

SUBMITTED ELECTRONICALLY

Chancellor Betty Rosa  
Members of the Board of Regents  
New York State Education Department  
89 Washington Avenue  
Albany, NY 12234

February 5, 2021

**Comment of the New York Civil Liberties Union (NYCLU) in Support of New York State Education Department (NYSED) Application for ESSA Waiver from Standardized Testing Requirements**



ACLU of New York

125 Broad Street  
19<sup>th</sup> Floor  
New York NY 10004  
(212) 607-3300  
nyclu.org

Donna Lieberman  
*Executive Director*

Olivier Sylvain  
*President*

Dear Chancellor Rosa and Members of the Board of Regents:

The New York Civil Liberties Union (NYCLU) submits this comment in strong support of The New York State Education Department (NYSED) application to the federal Department of Education (USDOE) for a waiver from federally-mandated standardized testing requirements. The NYCLU would like to thank the New York State Department of Education for considering the needs of students and families and applying for this waiver.

The NYCLU is invested in the outcome of this waiver application because of our longstanding pursuit of equity for young people across New York State. The NYCLU founded the Education Policy Center in 2018 to bring a civil rights and civil liberties analysis to institutions that serve young people, and to ensure our public schools are living up to their promise as incubators of democracy. One of the strategic priorities of the Education Policy Center is to tackle the practices and policies that have led New York schools to become the most segregated in the nation, including high stakes standardized testing (HSST).

In response to the novel coronavirus (COVID -19), public schools around the country are rightfully adjusting their policies with regard to teaching, learning, and testing practices. In the midst of the current public health crisis, a majority of New York schools shifted to remote instruction at some point in the prior and current school years. Most districts made incredible efforts to reach students through remote and virtual means. However, remote and virtual learning is widely disparate for children depending on their home circumstances, the school they attend, and their personal needs. Many students lack the basics required for successful remote learning, such as device and internet access, a quiet study space, and assistance from parents or tutors. Many students are responsible for taking care of siblings or other family members. And many students have lost their primary caregivers to the disease. These inequalities are magnified for Black and Brown communities who have been disproportionately impacted by COVID-19. Given the obvious risks of administering in-person exams during a pandemic, and the undue pressure HSST puts on children and families, the NYCLU fully supports NYSED's application for a waiver.

Additionally, we urge New York State to continue working towards a permanent system where high-stakes are not attached to standardized test scores. High-stakes testing negatively impacts schools, educators, and students in many ways: It

narrows the curriculum because teachers are incentivized to focus on material that will be tested. Test scores are the basis for separating students into different, often racially segregated academic tracks. Standardized testing harms students with disabilities and those for whom English is not a first language. It pushes good teachers out of the profession and incentivizes cheating. And it leads to equating intelligence with test performance.<sup>1</sup>

President Biden has indicated his administration’s strong commitment to addressing racial inequities by issuing Executive Order 13985. The EO states “the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government. Because advancing equity requires a systematic approach to embedding fairness in decision-making processes, executive departments and agencies (agencies) must recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity.” We believe this EO makes it clear that the USDOE must consider how HSST negatively impacts students of color.

HSST has created significant barriers for Black and Brown children to attend schools that are fully funded and have the greatest academic opportunities. While ESSA requirements are seen by some as a means for creating accountability, the truth is schools and districts are rarely held accountable for the fair education of students of color. Year after year, schools with high percentages of Black and Brown students are deliberately under resourced: they have less experienced teachers, they have fewer advanced courses, and even their school buildings are less equipped to keep them safe and healthy. No amount of HSST has ever righted this wrong—quite the opposite. Test scores are used to keep Black and Brown children out of enhanced educational environments, including gifted and talented programs and even highly desirable public schools. They have created stigma for schools and educators, and they have denied students the ability to graduate high school even when they had met every other requirement.

To advance educational equity, New York State must move to a permanent system where there are not high stakes, such as promotion, graduation, or funding, attached to standardized test scores. The Board of Regents must allow students’ progress to be determined by those who know them best: their teachers, counselors, and other educators. To ensure that every student is prepared for graduation and a possible higher education, districts can rely on coursework, successful internship participation, and demonstration of learning through projects and practical application. The State needs to move away from a system where children are labeled and sorted into cohorts, and toward one where each student’s individual needs are met, speed of learning is respected, and talents are cultivated. New York kids deserve an education system that makes room for enrichment in any area where they excel, without discounting that they may struggle in other subjects, or even have a disability that requires more support. They deserve to learn with and from all their classmates, not in segregated classrooms.

We applaud NYSED for seeking a waiver from testing requirements this year, because it demonstrates the agency’s understanding of what students, families, and teachers

---

<sup>1</sup> NYCLU, *Learning During a Pandemic: A Back to School Guide for Parents, Educators, and Students*, at 24, available at: <https://www.nyclu.org/en/publications/learning-during-pandemic-back-school-guide-parents-educators-and-students>.



125 Broad Street  
19<sup>th</sup> Floor  
New York NY 10004  
(212) 607-3300  
[nyclu.org](http://nyclu.org)

Donna Lieberman  
*Executive Director*

Olivier Sylvain  
*President*

are going through in 2021. We believe that any test scores this year would be so tainted by circumstance, trauma, and other factors as to be useless as an accountability measure. But we also believe all test scores are tainted in that way, even when the circumstances are personal, rather than felt by all simultaneously, and as such it is inappropriate to attach high stakes to them. We urge NYSED to make New York a leader in educational equity by replacing high stakes tests wherever possible with multiple measures of success.

Sincerely,



Johanna E. Miller, Esq.  
Education Policy Center Director



Lanessa L. Owens-Chaplin  
Education Policy Center Assistant Director



125 Broad Street  
19<sup>th</sup> Floor  
New York NY 10004  
(212) 607-3300  
nyclu.org



Reena Patel  
Legal Intern

Donna Lieberman  
*Executive Director*

Olivier Sylvain  
*President*