



The Education Trust–New York

Closing the gaps in opportunity and achievement, pre-k through college.

June 8, 2018

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

Dear Commissioner Elia:

We share your and the Board of Regents' belief that the federal Every Student Succeeds Act (ESSA) represents an opportunity for New York to advance an equity agenda on behalf of the state's students. ESSA enables New York to define what it means to be a successful school, set clear expectations that schools must raise achievement for *all* of their students – not just some – and help schools and school districts by targeting attention, resources, and support to the places where students are struggling.

Even when we have not entirely agreed with the outcome, we have appreciated the inclusive and transparent culture that the Board of Regents and State Education Department have worked to maintain during this long process. For that reason, while we will submit a more detailed public comment on the proposed ESSA regulations before the July deadline, we believe it is important to also correct the public record on several of the issues raised in a recent letter from the New York State United Teachers (NYSUT).

Most importantly, the NYSUT letter distorts the substance of New York's ESSA plan and the requirements of federal law. In so doing, it asks the Board of Regents and State Education Department to re-litigate issues that were transparently debated and resolved in the creation of the state's ESSA plan, which has now been approved by the U.S. Department of Education. Instead of going backwards, we urge the Board of Regents and State Education Department to move forward on behalf of the state's students.

Before we address the details of the NYSUT letter, we want to briefly note why we – as an equity organization – are flagging several of the “opt-out” issues below. We understand, and are sympathetic to, the Board of Regents' and State Education Department's goal of ensuring that schools are not identified for Comprehensive Support and Improvement (CSI) simply because they have a significant opt-out population. At the same time, the delicate balance that the state must strike is likewise to ensure that the accountability system does not create an incentive for

schools to discourage historically under-served groups of students – low-income students, students of color, English language learners, students with disabilities, and others – from being counted in state assessments that would shine a light on the school’s performance. At the end of the day, ESSA is – and must be implemented as – a civil rights law.

From that perspective, our specific concerns with the NYSUT letter follow:

First, the NYSUT letter states that, “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 is simply not the case.

In fact, it seems deeply confusing that NYSUT is refusing to take “yes” for an answer after the Board of Regents and State Education Department were responsive to NYSUT’s concerns on opt-out and even created a new performance index so that high opt-out schools would not be identified for improvement simply due to low test participation.

By way of background, in the accountability plan that the Board of Regents and State Education Department submitted to the U.S. Department of Education (USDE) in September 2017, the state proposed to calculate the academic achievement accountability indicator using the greater of two performance indices: PI-1 (based on at least 95 percent of test-eligible students, which federal law requires) and PI-2 (based on only the number of students who were actually assessed, which opt-out advocates prefer).

In its December 2017 initial response letter, USDE raised concerns that this approach would violate the federal law. The department wrote: “Since only PI-1 appears to be consistent with the requirements in ESEA section 1111(c)(4)(E)(ii) for calculating the Academic Achievement indicator, only this calculation may be used for the purposes of calculating the Academic Achievement indicator for each school in the State and, as such, only this calculation may be used for purposes of school identification.”

In response, the Board of Regents and State Education Department found a different, but seemingly equally effective, way to address the concerns raised by opt-out advocates in order to comply with federal law. In the final approved plan, determinations about a school’s identification for CSI and for Targeted Support and Improvement (TSI) would now instead be made based on a Composite Performance Index. The final approved plan indicates that the Composite Performance Index would be created by “combin[ing]” each school’s English language arts (ELA), math, and science performance indices (which are based on the greater of the number of students assessed or 95 percent of test-eligible students) with the school’s Core Subject Performance Index (which is based on only the number of students who were actually assessed, similar to PI-2).

This effectively means that schools that have low test participation (high opt-out) cannot be identified for improvement unless they *also* have very low achievement for the students who *do* take the assessments.

It is interesting that NYSUT points to Maine as an example for the Board of Regents and State Education Department to emulate with regard to participation rate, since Maine adheres to a strict use of the 95 percent requirement *and* requires an “action plan” for any school that falls below 95 percent test participation. Maine’s approved ESSA plan specifies that “in computing a school’s academic achievement indicator for an assessment in a content area (math or ELA), the denominator will be the greater of: 95% of all students in the grades assessed who are enrolled in the school; or, the number of all such students who participated in the content area assessment.” In other words, there is no analogous Core Subject Performance Index, at all.

NYSUT also indicates that the measure of Academic Progress included in New York’s draft regulation “penalizes schools with opt-outs.” From a mathematical perspective, we do not agree with their analysis. Moreover, the Academic Progress measure is explicitly based on the requirements of federal law. In addition, while NYSUT states that “these provisions were not included in the summary provided to the Regents at the April Regents meeting,” they were included in detail in the actual state plan and were subject to public review and discussion.

Second, the NYSUT letter states that “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.” In fact, the regulation does not in any way include a “financial penalty.”

The draft regulation provides extensive opportunities for schools to improve their test participation rates. This includes – over multiple years – a self-assessment, help from the school district, and help from a Board of Cooperative Educational Services (BOCES). Finally, after many years, “the school may be required by the Commissioner to undertake additional activities to raise student participation in State assessments.” To cover the costs of such activities (and presumably avoid unfunded mandates where possible), the draft regulation provides that “a portion of” Title I funds may be required for “use on activities to increase student participation in state assessments.”

NYSUT alleges that the Regents and public were not informed of this provision. However, the enacted state ESSA plan, which was subject to extensive public review and Regents approval, states: “Districts that have schools that implement the BOCES improvement plan and do not improve their participation rate may be required by the Department to undertake activities to raise student participation in State assessments.” The possible use of a portion of Title I funds appears to simply be a mechanism to pay for these activities.

Again, we raise this issue because if schools are systemically excluding certain groups of students from state assessments, there must be urgency and action to protect the ability of all students to be counted.

Finally, the NYSUT letter criticizes the Board of Regents and State Education Department for what it calls “inappropriate” attempts to ensure that historically under-served students have

access to the strongest educators. We urge the state to implement the teacher equity provisions that it has laid out.

New York’s enacted ESSA plan notes that “Black and Hispanic students [are] more than ten times as likely as White students to be placed with a teacher who received a rating of Ineffective. ELL students are twice as likely, and students with disabilities are nearly twice as likely, to be placed with a teacher who received a rating of Ineffective, compared to their counterparts.”

In light of these facts, the draft regulation reasonably requires that in the lowest-performing schools in the state – those identified for CSI – the district must “limit incoming teacher transfers to teachers rated effective or highly effective.”

This is not an “attack” on collective bargaining, as NYSUT alleges, and, in fact, the draft regulation notes that the provision is “subject to collective bargaining as required under article 14 of the Civil Service Law, and [would] require that any successor collective bargaining agreement authorize such transfers unless otherwise prohibited by law.”

Moreover, and importantly from a process perspective, the Board of Regents has already approved this provision after considerable public review. It is incorporated in the state’s enacted ESSA plan, which states that: “All CSI schools must... 1. Beginning with the district’s next Collective Bargaining Agreement, only permit incoming transfers of teachers who have been rated as Effective or Highly Effective in the most recent evaluation year.”

In conclusion, as you know, we have consistently identified parts of the state ESSA plan that we believe will improve equity, as well as areas that we believe merit further attention during implementation. We hope that the regulation process is an opportunity to refine and detail the plan that has already been adopted, rather than a venue to undermine public confidence and existing public commitments.

Sincerely,



Ian Rosenblum
Executive Director

cc: Members of the Board of Regents