

OPT-OUT OF STATE TESTS FOR 2020-21



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March 2021

NYSUT urged the State Education Department (SED) to request a federal waiver of the testing requirements in the Every Student Succeeds Act (ESSA). The tests required by this act include the grade 3-8 ELA and math tests. NYSUT's request pointed to the difficult year students and teachers have had and the fact many students are learning either in a remote or hybrid model. Without standardized instructional modes there should not be standardized tests at the end of the year.

The State Education Department developed two draft waiver requests for the federal Department of Education. One would eliminate the requirement to administer the state tests used for accountability purposes. The second, would decouple the assessments from the accountability system. This means the assessments would still be given but they would not be used to create a new accountability list using the 2020-21 school year results. There would be no consequence for districts that have high opt-outs for the 2020-21 school year. The public comment on the drafts overwhelmingly supported the two waiver requests.

SED sent the waiver requests to the United States Department of Education (USDE). USDE indicated in a letter dated February 22, 2021 they will not grant waivers to eliminate the tests for the 2020-21 school year. States will be required to administer the assessments this year. The letter indicated the department will waive the accountability requirements, including the 95 percent participation rate and will provide states with some flexibility for administering the tests. This flexibility includes:

- Extending the testing window and moving assessments to the summer or fall
- Giving the assessments remotely
- Shortening the state assessment

The USDE statement also recognized that individual states may need additional flexibility based on specific circumstances and will work with states to address these needs. In a statement in response to USDE, Commissioner Rosa expressed disappointment in the decision not to grant a blanket waiver of the testing requirements. SED will continue to have discussions with USDE to explore New York State's options. The Commissioner acknowledged that USDE affirmed no child should be made to come to school to take a state assessment. SED had stated previously that no state tests will be administered remotely.

NYSUT's position continues to be that standardized tests are not the best way to measure a student's development, and they are especially unreliable right now. Regardless of what flexibility the federal government provides, we have grave concerns that standardized tests can be administered in any sort of equitable way. NYSUT supports Commissioner Rosa's position that no student should be forced to come to school in person just to take a test.

As this 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. Some school districts have begun to provide parents and teachers with inaccurate information on the consequences of opting out and the procedures for testing in 2020-21. This NYSUT fact sheet attempts to clear up any misinformation teachers may hear by reviewing the potential consequences of opting-out for districts, students, and teachers and the procedures for this year's tests. **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.**

ADVICE FOR LOCAL LEADERS

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 3, below)
- Encourage the district to work with stakeholders to develop appropriate policies for students who choose to opt-out. Unfortunately, some districts 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. These punitive measures escalated in some districts once the participation rate became a significant factor in identifying CSI schools. **NYSUT is on record in opposing these policies.**
- Students learning remotely should not be forced to come to school to take the test.

FEDERAL ACCOUNTABILITY and the 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. The 95 percent participation rate was first introduced to ensure that districts did not discourage lower-performing students from taking the tests.

To comply with the federal requirements for the 2020-21 school year, New York State will administer the ELA and mathematics assessments in grades 3-8; Regents English Language Arts, Algebra 1, Living Environment and Physical Setting/Earth Science; and, grades 4 and 8 science. USDE will waive the requirement that states identify the lowest performing schools based on these state tests. Participation rates will have no impact on a school’s status. The USDE is waiving the 95 percent participation rate requirement and SED has said no children should come to school just to take the tests.

CONSEQUENCES OF OPTING-OUT FOR DISTRICTS

There are no consequences for districts in the 2020-21 school year. The state’s accountability system is placed on hold. SED has encouraged districts to consider student’s social emotional needs as the highest priority during the pandemic and not to focus on high-stakes tests. The State will not withhold aid from schools or divert school improvement funds because of participation rates on the state tests. Unfortunately, some Superintendents may still feel compelled to encourage students to take the tests to improve participation rates. Especially those that have schools identified as a low performing or that have corrective action plans because of high opt out rates in prior years.

CONSEQUENCES FOR STUDENTS

There are no consequences for students that do not take the 3-8 state tests. 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.**¹

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 and was made permanent by the Board of Regents in April 2019.²

¹ SED -2019-2020 SIRS Manual, <http://www.p12.nysed.gov/irs/sirs/>

² 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]

- 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 2017.³ 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.

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.

Additional Resources

- NYSUT ESSA Overview Fact Sheet [NYSUT ESSA Fact Sheet](#)
- SED ESSA Webpage <http://www.p12.nysed.gov/accountability/essa.html>
- Federal Guidance Dated February 22, 2021 [Guidance to States on Assessing Student Learning](#)
- USDE ESSA Webpage: [Every Student Succeeds Act \(ESSA\) | U.S. Department of Education](#)
- Full Text of the Federal Law (PDF) [PUBL095.PS \(congress.gov\)](#)

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³ <http://www.regents.nysed.gov/common/regents/files/617p12a1.pdf> and Commissioner’s Regulations: <http://www.p12.nysed.gov/part100/pages/1002.html#ee>