(A)]

ESEA/ESSA Transition

In general, each State and district that receives funds under a State formula grant program under ESEA Waiver must continue to implement that program through the 2017-2018 school year. However, most of the Federal reporting requirements are eliminated, including AYP, AMO and participation rates. New York state will need to develop and implement a new accountability system that is consistent with the new rules beginning with school year 2018–2019.

POTENTIAL CONSEQUENCES OF OPTING-OUT FOR DISTRICTS

According to the NYS approved ESEA Waiver, without 95 percent participation, schools would not be able to meet AYP. Districts may calculate a “weighted average” of the group’s participation rates using the current and the previous year. If the result meets the participation criterion for the measure, the group is considered to have met the participation criterion.¹ A district that does not meet the participation requirements may be required to develop an improvement plan for increased participation. For those with Focus or Priority schools, there may be other penalties.

- **NYSUT does not believe the SED is authorized to withhold state aid based on assessments participation. SED has stated that it does not support any attempted withholding of state aid from schools based on assessment participation rates.**
- Focus and Priority schools that do not meet the participation rate requirement may not be able to meet the exit criteria (assuming they would otherwise be able to.) Part 100 regulations, gives the commissioner authority to place under registration review (increasing state oversight) any school in which excessive percentages of students fail to fully participate in the State assessment program.
- Schools under Receivership could have a 95 percent participation rate as one of the indicators required to meet demonstrable improvement.
- Districts may need to adhere to “set-aside” rules for Title I funds. This funding is not lost but 5-15 percent may need to be re-allocated.
- In the schools in which one or more subgroups fail to meet the 95 percent participation rate in ELA and Math or 80 percent participation in science for three consecutive years, SED will require that a Local Assistance Plan (LAP) be developed to address student nonparticipation in assessments.
- Non-Title I districts/schools are held to the same participation requirements.
- The 95 percent participation rate is a factor in determining whether a school can be designated as a “Reward” school.

POTENTIAL CONSEQUENCES FOR STUDENTS

At this point, the assessments have limited academic consequences for students. Although originally intended to evaluate programs, the assessments are used by some districts as one of the criteria for placement decisions and by the state to determine whether or not a student should receive remedial services. However, actions by the state Legislature and Board of Regents have minimized how the assessments can be used.

- The 2014-15 state budget enacted laws that prohibit including the results of the grades three through eight ELA and mathematics assessments on a student’s permanent record until December 31, 2018.
 - Districts must notify parents that test results are not included in their student’s permanent record but are being used for diagnostic purposes.
 - Results may be used for promotion or placement decisions only if used as one of multiple measures and is not the primary factor.
 - Districts must notify parents annually how placement decisions are made and how the policy was developed.
- The ability for districts to use the results for remediation was further reduced by action of the Regents. Historically, students who performed below Level 3 (proficiency) would receive Academic Intervention Services (AIS). With the roll-out of the Common Core Learning Standards (CCLS), the SED anticipated student scores would drop and chose to

¹ Chapter 6 of the SIRS Manual (p 259 of Version 12.10) - <http://www.p12.nysed.gov/irs/sirs/>

provide flexibility to school districts to determine what services, if any, would be provided to students.²

Districts use a code that indicates refusal. Assessment records for these students do not move to Level 2 of the Student Information Repository System. These students will be considered to have "no valid test score" and will be counted as not tested in verification reports and for accountability calculations. Partial results continue to be reported.

The SED has informed districts that schools do not have any obligation to provide an alternative location or activities for individual students while the tests are being administered. This has created a dilemma for districts, which have responded in varied ways.³ Some will allow students to read, others provide an alternative activity. **Unfortunately, some have implemented "sit and stare" policies that are punitive and harmful to students. NYSUT is on record in opposing the use of "sit and stare" policies.**

POTENTIAL CONSEQUENCES FOR TEACHERS

APPR and the State Growth Model

During the moratorium on the consequences of using the state growth model, growth scores will continue to be reported for informational purposes but are not allowed to be used for critical employment decisions. However, SED has also stated they are evaluating changes to the growth model, including using three years of data, which means the ratings during the transition period could still have an impact in the future.

At the state level, large numbers of students opting out has the potential to increase the volatility of the model, particularly in subgroups with smaller numbers of students. This is something NYSUT will be looking at closely and asking our external experts to review as the technical reports are made available.

At the individual teacher level, it is impossible to determine the impact on the teacher. There is an expectation that higher-achieving students are more likely to opt-out. That has not been the experience in every district, but if that is the case, it still does not necessarily harm the teacher's growth score. The model is based on a relative scale - how each student in a teacher's classroom compares to other students that scored the same in prior years (up to 3 years history, also taking into account ELL, SWD, poverty) with the results averaged and then compared to all other teachers. In this model, high-achieving students can earn a teacher a low growth score if they didn't do as well this year as the average of their peer group, even if they are a level 3 or 4. Low-achieving students can earn a teacher a positive growth score, even if the student's results are below proficiency, if they did better than their peers.

It is possible that if too many students opt-out, a teacher will not get a growth score. A teacher needs a minimum of 16 scores of students assigned to the teacher for at least 60% of the year. SED has required for all plans negotiated under Education Law 3012-d that districts create Student Learning Objectives (SLOs) for teachers that may not have enough students.⁴ Locals

² Regents Action 9/8/2014, Amendment of Section 100.2(ee) of the Commissioner's Regulations, relating to Academic Intervention Services (AIS)

³ SED Field Memo, Information on Student Participation in State Assessments, Steven E. Katz, January 2013

⁴ The requirement for a back-up SLO has been suspended during the moratorium on the consequences of using the grades 3-8 state assessments. SED FAQ sections 30-2.14 and 30-3.17 dated March 1, 2016.

that use group measures that have large numbers of students opting out should also expect more volatility from year-to-year.

Another related issue is with students who did take part of the test but refused some sessions or parts of the assessments. Those students will get a score based on the questions answered and the results will be included in a teacher's state-provided growth score. This is also a factor for principals, where there may be a cumulative effect. The district should keep a record of these students and any teacher with an ineffective/developing rating should be able to use that as evidence in an appeal.

What to do if You or one of Your Members Faces Disciplinary Action

Locals and individual union members who advise parents or students to opt out of state tests may face risks.

- A teacher who, in conversations with students or parents, takes a position on testing contrary to the school district's educational program may potentially be subject to disciplinary action, e.g. charges of misconduct or insubordination. The Supreme Court has held that **when a public employee speaks in his/her capacity as an employee, the speech is not constitutionally protected.**
- However, because standardized testing is a matter of public concern, a local speaking as a union, or an individual member speaking as a parent or citizen, about educational concerns over standardized testing, for instance, in a letter to the editor or in a statement to the Board of Education, is protected by the U.S. Constitution at least so long as they are not encouraging other parents or students to opt out from a test.
- Members' questions about particular statements or actions regarding opting-out should be referred to the LRS.

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