

# FairTest

National Center for Fair & Open Testing

## Federal Law on Opting Out Under ESSA

The Every Student Succeeds Act (ESSA) requires that states assess 95% of all students, and 95% of each “subgroup” in every school with federally mandated annual state tests in English and math. It says that in calculating average school test scores, a school must include in the denominator the greater of either all test takers, or 95% of eligible test takers. If more than 5% of students are not tested, the lowest possible score will be assigned to non-test takers beyond 5%. This reduces the average score for such schools. In addition, ESSA says each state must, in its plan for ESSA implementation, “Provide a clear and understandable explanation of how the State will factor the requirement...into the statewide accountability system.”

States have responded in a variety of ways. A few have tried to avoid implementing this policy, but the U.S. Department of Education (DoE) has not approved such plans. In general, states have decided to do one of three things:

1. Compile two lists of schools, one with the 95%+ denominator and one with only students who took the test. The intent seems to be to use the latter in deciding which schools receive interventions, but states taking this position have been vague about what they will actually do. It seems they don’t want to penalize districts in which parents choose to opt out, nor do they want to distribute ESSA improvement funds to districts that have low scores solely due to opting out. (States must provide support or intervention to schools that perform poorly; see <http://fairtest.org/State-ESSA-Plans-Report-2018>.)
2. Require districts with low participation to develop a plan to increase the number of test-takers. Some of these states may employ differing interventions based on whether the low rating is due to opting out or actual low scores.
3. Add penalties for districts that opt out, such as lowering the school a level on the state’s ratings, on top of any lowering caused by not meeting the 95% requirement. This further penalizes schools for the actions of parents and students.

In all of this, some states are ignoring their own laws explicitly stating that parents can opt their children out, policies supported in ESSA itself. They are declaring, in effect, that you *can* opt out but we will penalize your school if you do.

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## What can parents, students and their allies do?

The best way to fight back is to increase opting out. In New York, widespread refusal has rendered state testing data useless. Recognizing this, New York is compiling two lists under its approved plan. While it has not specified how it will use them, officials have made clear they will not use opt out rates to punish schools or districts. New Jersey has a similar approach, though also vague. Four states that have tried to not penalize refusals – Colorado, New Jersey, New York and Utah – have sizeable opt out rates.

Test reformers need to fight efforts to penalize schools due to opting out. State support or interventions should be done only on the basis of actual educational or financial need, not test refusal. Louisiana’s approved plan, for example, does not say it will do anything to schools based on opting out. New York is likely to ask districts to call on parents to take the tests (the “improvement” effort), but in the past many superintendents have refused to do so, and facing large numbers, the state is unlikely to take further action.

Thus, based on a few approved state plans, activists can demand that state policies be changed so that they:

- Develop a second list based only on actual test takers
- Use the list with actual test takers in determining support or intervention, and
- Impose no additional penalties on schools with high opt out rates. (The exception would be to monitor schools non-participation rates to ensure that schools are not pushing likely low-scorers, such as students with disabilities, out of the testing pool.)

To win these changes, as with other testing reforms, will require responsive state officials. Those who do not support significant assessment reform should be replaced with officials, elected or appointed, who do.

## ESSA language on testing rates, accountability and opting out

### *Testing rates 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.”

### **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): “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.”

### **Resources**

FairTest’s report, *State ESSA Plans: Uneven Progress toward Better Assessment and Accountability*, which reviews the first 16 approved plans, is available at [LINK](#)

ESSA is available at:

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

State ESSA plans are available at:

<https://www2.ed.gov/admins/lead/account/stateplan17/statesubmission.html>. If DoE required changes before approval, the revised plan is posted after approval. If it has not been, search a state’s education department website.

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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