

FairTest

National Center for Fair & Open Testing

Federal Law on Opting Out Under ESSA:

The U.S. Congress has canceled Department of Education (DoE) regulations regarding accountability. This includes regulations that would have governed test participation, the requirement to test 95% of all students, and federally mandated accountability consequences. As a result, states must turn to the language of the law itself, at least until the DoE provides new regulatory language. States may impose more stringent requirements than does ESSA.

Language on testing and accountability:

1003(b)(2) is the section ('paragraph') requiring testing.

1003(c) is the section on accountability. Within that:

“(E) ANNUAL MEASUREMENT OF ACHIEVEMENT.—(i) Annually measure the achievement of not less than 95 percent of all students, and 95 percent of all students in each subgroup of students, who are enrolled in public schools on the assessments described under subsection (b)(2)(v)(I).

“(ii) For the purpose of measuring, calculating, and reporting on the indicator described in subparagraph (B)(i) [FT: the statewide test indicator], include in the denominator the greater of—

“(I) 95 percent of all such students, or 95 percent of all such students in the subgroup, as the case may be; or

“(II) the number of students participating in the assessments.

“(iii) Provide a clear and understandable explanation of how the State will factor the requirement of clause (i) of this subparagraph into the statewide accountability system.”

Language on opting out:

1111(b)(2)(K): “RULE OF CONSTRUCTION ON PARENT RIGHTS.—

“Nothing in this paragraph shall be construed as preempting a State or local law regarding the decision of a parent to not have the parent’s child participate in the academic assessments under this paragraph.”

1112(e)(2)(A):

“(2) TESTING TRANSPARENCY.—

“(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.”

On March 13, DoE issued a “template” for states to submit their ESSA plans. It asks states, “Describe how the State factors the requirement for 95 percent student participation in statewide mathematics and reading/language arts assessments into the statewide accountability system.”

Discussion

While states must administer statewide assessments/tests, nothing in federal law requires students to take them. In fact, ESSA recognizes the right of parents to opt out if the state or district has an opt-out law. And no state has a law making refusal illegal, although some use test scores as a graduation or grade promotion requirement.

ESSA contains no requirement that states punish schools or districts which have high rates of refusal. It is entirely up to states how they respond to opt outs. David Cleary, a key aide to the Senate HELP Committee and its chair, Lamar Alexander, explained it this way to Diane Ravitch:

“States have to take into account what happens to a school if the individual school fails to meet the 95 percent participation requirement within the state accountability system. But this can be very flexible. A state could choose a variety of outcomes—including that test participation has no impact on a school’s identification (emphasis added):... It is up to the state.”

A state should take no specific steps against schools with low test participation rates. Under current federal laws and regulations, low participation by itself need not lead to a school being declared low performing. States should not punish schools or districts because of parent actions in order to forestall federal “requirements” that do not exist.

States must use test scores (proficiency, growth, ELL language proficiency) to differentiate among schools and to identify schools for assistance. ESSA requires states to report test participation rates using at least 95% of all eligible students as the denominator. However, a state does not have to include scores of refusers in identifying “low performing” schools.

To identify schools for assistance, a state can separately calculate school scores without including refusers in the denominator (that is, include only test takers). Or a state can apply a school’s average score to each refuser, include those results in the numerator, keep 95% in the denominator, and thereby avoid lowering a school’s scores because of opt outs. ESSA does not specify what states must include in the numerator.

ESSA is available at:

<https://www.gpo.gov/fdsys/pkg/BILLS-114s1177enr/pdf/BILLS-114s1177enr.pdf>.

DoE state application template is at

<http://www2.ed.gov/admins/lead/account/stateplan17/revisedessastateplanguidance.docx> (p. 13)

Cleary's comments to Ravitch are at <https://dianeravitch.net/2016/01/22/exclusive-what-does-essa-affect-opt-outs/>

New York State Allies for Public Education (NYSAPE) explains the use of average scores in the numerator at <http://www.nysape.org/nysape-memo-sed-essa-testrefusals.html>.

See also *Just Say No to Standardized Tests* and *Why You Can Boycott Standardized Tests Without Fear of Federal Financial Penalties to Your School*, on the web at <http://www.fairtest.org/fact%20sheets>.

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