

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, in particular, the grades 3-8 ELA and math state assessments. The state's accountability system has changed to comply with the requirements of Federal The Every Student Succeeds Act (ESSA). ESSA continued the 95 percent participation requirement but placed responsibility for how to address it in the hands of the states. New York State's new accountability system was approved in January 2018 for implementation in the 2018-19 school year. The state regulations that govern how the new system is implemented have been adopted as emergency regulations but not as a permanent rule as of the release of this document.

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

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. Despite the temporary moratorium that eliminates certain consequences of the state tests for students and teachers, these tests are still administered and used for advisory purposes and are a significant factor for identifying low-performing schools.

ADVICE FOR LOCAL LEADERS

We recognize that many members have strong feelings about this issue. As an organization, NYSUT has been clear that students should not be subjected to over-testing or burdened with field tests. NYSUT is on record as 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 their mind about 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/b charges. (See page 5, below)
- Districts with persistent high opt-out rates will be required to develop improvement plans. Encourage the district to work with stakeholders to develop appropriate policies for students who choose to opt-out. Students should not be subject to punitive, harmful "sit and stare" policies.
- Ensure that there are processes in place to track students who take part of an assessment and then choose to opt-out. These students are still counted as tested. This data may be grounds for a teacher to appeal a growth score or SLO after the moratorium is lifted.

FEDERAL ACCOUNTABILITY and the Grades 3 – 8 STATE ASSESSMENTS

The grades 3-8 English Language Arts (ELA) and mathematics state assessments are required by the Federal Elementary and Secondary Education Act (ESEA) and were originally intended to evaluate school and 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. The intent of ESEA when the 95 percent participation rate was first introduced was to ensure that districts did not discourage lower-performing students from taking the tests.

In December 2015, ESEA was reauthorized as amended by the Every Student Succeeds Act (ESSA).¹ Under ESSA, the Federal role in state accountability systems was severely limited. States are responsible for most of the

¹ See link to the full text of the statute and language for the provisions cited in the additional resources section

decisions regarding the design and consequences of the accountability system. Key provisions related to test administration include:

- Maintains program for administration of statewide standardized tests (these include ELA and math in grades 3-8 and once in high school; and, grade span testing for science).
- States must set goals for ELA and math (aligned to college-career readiness) and English Language proficiency.
- Maintains the requirement that 95 percent of all students and subgroups be assessed annually.
- States must provide a clear and understandable explanation of how the State will factor the participation rate requirement into the accountability system, including any consequences for not meeting the 95 percent participation rate.
- 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. SED has taken the position that since New York State law does not specifically address the right to opt-out, there is no obligation to pro-actively inform parents.

NEW YORK STATE ACCOUNTABILITY PLAN

ESSA establishes a methodology for calculating student achievement that requires including all “continuously enrolled” students, regardless of whether or not they took the test. Districts must report participation rate data for all accountability subgroups in all schools. The language of the law is also clear: states must determine what actions they wish to take as part of their state accountability system in those schools that have student participation rates of less than 95 percent. New York State has chosen to calculate student achievement using two different methodologies:

- Academic Achievement Index - The State will use Performance Indices based on measures of proficiency on state assessments using the prescribed methodology that includes all enrolled students.
- Core Subject Performance Index – This calculation is based only on those students that participate in the state assessments. The state intends to use the Core Subject Performance Index to differentiate schools with low participation rates from those with actual low achievement.

These measures will be combined to determine a school's composite performance rating for student achievement. Student achievement is one of the indicators used to determine a school's accountability status. If a school's indicator ratings are mixed (some high, others low) decision rules are used to determine whether the school's overall performance requires intervention. SED has stated publically that they do not intend to identify schools for improvement if the schools have high academic achievement but low participation rates. However, the state plan does not explicitly state this. In fact, the initial draft regulations contained several onerous provisions related to opt-outs that NYSUT strongly opposed. Some of these were removed but several provisions remain that may have an adverse effect on schools with high opt-outs. **Schools with high opt out levels are penalized under the new accountability system.** In some cases this penalty did not change the accountability status of the school. SED has indicated that schools with above average student performance (before accounting for opt outs) were not designated as a CSI schools. However, school buildings with performance levels below the state average could be identified as low performing CSI schools due to the opt out penalty if the school also performed poorly on the state growth model and other factors. NYSUT will continue to advocate for all of these provisions to be modified or eliminated so that no school is penalized as a result of parents exercising their right to opt-out their children of state assessments.

POTENTIAL CONSEQUENCES OF OPTING-OUT FOR DISTRICTS

Districts will be required to report participation rates for all subgroups in all schools in the district report card, along with other accountability measures. Districts with schools that persistently and substantially do not meet participation rates will be required to submit a corrective action plan that will escalate over time.

SED has stated that it does not support any withholding of state aid from schools or diversion of school improvement funds from those schools that need them most because of participation rates. Superintendents will be pressured to improve participation rates primarily by creating improvement plans with increasing state oversight if benchmarks are not met. However, there are some potential consequences for schools.

- The methodology used for combining the academic achievement and core performance indices will result in a lower performance level for some schools with high opt-outs. This performance level will be combined with other indicators, including a growth measure, chronic absenteeism and progress goals, and could lead to some schools being mislabeled as underperforming.
- Comprehensive Support and Improvement (CSI) and Targeted Support and Improvement (TSI) schools may not be able to meet the exit criteria if the academic achievement measure remains in the lowest performance level, which is more likely with a high number of opt outs.
- To exit receivership, schools are required to meet improvement targets on ESSA indicators and other measures that include participation rates.
- The 95 percent participation rate will be a criterion in determining whether a school can be designated as a “Recognition (high performing)” school. This would be consistent with past practice.

PARTICIPATION RATE IMPROVEMENT PLANS

- Improvement plans are required for schools that have an academic achievement rating that is Level 1 (lowest 10 percent); fail to meet the 95 percent participation requirement for two consecutive years; and, fails to improve participation rates. The plan must be developed in collaboration with a committee composed of the principal and staff selected by the representative of the collective bargaining organization(s), and parents (not employed by the district or a collective bargaining organization.) Schools will be required to submit their self-assessment and improvement plan to SED for approval.
- Schools that implement a school improvement plan and do not improve their participation rate the following year must conduct a district participation rate audit and update their plan.
- Districts with schools that do not improve their participation rate by the third year must contract with a BOCES to conduct an audit and develop an updated plan. The updated plan must be developed in collaboration with a committee composed of BOCES staff, the superintendent, the school principal or designee, school staff including teachers and support staff, and parents. At this point, only fifty percent of the school staff can be selected by the representative collective bargaining organization(s). Districts that have schools that implement the BOCES improvement plan may be required by SED to undertake activities to raise student participation. These activities are not specified in the state plan.
- Schools that do demonstrate improvement will be required to update the plan but will not need to conduct an audit or new self-assessment.

POTENTIAL CONSEQUENCES FOR STUDENTS

One of the more persistent rumors is that students who opt-out will automatically receive a “level one” score that will become part of their permanent record. This is false. When reporting individual students that opt-out, districts use a code that indicates refusal and no score is reported for the child. **These students will be considered to have no valid test score.**²

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 Academic Intervention Services (AIS). 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 3-8 ELA and mathematics assessments on a student’s permanent record until December 31, 2018. This provision of the law was extended in 2018 until December 31, 2019.³
 - 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.

² SED 2017-2018 SIRS Manual, see page 75 <http://www.p12.nysed.gov/irs/sirs/home.html>

³ Section 35 of Part CCC of Chapter 59 of the Laws of New York

- The ability for districts to use the results for remediation was reduced by action of the Regents. Historically, students who performed below Level 3 (proficiency) would receive Academic Intervention Services (AIS). With the initial roll-out of the Common Core Learning Standards (CCLS), SED anticipated student scores would drop and chose to provide flexibility to school districts to determine what services, if any, would be provided to students. SED has been extending the regulatory language on AIS eligibility criteria on an almost annual basis. The latest amendment was in June 2017.⁴ The item notes that SED recommends delaying the establishment of the standard setting panel until the 2019-20 school year to ensure appropriate alignment with the Next Generation English Language Arts and Mathematics Learning Standards and corresponding assessments. Later guidance provided by SED explains that this panel will be convened following the spring 2021 administration of the Grades 3-8 tests.

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.⁵ 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 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.

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 percent 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.⁶ Locals 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.

The State Accountability System and The Growth Model

The state is using a school-wide growth measure in the State accountability system as one of the indicators to identify schools for corrective action. The moratorium does not apply to the accountability system. The growth

⁴ <http://www.regents.nysed.gov/common/regents/files/617p12a1.pdf> and Commissioner's Regulations: <http://www.p12.nysed.gov/part100/pages/1002.html#ee>

⁵ [Grades 3-8 Common Core English Language Arts and Mathematics Tests School Administrator's Manual, 2014 Edition](#)

⁶ 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.

model is the same one used to create the school-wide ratings used to evaluate principals and some teachers under APPR but modified to include three years of data. At the state and school 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.

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.

Additional Resources

- NYSUT ESSA Overview Fact Sheet SED ESSA Webpage
<http://www.p12.nysed.gov/accountability/essa.html>
- Full Text of the Federal Law - <https://www2.ed.gov/policy/elsec/leg/esea02/index.html>

Federal Citations in this document:

[ESEA section III(c)(4)(E)] 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.”

[ESEA III2 (e)(2)(A)] *“(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.”*

[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.”*