

# OPT-OUT OF STATE TESTS



**Fact Sheet No: 15-01**

**January 2015**

Parents and teachers share deep concerns about over-testing resulting from the state's botched implementation of the Common Core Learning Standards (CCLS). Concerns include: stress on students, appropriateness of tests, erosion of learning time and lack of state transparency on 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. 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. In addition, NYSUT encourages members to exercise their rights as professionals to speak out against the harmful effects of high-stakes tests—and will vigorously defend members if a district brings disciplinary charges in that event.

The State Education Department (SED), which has a vested interest in ensuring students take the assessments, claims there is no provision in state law that allows students to "Opt-Out" and has provided little guidance to districts. 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. NYSUT fully supports a parents' right to choose what is best for their child—including parents who are teachers. Additional action is recommended at the local level.

- Members should feel comfortable in exercising their right to speak out against the overemphasis and misuse of standardized tests.
- NYSUT will defend teachers against disciplinary action if a district pursues 3020-a charges.
- 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.

## STATE ACCOUNTABILITY – GRADES 3-8 ELA AND MATH ASSESSMENTS

The state assessments are required by Federal law and were originally intended to evaluate district programs. ESEA section 1111(b)(2)(E)-(H) requires each state 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 by no later than the end of the 2013–2014 school year. The ESEA Waiver allows states the flexibility to develop new AMOs based on growth targets that are no longer subject to that timeframe. The Waiver does not provide flexibility around the required assessments.

- State assessments must be used and there must be a state-approved methodology for determining student growth. ESEA section 1111(b)(3) requires measuring 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)).

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

- **The failure to meet the 95 percent participation requirement has no impact on a district's state aid. SED is not authorized to withhold state aid based on assessments participation.**
- SED has used the ESEA Waiver to merge and align the state's accountability system. The lowest performing five percent of schools in the state were identified as “Priority” and ten percent of districts as “Focus” districts/schools. Focus and Priority schools that do not meet the participation rate requirement will 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.
- 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 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. How SED would compel parents who are boycotting the state assessments is unknown.
- Non-Title I districts/Schools are held to the same participation requirements.

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<sup>1</sup> Chapter 6 of the SIRS Manual (p 212 of Version 9.10) - <http://www.p12.nysed.gov/irs/sirs/>

## 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 provide flexibility to school districts to determine what services, if any, would be provided to students for the 2013-14 and 2014-15 school years for those students.<sup>2</sup>

Although SED claims there is no provision for students to opt out, **there is a mechanism in place for tracking students who refuse to take the entire test.** 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.<sup>3</sup> 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*

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.

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

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

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 eight students with *both* pre- and post- assessments (a total of 16 scores) assigned to the teacher for at least 60% of the year. SED has suggested that districts create Student Learning Objectives (SLOs) for teachers that may not have enough students. If an SLO is not created at the beginning of the year, NYSUT's position is that it is inappropriate to give a teacher an SLO or group measure after the fact. Those teachers should not have a sub-component score for growth and therefore, no composite score. 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.

### ***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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