

# OPT-OUT OF STATE TESTS FOR 2022-23



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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. NYSUT's position continues to be that standardized tests are not the best way to measure a student's development. 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 a significant factor 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.**

## ADVICE FOR LOCAL LEADERS

We recognize that many members have strong feelings about this issue. 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 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 schools. **NYSUT is on record in opposing these policies.**

## FEDERAL ACCOUNTABILITY and the Grades 3-8 STATE ASSESSMENTS

The state's accountability system must comply with the requirements of the Federal Every Student Succeeds Act (ESSA). New York State must 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 5 and 8 science. The grades 3-8 ELA and mathematics assessments 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.

## 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 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.

### CONSEQUENCES OF OPTING-OUT FOR DISTRICTS

SED 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 were paused during the pandemic and will not be required for the current school year. A decision has not been made yet for the 2023-24 school year. However, SED is phasing in the accountability system and we expect improvement plans will be required based on 2022-23 data.
- 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.

## 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.**<sup>1</sup>

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.<sup>2</sup>
  - 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 as the only measure for remediation was removed by action of the Regents. Historically, students who performed below Level 3 (proficiency) would receive Academic Intervention Services (AIS). Beginning with the roll-out of the Common Core Learning Standards (CCLS), SED has provided flexibility to school districts to determine what services, if any, would be provided to students. Beginning with the 2019-20 school year, districts were required to implement a two-step identification process. Students who perform at or below a certain scale score on one or more of the state assessments in ELA or math would be identified initially. Districts then use a district-developed procedure that takes into consideration multiple measures of student performance. However, districts have the ability to provide services to any student determined, through a district-developed procedure, to be at risk of not achieving the state standards.<sup>3</sup>

## 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.**

<sup>1</sup> SED -2021-22 SIRS Manual, <http://www.p12.nysed.gov/irs/sirs/>

<sup>2</sup> 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]

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

- 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 their LRS.

#### **Additional Resources**

- SED ESSA Webpage [Programs | New York State Education Department \(nysed.gov\)](#)
- 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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