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May 29, 2018

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

Dear Commissioner Elia:

The following are the formal comments from NYSUT on the draft ESSA regulations that were published on May 9, 2018.

Opaque Process

I am compelled to raise NYSUT's strong objection to the process used by the State Education Department (SED) to produce these draft regulations. Since ESSA was adopted in 2015 by Congress, the State Education Department did extensive field engagement via the ESSA Think Tank, as well as other forums, in recognition of the importance of the issues that the Regents would grapple with when it came time to produce the new school accountability system. Unfortunately, when it came time to review, and vote on, the draft regulations at the April 2018 Regents meeting, the State Education Department did not share the draft regulations with the Regents and stakeholders. The Regents had to rely on a summary (which was lacking key provisions) of the draft regulations when the Board voted to publish the draft ESSA regulations.

This was an unprecedented action by the State Education Department. There is a grand tradition at SED that the Regents and stakeholders always see the actual text of proposed regulations before they are published in the State Register. This is done to ensure an open and transparent process that allows all interested parties to know exactly what is being voted on. A summary can never capture the important nuances and details in the words of the regulations. The failure to maintain this tradition is an alarming development that undercuts the authority of the Board of Regents, since they were unable to review and debate the various provisions of the regulations.

The Department indicated that the Regents had to act in April without seeing the regulations, since these regulations needed to be enacted in time for the beginning of the 2018-19 school year and waiting until the May Regents meeting was too late to achieve that goal. However, the evidence does not bear this out. The Department has indicated that the Regents will take up these draft regulations again at your June meeting and may incorporate some changes that the Department receives during the first part of the comment period on the current draft ESSA regulations. Assuming the Board adopts the ESSA regulations again in June, this will start a second comment period, which will then cause the Regents to take final action on these regulations no sooner than September. This is the same point in time that the Regents would have acted on final ESSA regulations, if the Department had waited until the May Regents meeting for initial action on draft regulations by the Regents.

To safeguard the integrity of the rule-making process, I strongly encourage you to ensure that the Regents always see and have the opportunity to review and discuss the full text of proposed regulations prior to publication.

Attack on Opt Outs

NYSUT strongly supports the right of parents to opt-out their children from state tests. Under the current accountability system, the state does not penalize schools when children opt-out. This policy should be continued under the new accountability system. However, there are several ways in which the draft regulations would punish schools via the state accountability system for parents exercising their federally protected right to opt their children out of the state assessments. During the process of developing the plan at a Regents meeting NYSUT, The Chancellor, Jhone Ebert and Ira Schwartz formally discussed that the ESSA plan would not use the required federal calculation using continuously enrolled students (which punishes opt outs) as a factor in determining school accountability. Unfortunately, the proposed regulations do not keep this agreement.

It is important to set the record straight on what federal law allows as it relates to opt-outs and the state accountability system.

First, ESSA asserts that parents have the right to opt their children out of state tests and schools must inform parents of those rights. [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."*
This provision of ESSA clearly provides parents with the right to opt-out of state assessments.

Second, the language of the ESSA law is unambiguous - states must calculate participation rates but it is up to states to determine how opt-out data will be factored into the state accountability system. ESSA § 1111(c)(4)(E)(iii) provides that states 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."

So let us be clear – ESSA allows for opt-outs and while the law "requires" 95% participation on state assessments, it leaves it up to the states to determine how low participation rates will be incorporated into each states accountability system. The US Department of Education has acknowledged that states have the ability to identify schools that need improvement without including participation rates as a factor. This is evident by the fact several state plans have been approved that do not include this measure for identifying Comprehensive Support and Improvement (CSI) and Targeted Support and Improvement (TSI) schools. For example, in Maine, the participation rate is included in a school dashboard and an improvement plan is required for those schools with low participation, but this measure is not included in the summative rating used to identify schools for improvement. [1]

[1] Maine's approved ESSA plan Page 46 "The 95% participation rate will not factor into the accountability system as part of the summative rating but will be included in the school review dashboard in order to provide a holistic review of the school."

The draft ESSA regulations make a direct frontal assault on the rights of parents to opt-out their children from the state testing system. This was a choice made by SED. This is contrary to the intent of ESSA and good public policy. Further, a number of these provisions were never discussed in public and were not detailed in the summary provided to the Board of Regents at the April Regents meeting.

The methodology for identifying CSI and TSI elementary and middle schools includes a measure that counts performance and achievement levels based on grades 3-8 state tests. There are two performance scores calculated -- one using the continuously enrolled students and the other using tested students as the basis for proficiency rate calculations. During presentations to the Regents Think Tank and the Committee of Practitioners (COP), and in documents, such as the *Public Facing ESSA Summary*, SED has stated that the higher of these two calculations would be used for identifying CSI and TSI schools[2]. However, in the draft regulations, these two performance scores are added together to calculate the "Composite Performance Index". This has the effect of lowering the "score" in schools with higher opt-out rates for the Composite Performance Index that is then used to identify schools for CSI and TSI status. The higher score will only be used as a "tie-breaker" when two schools have the identical Composite Performance Index score (subpart(f)(1)(i)(a)(9) page 36) . These provisions were not included in the summary provided to the Regents at the April Regents meeting.

The draft regulations also establish an Academic Progress Index for each school. This Index is based on performance levels on the ELA and Math assessments using continuously enrolled students as the student count. This is a measure used to identify CSI and TSI schools. This measure penalizes schools with opt-outs since it assumes all students are taking the state assessments. This has the effect of lowering the Academic Progress Index for schools with higher opt-out rates (subpart (f)(1)(i)(e) pages 39-41). These provisions were not included in the summary provided to the Regents at the April Regents meeting.

In addition, the draft regulations provide that a school cannot exit CSI or TSI status if the school has a participation rate below 95 percent, regardless of all other indicators. This will block schools from exiting CSI or TSI status which otherwise have met performance targets set by SED (subpart (j)(1)(ii)(d) and (iii)page 76). This has the perverse effect of making participation rates the most important factor in what was intended to be a multiple measure accountability system less reliant on state assessments. This provision was not included in the summary provided to the Regents at the April Regents meeting.

Based on the 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." This authority does not exist in the current SURR regs. If these regulations are enacted the Commissioner would have the unilateral authority to close schools that have high opt-out rates but are otherwise high performing (subpart (k)(3) page 79). Again, this component of the draft regulations makes participation rates more important than actual student performance levels. This provision was not included in the summary provided to the Regents at the April Regents meeting.

The draft regulations also include provisions that would allow the Commissioner to impose a financial penalty by requiring districts to set aside Title I funds if the participation rate on state tests do not improve by the third year. This provision was not included in the summary provided to the Regents at the April Regents meeting.

[2] Page 27 "The State will use the higher ranking of PI-1 or PI-2 to determine whether a subgroup is in the lowest-performing 10% and would cause a school to potentially be identified for Comprehensive or Targeted Support and Improvement."

All of these provisions should be modified or eliminated so that no school is penalized as a result of parents exercising their legal right to opt-out their children of state assessments.

Attacks on Collective Bargaining

Before discussing the specific concerns that NYSUT has with these provisions of the draft regulations, it is important to highlight what ESSA says about collective bargaining rights and agreements. Under the Section 1111 Construction Rule, the ESSA law specifically states that provisions of ESSA are not to be construed to "*alter or otherwise affect the rights, remedies, and procedures afforded to school or local educational agencies employees under Federal, State, or local laws (including applicable regulations or court orders) or under the terms of collective bargaining agreements, memorandum of understanding, or other agreements between such employers and their employees*." These draft regulations include several direct attacks on collective bargaining rights in public schools by unilaterally imposing specific contract provisions.

First, the draft regulations require any new collective bargaining agreement to limit teachers transferring into a CSI school to those rated Effective/Highly effective (subpart (i)(1)(k)(c)page 64). Many collective bargaining agreements contain provisions that govern the transfer of teachers. This provision of the draft regulations would impair these existing and long standing collective bargaining agreements by requiring that any future agreement preclude certain teacher transfers. This is a totally inappropriate intrusion into collective bargaining rights of employees by the State Education Department.

Second, districts that create a new school to replace a closed and restructured SURR/CSI school must select staff that consists "primarily" of experienced teachers (at least three years) who have been rated Effective/Highly Effective in each of the past three years and are not currently assigned to the school (subpart (d)(5)(iv)page 84). Similar to our objections detailed above, this is in an inappropriate intrusion into collective bargaining.

Third, the committee that is established to develop the corrective action plan in schools with high opt-out rates must include teaching and support staff. However, beginning with the third year of a corrective action plan, only half the staff members can be selected by the bargaining unit (subpart (c)(5)(iv)page 74). All staff should be selected by the respective bargaining units. It is inappropriate for the administration to select employees to serve on such committees.

Thank you in advance for your review and consideration of these important issues. We strongly encourage you to modify the draft regulations to reflect the issues raised in this correspondence.

Sincerely,

Jolene DiBrango

Jolene DiBrango
Executive Vice President

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cc: Members of New York State Board of Regents