

June 6, 2018

Ms. MaryEllen Elia
Commissioner of Education
New York State Education Department
89 Washington Avenue
Albany, NY 12234

Cc: Board of Regents

Dear Commissioner Elia and the Board of Regents:

NY State Allies for Public Education is a coalition of over fifty parent and educator groups from throughout the state. Class Size Matters is an advocacy group based in New York City. We vociferously oppose the draft ESSA regulations released by the NY State Education Department on May 9, 2018, and urge you to make immediate changes.

Lack of transparency

First of all, the draft regulations are extremely difficult to find. No link is provided from the New York State Education Department announcement, dated May 9, that requested public comments.¹ That announcement instead linked to what appears to be an incomplete summary, dated April 5, 2018.² Nor were the regulations linked to from the NYSED ESSA webpage.³ We only received them only after the NY State United Teachers recently sent us a copy.⁴ Members of the public cannot adequately comment on regulations they cannot access.

Four of the members of the NYSAPE Steering committee were on different ESSA Working groups, and yet none of the provisions outlined below were ever mentioned as possibilities, no less discussed in our groups. Neither did any of us receive copies of these draft regulations in May when they were released.

We also echo NYSUT's strong objections to way the regulations differ considerably from the version previously described by NYSED officials.⁵ Earlier, NYSED officials had assured us and members of the public that schools with large numbers of opt out students would not be punished and/or incorrectly identified as schools needing comprehensive or targeted support. Schools so identified are required to draw up annual needs assessments and plans each year to make significant changes and to be subjected to increasingly aggressive forms of intervention.

¹ <http://www.nysed.gov/news/2018/public-comment-period-proposed-every-student-succeeds-act-regulations-begins-today>

² <http://www.regents.nysed.gov/common/regents/files/418p12a6.pdf>

³ <http://www.p12.nysed.gov/accountability/essa.html>

⁴ The proposed ESSA regulations, dated May 9, 2018, that we received from NYSUT are now posted here: https://drive.google.com/open?id=1G0Brwnvy3af8v0FoM04zbG_Bd9mDUYmG

⁵ Letter from Jolene Brango, Executive VP of NYSUT, May 29, 2018. <https://www.nysut.org/news/2018/june/nysut-voices-concerns-over-states-draft-essa-regulations>

What ESSA says regarding opt outs

Under the current accountability system, New York State does not penalize schools when parents decide that their children should not take these tests. This policy should be continued because in certain respects, ESSA is even more respectful of parental rights to opt their children out of testing than NCLB had been.

First, ESSA asserts that states and districts can provide parents with the right to opt out and if they do so, schools must inform parents of these rights – as many New York schools currently do. See for example, ESSA section 1111(c)(4)(E):

“(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.”

Second, ESSA makes it clear that the US Department of Education cannot prescribe how states should treat testing participation in their accountability systems, as in §1111(c)(4)(E)(iii) and elsewhere. And yet even though not required to do so, the draft regulations released by the state target and unfairly punish schools with high opt out rates, in several different ways.

How the draft regulations punishes schools with high opt out rates

As you are undoubtedly aware, between 20% and 22% of eligible students throughout the state of New York opted out of the 3-8th grade state exams during the previous three years. Only 8% of districts met the 95% testing participation rate in 2017, according to state figures.⁶ And although the state has not yet released the opt out figures for the current year, several news accounts and our own estimates reveal that the number will remain high.

And yet these draft regulations would allow the Commissioner to label schools with high opt out rates as needing Comprehensive or Targeted Support, require them to use Title I funds to lower these rates, and in some cases, even close or convert them into charter schools.

None of these provisions are required in the ESSA law, none of them would improve the learning conditions for NY state children, and all of them contradict earlier statements from the NYS Education Department that schools with high opt out rates would not be punished.

As previously announced, the state intends to use two scores to determine school performance -- one using all continuously enrolled students in the denominator whether they took the state tests or not, and thus implicitly treating opt out students as “level ones,” called PI-1. The other score, called PI-2, will only include those students who actually took the test in the denominator. Up to now, in comments to

⁶ <https://www.nysape.org/nysape-pr-2017-opt-out-results.html>

the press and to the public, SED has repeatedly stated that the higher of these two calculations would be used to identify schools in need of comprehensive or targeted support.⁷

See for example, this article published on January 22, 2018, in which Ira Schwartz of NYSED was quoted, after the state's ESSA plan was approved by the US Department of Education:

*... the department created a "Core Subject Performance Index," which combines the math, ELA and science scores and bases performance on the achievement of only the students who took the exam. Under this calculation schools with high opt-out rates but high levels of achievement would see a higher score than under the 95 percent participation method. The state would then take the rankings from both indexes and judge schools **on the higher of the two**.....[emphasis added]*

"New York's revised plan will continue to use both methods for measuring school performance. The difference is that the measure based only on those continuously enrolled students who took the state assessments is now classified as 'another academic indicator' rather than an 'Academic Achievement' Indicator, and the Academic Achievement Indicator for ELA and math is now calculated in only one way," Ira Schwartz of the Office of Accountability said in an emailed statement. "These two methods of assessing student performance are then utilized to make accountability determinations in a way similar to that proposed in the draft plan."⁸

However, in the recently released draft regulations, these two performance scores would be averaged to calculate a "Composite Performance Index," which would then be used to identify schools that need Comprehensive Support and Improvement (CSI) or Targeted Support and Improvement (TSI). The higher score will only be used to break the tie, when two schools have an identical Composite Performance Index score.⁹

The draft regulations also would establish an Academic Progress Index for each school. This index would only use the first figure in the denominator – all continuously enrolled students, whether they took the state exams or not -- which would treat all opt- out students as level ones. This measure, too, could lead to schools with high opt-out rates to be incorrectly targeted and punished.¹⁰

The proposed regulations require any school that has not made 95% participation rate to engage in a multi-year, bureaucratic "self-assessment" process to identify the reasons for the lower rate, and plan and enact various "interventions" and "audits" to improve participation rates, whether students are

⁷ See for example slides 21-22 in: **Every Student Succeeds Act (ESSA), Presentation by Ira Schwartz to Nassau BOCES**, June 21, 2017 : "Determining Achievement Index percent. The Performance Index for Achievement is Computed Two Ways: PI-1 is computed using the number of continuously enrolled students with valid test scores as the denominator. PI-2 is computed using the greater of 95% of continuously enrolled students or the number of continuously enrolled students with valid test scores as the denominator. All elementary and middle schools are ranked ordered based upon PI-1 and are also rank ordered based upon Pi-2. A Third rank order is than [sic] created using the higher of a school's rank order for PI-1 and PI-2."
<https://www.nassauboces.org/cms/lib/NY01928409/Centricity/Domain/32/Ira%20Presentation%20Nassau%20BOCES%20v2.pdf>

⁸ Keshia Clukey, "Advocates question New York's ESSA plan loophole," Politico, Jan. 22, 2018.

⁹ See p. 36, proposed ESSA regs, May 9, 2018 at:

https://drive.google.com/open?id=1G0Brwnwv3af8v0FoM04zbG_Bd9mDUYmG

¹⁰ pp. 39-41.

opting out as a result of their parents' choice or not. These plans must be approved by the district and eventually by the Commissioner.

Worse yet, the regulations would now allow the Commissioner to impose a financial penalty if the opt out rates don't improve sufficiently, by requiring districts to set aside Title I funds to improve their schools' participation rates, starting in the year 2020-2021.¹¹

(v) Beginning with 2020-2021 and 2021-2022 school year results, for any school for which an audit and participation rate improvement plan was completed pursuant to subparagraph (iv) of this paragraph in the previous school year and that fails to improve its participation rates for the subgroup(s) and subject(s), as determined by the Commissioner, for which the plan was required, the Department shall conduct an audit of the participation rate and the school may be required by the Commissioner to undertake additional activities to raise student participation in State assessments, which may include requiring that the district set aside a portion of its Title I funds to use on activities to increase student participation in state assessments.

The draft regulations would also mandate that any school identified with CSI or TSI status could not exit that status if the school had a testing participation rate below 95 percent, regardless of progress on all other indicators and factors.¹²

(d) Notwithstanding any provision to the contrary including clause (c) of this subparagraph, an elementary/middle school may not exit CSI status if the school is required to implement a participation rate plan improvement pursuant to paragraph (5) of subdivision (i) of this section.

Finally, based on these draft regulations, the Commissioner could place under preliminary registration review (SURR) any school with "excessive percentages of students that fail to fully participate in the state assessment program," without even specifying what participation rates might trigger this action.

(3) The Commissioner may also place under preliminary registration review any school for which a school district fails to provide in a timely manner the student performance data required by the Commissioner to conduct the annual assessment of the school's performance or any school in which excessive percentages of students fail to fully participate in the State assessment program.

As NYSUT has pointed out, this authority currently does not exist in SURR regulations or state law, and if enacted, would grant the Commissioner the unilateral authority to close schools that have "excessive"

¹¹ p. 75

¹² p. 76.

opt-out rates in her judgement, or convert them to charter schools -- but are otherwise high-performing in every way that can be measured.¹³

All of these provisions must be eliminated so that no school is penalized as a result of parents' exercising their fundamental right to opt-out their children of state assessments.

Other unacceptable provisions in the draft regulations

There are several other provisions of the draft regulations that we believe give excessive discretion to the Commissioner to incorrectly place schools into CSI status, close them or convert them to charter schools.

Even though transfer schools serve the highest need population, overage students who have repeatedly dropped out or failed at their previous high schools, the regulations make no allowances to consider them differently in terms of their graduation or absentee rates. Instead, districts in which these schools are located must personally "petition" the Chancellor for them to be treated differently from other CSI schools: *"a school district, on behalf of a transfer high school that has been identified as a CSI school, may petition the Commissioner to differentiate the required interventions for such transfer high school."*¹⁴

In addition, the Commissioner could identify ANY school as a "poor learning environment" and put the school into registration review, based upon a multiplicity of factors, including but not limited to high rates of absenteeism, suspensions, teacher or administrator turnover, referral of students to special education or more. The regulations do not limit the reasons the Commissioner's could judge a school as a "poor learning environment," and no particular evidence or data is required to do so.¹⁵

If the school is placed under Registration Review, based upon the Commissioner's decision that it is a "poor learning environment", the Commissioner need not inform the relevant board of education, the district Superintendent or the NYC Chancellor of what progress should be made for the school to be removed from this status. Instead, an "intervention team" would be appointed by the state to make recommendations, after which the Commissioner could decide unilaterally to take a range of different options, including closing the school or converting it to a charter school.¹⁶

In short, these proposed regulations grant too much discretion to the Chancellor to make disruptive and drastic decisions, based upon unspecified and even subjective factors. This ignores the growing body of research revealing that closing schools does not improve academic outcomes, but instead causes students to fall further behind.¹⁷

¹³ p. 79.

¹⁴ p. 68.

¹⁵ p. 78.

¹⁶ pp. 81-82.

¹⁷ Univ. of Chicago Consortium on School Research, *School Closings in Chicago: Staff and Student Experiences and Academic Outcomes, Executive Summary*, May 2018. Mid Atlantic Equity Center Information Brief, *Does Closing Schools Cause Educational Harm? A Review of the Research*, 2009. National Education Policy Center, *School Closure as a Strategy to Remedy Low Performance*, May 2017.

We urge you to immediately remove all these provisions, because they are inherently unacceptable and violate previous assurances made to parents that the state will continue to respect their right to opt out their children from testing. Most of all, we urge you to amend these regulations because as currently drafted they will not help NYC public schools improve or children learn.

Once these regulations have been appropriately amended, we ask that you allow for another round of public comment, after making them accessible with a clear link from both the release announcement and from the NYSED ESSA page.

Yours sincerely,

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