



The Education Trust–New York

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

August 15, 2018

Dr. Lisa Long
New York State Education Department
Office of Accountability, Room 400
55 Hanson Place
Brooklyn, NY 11217
Via E-Mail: ESSARegComment@nysed.gov

Dear Dr. Long:

We share the New York State Education Department (NYSED) and 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 urgency, resources, and support to the places where students are struggling.

We have appreciated the inclusive and transparent process that the Board of Regents and NYSED have worked to maintain while creating the ESSA state plan. Our comments below are not intended to revisit decisions that have already been made in the state plan itself, which has now been approved by the U.S. Department of Education. Rather, we are focused on *how* the plan will be implemented in order to maximize the positive impact on improving the quality of education for historically under-served groups of students.

There are many strong aspects of the state plan and the regulations, several of which we highlight below. In particular, we would like to point to the importance of preserving the provisions regarding **test participation**, which are an essential equity protection for historically under-served groups of students whose needs are too often ignored in our education system. Throughout the ESSA process, NYSED and the Board of Regents worked to find common ground among opposing views on this issue. For some stakeholders, even these reasonable compromises will never be enough. There are those who have asked you to violate federal law and ignore test participation altogether. Others have called for provisions that would effectively enable schools to systemically exclude certain groups of students from state assessments. We stand with civil rights, education, parent, and business community partners in urging you to maintain the current provisions. (We previously submitted a public comment letter focused on this issue, which we reattach here.)

In addition, we would also like to draw your attention to three issues described in greater detail in the full comments that follow, where the proposed regulations do not yet fulfill key commitments found in the state plan:

1. **Parent involvement** – We are grateful that the ESSA plan takes essential steps to ensure parent involvement in the school improvement process; indeed, this is a highlight of New York’s approach to accountability under ESSA. However, the protections found in the state plan are not reflected in the proposed regulations that specify how the plan will be implemented. (See Comment 7, page 6)
2. **School discipline** – We strongly support the state’s commitment to hold schools accountable for reducing suspensions beginning in the second year of the accountability system, as specified in the state plan. The proposed regulations do not commit New York to the timeline established in the state plan, and we hope this will be remedied. (See Comment 3, page 4)
3. **Dual enrollment** – We are also pleased that New York adopted a College, Career & Civic Readiness accountability indicator, and that the state plan clearly specifies that the indicator will give schools the highest level of recognition on behalf of students who earn *college* credit for dual enrollment courses, similar to how the indicator treats performance on Advanced Placement and International Baccalaureate assessments. This commitment is, however, not reflected in the proposed regulations, which we hope will be amended so that this approach will take effect when data collection permits. (See Comment 12, page 10)

These and other important issues are described in greater detail in our full comments, which follow.

Thank you again for the opportunity to submit feedback on the proposed regulations. We would be happy to provide any additional information.

Sincerely,



Ian Rosenblum
Executive Director

Comments on Proposed ESSA Regulations

1. Access to information in multiple languages

1.1. School report cards

§100.2(m)(4) states that: “To the extent practicable, the district or charter school shall provide the reports and additional information in a language that the parents can understand.”

Comment:

We request that this provision be amended to specify that NYSED will produce, and school districts shall make available, the report card in at least the 10 most frequently used languages statewide. In the case of any school districts where local laws, regulations, and policies mandate translation into more than 10 languages, the regulation should specify that districts must follow local policies and/or regulations to make the report card available in additional languages.

1.2. Required notices

§100.21(h) states that: “(1) Upon receipt of a designation as a CSI or TSI school or Target District, the board of education (in New York City, the chancellor or the chancellor’s designee) or charter school board of trustees shall take appropriate action to notify the general public of the issuance of such designation. Such action shall include, but not be limited to, direct notification, within 30 days of receipt of the Commissioner’s designation, in English and translated, when appropriate, into the recipient’s native language or mode of communication, to persons in parental relation of children attending the school that it has been designated as a CSI or TSI school, or Target District and disclosure of such designation by the school district at the next public meeting of the local board of education or by the charter school board of trustees at the next public meeting.

(2) Each school year during which a school remains identified as a CSI or TSI school or Target District, by June 30th or at the time of a student's initial application or admission to the school, whichever is earliest, the board of education or charter school board of trustees shall provide direct notification to parents or other persons in parental relation to children attending the school or district, as applicable, that the school or district remains a CSI or TSI school or Target District, as applicable. Such notification shall include a summary of the actions that the school district and school are taking to improve student results and an explanation of any district programs of choice, magnet programs, transfer policies, or other options that a parent or a person in parental relation may have to place the child in a different public school within the school district. Such notification shall include the timelines and process for parents exercising their rights to school choice.”

Comment:

We request that notification of CSI or TSI designation be made in the 10 most frequently used languages statewide. In addition to making this requirement clear (including, but not limited to, by removing “when appropriate” from paragraph (1)), we request that the requirement for notification in the 10 most frequently used languages statewide be added to paragraph (2).

2. Former members of certain subgroups

§100.21(b)(1)(xi) states that: “Accountability subgroups shall mean the following subgroups: all students; students from major racial and ethnic groups, as set forth in subparagraph (bb)(2)(v) of section 100.2 of this Part; students with disabilities, as defined in section 200.1 of this Title, including students no longer identified as students with disabilities but who had been so identified during the preceding one or two school years; English language learners, as defined in Part 154 of this Title, including students previously identified as an English language learner during the preceding one, two, three, or four school years....”

Comment:

As allowed by ESSA, the proposed regulation includes former students with disabilities in the students with disabilities subgroup and former English language learners (ELLs) in the ELL subgroup for the purpose of accountability determinations. We do not seek any change in this provision. However, we request that the regulation be amended to provide for disaggregated reporting of accountability data for current versus former members of these subgroups. In addition, the regulation should ensure that schools develop an action plan to address the academic needs of current members of these subgroups if their achievement, without factoring in former subgroup members, would have resulted in the school receiving a “1” for such subgroup.

3. Holding schools accountable for reducing out-of-school suspensions

§100.21(b)(2)(i) states that: “An accountability measure shall mean a measure used for the purpose of implementing the system of accountability for schools and districts in accordance with the provisions of this section, and shall include the following measures for elementary/middle schools: (1) Composite Performance; (2) Student Growth; (3) Combined Composite Performance and Student Growth; (4) English Language Proficiency; (5) Academic Progress; and (6) Chronic Absenteeism as described in subdivision (f) of this section. High school accountability measures shall include: (1) Composite Performance; (2) Graduation Rate; (3) Combined Composite Performance and Graduation Rate; (4) English Language Proficiency; (5) Academic Progress; (6) Chronic Absenteeism; and (7) College, Career, and Civic Readiness as described in subdivision (f) of this section.”

§100.21(b)(2)(xi) states that: “The out-of-school suspension rate shall mean the number of students who were suspended from school (not including in-school suspensions) for one full day or longer anytime during the school year divided by the number of students enrolled on BEDS day of that school year commencing with data collected for the 2017-2018 school year, which shall in the future be incorporated into the accountability system within a timeframe prescribed by the Commissioner. A student is counted only once, regardless of whether the student was suspended one or more times during the school year.”

Comment:

New York's approved ESSA plan provides that out-of-school suspensions will become an accountability indicator "beginning with the 2018-19 school year results," which we strongly support. We request that this language be incorporated in the regulations, as well, including by adding it to the definition of "accountability measure" (and noting the school year for which the addition goes into effect) and by replacing "within a timeframe prescribed by the Commissioner" in the "out-of-school suspension rate" definition with a date certain that is consistent with the state's ESSA plan. Conforming changes should be made throughout the regulation where accountability indicators are listed.

4. Identifying schools for Comprehensive Support & Improvement (CSI)

§100.21(b)(3)(i)(b) states that: "Any Target[ed] Support and Improvement school that has been identified for additional targeted support based on the performance of one or more accountability subgroups and continues, following the designation for additional targeted support, to be identified as a targeted support and improvement school for three consecutive school years for the performance of the same accountability subgroup(s) shall be preliminarily identified as a CSI school."

Comment:

TSI schools are under-performing for one or more subgroups of students. New York's ESSA plan already constrains the definition of "additional targeted support" schools to a narrow set of extremely low-performing schools. We request removal of the phrase "for the performance of the same accountability subgroup(s)" so that any school that has been designated for additional targeted support and has been in TSI for three consecutive school years is subsequently identified for CSI in order to provide escalated support and intervention. This change would ensure that schools that are seriously under-performing for historically under-served groups of students will receive the urgent attention and support that they need.

5. Identifying "Target Districts"

§100.21(b)(3)(iv) states that: "Target District shall mean any school district with one or more CSI and/or TSI schools. A Target District shall also mean any district whose district-wide performance levels would cause a school to be identified as a CSI or a TSI school pursuant to the provisions of this section; provided that, in the city school district of the city of New York, in any borough in which the aggregate performance of all of the high schools in such borough would cause a school to be identified as a CSI or a TSI high school pursuant to the provisions of this section, such district shall designate one or more high school superintendents in each such borough to carry out the requirements of this section applicable to a Target District within such borough...."

Comment:

We commend NYSED for identifying Target Districts as part of the state's ESSA plan and regulations. This approach will help ensure that school districts receive the support that they

need to help under-performing schools, and can help identify district-level capacity challenges that would impede the school improvement process. Focusing on district-level as well as school-level improvement is an important hallmark of an effective strategy to support increased student achievement.

6. Identifying “Recognition schools”

§100.21(b)(3)(vi) states that: “Recognition schools shall mean schools in good standing that exhibit evidence of high performance and/or rapid improvement as determined by the Commissioner.”

Comment:

We request that NYSED provide additional opportunity for public input on the definition of “Recognition schools,” either by specifying the criteria in the regulation or by committing to seeking public input in the future.

7. Parent, teacher and student involvement

7.1. School improvement process

§100.21(b)(4)(viii) states that: “Schools identified as CSI will submit their plans to the Department for approval, which may reject any plan that does not adhere to the directions provided by the Department and/or provide sufficient evidence in such format as prescribed by the Commissioner that parents and pedagogical staff and in high schools, students, meaningfully participated in the development of the plan.”

Comment:

New York’s approved ESSA plan includes appropriately strong language about the importance of parent involvement in the school improvement process, specifying that “the State will reject plans from CSI schools that do not provide adequate evidence of involvement from parents and families” (emphasis added). We request that the regulation conform to the state plan in this regard. Two specific changes to the proposed regulation would accomplish this critical need:

Schools identified as CSI will submit their plans to the Department for approval, which **shall** [may] reject any plan that does not adhere to the directions provided by the Department **and** [and/or] provide sufficient evidence in such format as prescribed by the Commissioner that parents and pedagogical staff and in high schools, students, meaningfully participated in the development of the plan.”

In addition, we request strong and specific provisions to ensure that parents’ voices are heard throughout the improvement process. This should include, but not be limited to, a provision consistent with the ESEA Title I requirement that “if the LEA’s plan is not satisfactory to the parents of participating children, the LEA must submit any parent comments, along with the LEA’s plan, to the SEA.”

Finally, we commend NYSED for including student input in the creation of high school improvement plans and encourage NYSED to maintain this provision.

7.2. Development of CSI needs assessment and plan

§100.21(i)(1)(iii)(e) states that: “Any CSI that did not meet or exceed its Annual Achievement Progression target in the first and second set of available assessment data following the release of accountability determinations will receive a progress needs assessment or comprehensive needs assessment, as determined by the Commissioner and based on the needs of the school as exhibited by the most recent performance on the accountability measures. Provided that, if a progress needs assessment was conducted in previous year of identification, a comprehensive needs assessment must be completed. Any CSI school that did not meet its Annual Achievement Progression target in the first and second set of available assessment data following the release of accountability determinations will also be required to amend the current year’s comprehensive education plan, and submit such amendment for the Commissioner’s approval, within 60 days of the release of the school’s Annual Achievement Progression results to identify how the school will partner with a BOCES, Regional Bilingual Educational Resource Network, Teacher Center, or other Regional Technical Assistance Center, or other technical assistance provider as determined by the Commissioner to support the implementation of its comprehensive education plan. Additionally, a Principal Needs Assessment, as defined in subparagraph (xiii) of paragraph (4) of subdivision (a) of this section, will be added to the District Needs Assessment process for any district with a CSI school that does not reach its Annual Achievement Progression targets for two consecutive years; and....”

Comment:

We request that the participation of parents and teachers be required for the needs assessment and plan development process for schools that are in their third year of CSI identification.

7.3. Development of comprehensive education plans for TSI schools

§100.21(i)(2)(i)(b)(5) states that: “In the first school year of identification as a TSI school, and for every school year thereafter during which the school remains so identified, the school must... develop a school comprehensive education plan. Such plan shall... be developed in consultation with parents, school staff, and others pursuant to section 100.11 of this Part....”

Comment:

We request that this provision be amended to specify that the parents be parents of students in the subgroup(s) for which the school was identified for TSI.

7.4. Parent involvement in the school improvement process

Comment:

We request that the regulation specify that the notification to parents of a school’s identification for TSI, CSI, and relevant school improvement status changes must also include information (in multiple languages) about how parents can participate in the school improvement process.

8. Meaningful measures of school progress

§100.21(b)(4)(xiv) states that: “Annual Achievement Progression Target means:

(a) For elementary and middle schools, an increase between the school’s performance in the current school year compared to the prior school year on either of the following measures for the all students group:

- (1) Core Subject Performance Index as defined in subdivision (f) of this section.
- (2) Mean Student Growth Percentile as defined in subparagraph (x) of paragraph (2) of this subdivision, using only the most current school year results compared only to the prior school year results; except that if a school receives a Mean Student Growth Percentile score of 50 or higher, the Annual Achievement Progression for such school shall be deemed an increase.

(b) For high schools, an increase between the school’s performance in the current school year compared to the prior school year on either of the following accountability measures for the all students group:

- (1) Composite Performance Index computed pursuant to (f)(i)(a)(9) of this section.
- (2) Unweighted average of the Four-Year, Five-Year, and Six-Year Graduation Rates computed pursuant to clause (b) of subparagraph (i) of paragraph (2) of subdivision (f) of this section.
- (3) Notwithstanding the provisions of this clause, a school identified as a CSI school solely because of a Graduation Rate below 67 percent must show an increase on the Average of the Four-Year, Five-Year, and Six-Year Graduation Rates computed pursuant to subclause (2) of this clause.”

Comment:

The proposed criteria for demonstrating progress are far too weak to signify meaningful school improvement. Under this definition, any increase in the school’s performance index – no matter how small – would result in the school making sufficient progress. Likewise, demonstrating growth at the state average would result in the school making sufficient progress, no matter how far behind its students already are. We request more ambitious targets tied to demonstrating that the school is on track to meet its accountability measures.

In addition, the use of the Core Subject Performance Index is troubling in this instance. Based on the definition, it appears that a school could meet its target simply by encouraging low-performing students to opt-out of the state assessment. We request that the factors used to calculate the Weighted Average Achievement Index be used instead.

9. Use of the Core Subject Performance Index

§100.21(f)(1)(i)(a)(9) states that: “The Commissioner shall combine the results of the Weighted Average Achievement Level as calculated in subclause (5) with the Core Subject Performance Index Level as calculated in subclause (8) to create a Composite Performance Index. The

Composite Performance Index for elementary/middle schools is a calculation by which the results of the Weighted Average Achievement Level and the Core Subject Performance Index Level are combined to be used as a measure of academic achievement pursuant to subdivision (f) of this section. Provided that, for elementary/middle schools in the State with the same Composite Performance Index, the Commissioner shall rank order schools using the higher of the Weighted Average Achievement rank order as calculated in subclause (4) or the Core Subject Performance Index rank order as calculated in subclause (7) of this clause.”

Comment:

We understand, and are sympathetic to, the Board of Regents’ and NYSED’s goal of ensuring that schools are not identified for 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 underserved 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.

The decision to use the Core Subject Performance Index, as defined in the regulation and further explained by NYSED at the June meeting of the Board of Regents, 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. This methodology appears consistent with federal law and, in the short-term, appears to strike a reasonable balance between the interests described above.

10. Definition of “chronic absenteeism”

§100.21(f)(1)(i)(f)(1) states that: “The Commissioner shall first compute the school’s Chronic Absenteeism Rate, which means the number of students enrolled during the school year in a school for a minimum of ten instructional days and in attendance at least one of those days who were absent (excused or unexcused) for at least 10 percent of enrolled instructional days divided by the total number of students enrolled during the school year, expressed as a percentage. Suspensions are not counted as excused or unexcused absences, as suspended students are required to be provided with instruction while they are suspended.”

§100.21(f)(2)(i)(f)(1) states that: “The Commissioner shall first compute the school’s Chronic Absenteeism Rate, which means the number of students enrolled during the school year in a school for a minimum of ten instructional days and in attendance at least one of those days who were absent (excused or unexcused) for at least 10 percent of enrolled instructional days divided by the total number of students enrolled during the school year, expressed as a percentage. Suspensions are not counted as excused or unexcused absences, as suspended students are required to be provided with instruction while they are suspended.”

Comment:

We request that this item be amended such that absences due to suspensions be included in the computation of the chronic absenteeism rate. According to Attendance Works, “Chronic absence – missing 10 percent or more of school days due to absence for any reason – excused, unexcused absences and suspensions, can translate into third-graders unable to master reading, sixth-graders failing subjects and ninth-graders dropping out of high school.” A large body of research supports the inclusion of *all* absences in the calculation of chronic absenteeism rates.

11. TSI schools identified for additional support

§100.21(f)(1)(iii)(b) states that: “Such school shall be identified for additional targeted support only if the school had been identified as a TSI school in the prior school year and remains so identified in the current school year.”

Comment:

We request clarification on the impact of this provision and why it is necessary. We are specifically interested in the specific circumstances for which the provision seeks to avoid identifying schools for ATSI. If the language would prevent extremely low-achieving schools for a particular subgroup from receiving additional attention via identification for ATSI, we recommend that it be removed.

12. Dual enrollment in the College, Career & Civic Readiness accountability indicator

§100.21(f)(2)(i)(g)(2) states that: “The numerator is the number of these students demonstrating success on specific college, career, and civic readiness using specific measures multiplied by the weighting (0.5 to 2.0) assigned to each of these measures in accordance with table below plus the number of students who earned a High School Equivalency diploma in the current reporting year and students who were members of the English language learner subgroup at the time of graduation who earned a Regents Diploma with a Seal of Biliteracy in the reporting year, regardless of whether or not they were in the 4-year Graduation Rate Cohort.

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| <p>In accordance with the provisions of Section 100.5 of this Part:</p> <ul style="list-style-type: none"> • Regents Diploma with Advanced Designation • Regents or Local Diploma with CTE Technical Endorsement • Regents Diploma with Seal of Biliteracy • Regents Diploma and score of 3 or higher on an Advanced Placement exam • Regents Diploma and score of 4 or higher on an International Baccalaureate exam | <p>2.0</p> |
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| <ul style="list-style-type: none"> • Regents or Local Diploma and the passage of nationally certified Career and Technical Education (CTE) examination • Regents Diploma and high school credit earned through participation in dual enrollment (in high school and accredited college) course • Skills and achievement commencement credential as provided in section 100.6(a) of this Part and a Level 4 on the New York State Alternate Assessment for students with disabilities as defined in section 100.1(t)(2)(iv) of this Part. • Annual ELL and earned Regents with Seal of Biliteracy in current reporting year and not in 4-year graduation-rate cohort | |
| <p>In accordance with the provisions of Section 100.5 of this Part:</p> <ul style="list-style-type: none"> • Regents Diploma and high school credit earned through participation in an Advanced Placement course • Regents Diploma and high school credit earned through participation in an International Baccalaureate course • Regents Diploma with Career Development and Occupational Studies (CDOS) endorsement • Skills and achievement commencement credential as provided in section 100.6(a) of this Part and Level 3 on the New York State Alternate Assessment for students with disabilities as defined in section 100.1(t)(2)(iv) of this Part. | 1.5 |
| <ul style="list-style-type: none"> • Regents or Local Diploma only in accordance with provisions of section 100.5 of this Part • Skills and achievement commencement credential as | 1.0 |

| | |
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| <p>provided in section 100.6(a) of this Part and an achievement Level 2 on the NYSAA</p> | |
| <ul style="list-style-type: none"> • Annual high school equivalency diploma recipients (included in numerator but not denominator) • New York State career development and occupational studies commencement credential as provided in section 100.6(b) of this Part. | <p>0.5</p> |
| <ul style="list-style-type: none"> • No high school diploma or high school equivalency diploma. | <p>0”</p> |

Comment:

We have strongly supported the creation of the College, Career & Civic Readiness accountability indicator and generally believe that NYSED’s approach to the calculation is appropriate.

However, we request that treatment of dual enrollment courses align with the language of the state’s approved ESSA plan, which states that: “New York State’s College, Career, and Civic Readiness Index will give credit to schools for students who pass high school courses and additional credit for students who achieve specified scores on nationally recognized exams associated with these courses or who earn college credit for participation in dual enrollment courses” (emphasis added).

To effectuate this change, dual enrollment courses should be treated more consistently with AP and IB courses in the calculation of the College, Career & Civic Readiness accountability indicator. To that end, the regulation should specify that as soon as data collection permits, student participation in the course should be included at the 1.5 level and success in the course should be included at the 2.0 level, e.g.:

- Regents Diploma and high school credit earned through participation in dual enrollment (in high school and accredited college) course – 1.5
- Regents Diploma and college credit earned through participation in dual enrollment (in high school and accredited college) course – 2.0

13. Improving teacher equity

§100.21(i)(1)(i)(c) states that: “In the first school year in which the school is identified as a CSI school, the school must... limit incoming teachers transfers to teachers rated effective or highly effective pursuant to Education Law §3012-d by a school district in the previous school year, subject to collective bargaining as required under article 14 of the Civil Service Law, and require that any successor collective bargaining agreement authorize such transfers unless otherwise prohibited by law...”

Comment:

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 state's enacted ESSA plan 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."

NYSED should be commended for including this provision in the ESSA plan and regulations.

14. Public school choice

§100.21(i)(1)(iii)(g) states that: "In any CSI school that has a decline in its Core Subject Performance Index for elementary/middle schools or its Composite Performance Index for high schools for the all students subgroup, as determined by the Commissioner, for two consecutive years, the school district must provide all students enrolled in the school with public school choice in accordance with section 120.1 and paragraph (4) of subdivision (b) of this section. Provided further that, in instances when there are no schools in Good Standing or TSI schools serving the grade levels served by the CSI school that is required to provide public school choice, the district shall ensure that the CSI school expends for Participatory Budgeting an amount equal to or greater than three times the amount expended by such school during the previous year. In instances when there are schools within the school district that are in Good Standing or TSI but the district is unable to fulfil all of the public school choice transfer requests submitted on behalf of students from the CSI school because there are not enough available seats to accommodate all transfer requests received, then the district must ensure that the CSI school expends for Participatory Budgeting an amount equal to or greater than at least two times the amount set aside at such school during the previous year."

Comment:

We request several specific changes to the provisions for public school choice:

- Rather than being available only for students in CSI schools with declining achievement on the performance index, public school choice should be available for students in all CSI schools. We note that CSI schools are already the bottom-performing schools in the state.
- If there are no schools in good standing or TSI schools serving the grade levels served by the CSI school that is required to provide public school choice, the school district should be required to create additional seats in schools in good standing or open additional schools in good standing. This is consistent with President Obama's draft non-regulatory guidance for public school choice under NCLB, which stated: "Every student enrolled in a

Title I school identified for school improvement, corrective action, or restructuring who wishes to transfer to another school must have that opportunity.... [I]f an LEA does not have sufficient capacity in its schools that are not identified for school improvement, corrective action, or restructuring (or as persistently dangerous) to accommodate the demand for transfers by all eligible students, the LEA must create additional capacity.”

- We appreciate NYSED’s proposal for Participatory Budgeting; however, we do not believe that it is, or should be described as, an alternative to public school choice. Both concepts are valuable and should be advanced independently.

15. Strategies to support improvement in test participation rates

15.1. School improvement plans

§100.21(i)(5)(ii)-(v) states that: “(ii) Beginning with 2017-2018 and 2018-2019 school year results, any public elementary/middle or high school that fails to meet the required 95 percent participation rate for the same subgroup(s), in the same subject (i.e., ELA or math) for two consecutive years, and that fails to improve participation rate as compared to the previous year for the same subgroup(s) and subject(s), as determined by the Commissioner, must conduct a participation rate self-assessment and develop a participation rate improvement plan, in such form and according to such timeline as determined by the Commissioner....

(iii) Beginning with 2018-2019 and 2019-2020 school year results, for any school that completed a school participation rate self-assessment and improvement plan 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 district shall conduct a participation rate audit and develop an updated participation rate improvement plan....

(iv) Beginning with 2019-2020 and 2020-2021 school year results, for any school for which a district audit and district participation rate improvement plan was completed 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 district must partner with a Board of Cooperative Educational Services (BOCES) or other technical assistance center to conduct a participation rate audit and develop an updated participation rate plan....

(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.

Comment:

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.

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 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.” This is appropriate and is aligned with the state’s approved ESSA plan, which 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.”

We commend NYSED for this reasonable and balanced approach to supporting schools in improving their test participation rates. If anything, we believe the process may be too elongated, and would benefit from combining the district and BOCES steps.

15.2. Schools with the lowest participation rates

§100.21(i)(5)(vi) states that: “Beginning with 2017-2018 and 2018-2019 school year results, for any public elementary/middle or high school that is required to develop a participation rate improvement plan and is among the lowest 10 percent of schools within the State for participation rate as determined by the Commissioner, the district must submit such plan for approval by the Commissioner no later than 60 days following notification to the district that such plan is required.”

Comment:

We commend NYSED for including this provision, which will ensure that schools with the lowest participation rates in the state take immediate steps to improve test participation in partnership with parents, and will enable NYSED to support these schools in their efforts.



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