

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 the Federal 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 implemented in the 2018-19 school year. The new system changed how the state factors in opt-outs for identifying low-performing schools. 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. There have been changes in state policies and laws that eliminate certain consequences of the state tests for students and teachers; however, 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. NYSUT has demanded the state take action to fix the serious issues with New York's grade 3-8 ELA and math 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 4, 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.
- To address the numerous testing concerns, NYSUT launched a Correct the Tests campaign calling on SED to correct the tests and stop the roll-out of computer-based testing.

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 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.
- Requires states to identify the lowest performing five percent of schools, with state tests weighted more heavily than other factors.

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.
- These measures will be combined to determine a school’s composite performance rating for student achievement. The core subject calculation is intended to mitigate the chance that a school will be identified based on opt-outs rather than low achievement. However, the more students that opt-out, the more likely the school will have a lower average academic achievement measure, resulting in a lower combined rating.
- The state will then combine a school-wide growth measure with the composite performance rating to initially identify schools for corrective action.

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 methodology used by the state for identifying low performing schools will penalize schools with high opt-outs.** SED has indicated that schools with above average student performance (before accounting for opt outs) will not be designated among the lowest performing group, they are above the initial cut-point. However, school buildings with performance levels below the state average (but well above the lowest five percent required by ESSA) are at risk. These schools could be identified as low performing schools if the school also performed poorly on the state growth model and other factors. 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. 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.

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

POTENTIAL CONSEQUENCES OF OPTING-OUT FOR DISTRICTS

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. However, Superintendents will be pressured to improve participation rates to avoid an opt-out penalty and potential for being misidentified as a district with low-performing school(s).

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 will require improvement plans for the lowest performing schools in the state, Comprehensive Support and Improvement (CSI) schools, and for the lowest performing schools based on subgroup performance, Targeted Support and Improvement (TSI) schools.
- CSI and 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.

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 and fail to improve the following year, will undergo an audit by SED and may be required by the Commissioner to undertake activities to raise student participation. These activities are not specified in the Commissioner’s Regulations.
- 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

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.

² SED -2019-2020 SIRS Manual, <http://www.p12.nysed.gov/irs/sirs/>

- 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 and was made permanent by the Board of Regents in April 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.
- 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.

NYSUT recommends that SED provide guidance on what districts should do when parents inform the school they do not want their child to participate in state tests in order to ensure that districts do not implement policies that are punitive and harmful to students. Districts have been informed 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 policies that are punitive and harmful to students, such as substituting an assessment that has no value, “sit and stare” and excluding students from school celebrations. NYSUT is on record in opposing these policies.**

POTENTIAL CONSEQUENCES FOR TEACHERS

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.

³ Section 35 of Part CCC of Chapter 59 of the Laws of New York and Section 30 of Part YYY of the 2019-2020 Enacted State Budget [S.1509-C/A.2009-C]

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 SED has created an assessment tool kit at <http://www.nysed.gov/assessments-toolkit>

Additional Resources

- NYSUT Correct the Test Website: <https://correctthetests.com/>
- 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.”*

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