June 13, 2018

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington D.C. 20202

Dear Secretary DeVos:

The Utah State Board of Education (USBE) received your denial, dated May 31, 2018, of the USBE's initial request to waive ESEA 1111(c)(4)(E)(ii). We are writing now to request that the U.S Department of Education use its transition authority under Section 4(b) of the Every Student Succeeds Act (ESSA) to allow Utah one year to resolve a conflict between state law and ESSA. This conflict would otherwise require Utah to bifurcate its accountability system into two systems—one for federal and one for state accountability purposes, thereby undermining the orderly transition to, and implementation of, the accountability requirements included in ESSA. Utah is committed to complying with ESEA 1111(c)(4)(E)(ii) following the one year transition period.

Utah has a history of using multiple, misaligned accountability systems. This practice bred confusion and mistrust among educators and the public and undermined efforts to advance student academic achievement. In addition, a 2017 Utah State Legislative Auditor performance audit found that using multiple accountability systems created unnecessary duplication of effort and was indicative of inadequate state level oversight.[1] As a result, Utah sought to take advantage of the flexibilities available through ESSA to unify accountability systems.

As described in Utah's initial waiver request, Utah state law requires USBE to prevent negative impact to a local education agency (LEA) or an LEA's employees through the school accountability system due to parental opt-out (U.C.A. § 53G-6-803). While explicitly accommodating state and local parental opt-out laws, ESSA also requires states, in their required academic achievement indicator, to account for non-tested students when a school's assessment participation rate is less than 95 percent. Following the methodology set forth in Section 1111(c)(4)(E)(ii) of ESEA will negatively impact (through lower

[1] Office of the Legislative Auditor General, Audit Number 2017-12, A Performance Audit of the History of Selected Public Education Programs. Available at: https://le.utah.gov/audit/17_12rpt.pdf.

proficiency rates and accountability ratings) any school with an assessment participation rate of less than 95 percent.

Thoughtfully using the Secretary's transition authority to allow Utah one year to resolve a conflict between state law and federal law is consistent with Secretary DeVos' public statements regarding the Department's commitment to respecting local decision making over students and schools. We share in your commitment to ensure that all students are held to the same state-determined, high academic standards. We further agree that state assessments provide invaluable information to parents, educators, policymakers and the public about the condition of education in each school in the state in order to inform instruction and improve student achievement. The goal of this request is to ensure an orderly transition to the accountability provisions of ESSA by providing one year for the state to resolve the conflict between state and federal law that otherwise prevents Utah's ability to authentically implement one single, coherent accountability system and further advance student academic achievement.

We further respectfully request that this issue be considered separate from approval of Utah's ESSA State Plan. The ESSA State Plan Template does not require a state to describe or provide assurances regarding this specific calculation provision. Rather, the template requires a state to describe broadly how the state factors the 95 percent participation rate requirement into the accountability system. Utah has successfully addressed this question in its plan. ESEA 8302(b)(3) provides that the Secretary shall only require information that is absolutely necessary for the consideration of the consolidated state plan. Given that this provision was not in the state plan template, compliance with this provision should be determined outside of the state plan approval process.

Thank you for your consideration of this matter.

Sincerely,

Mark Huntsman, Chair
Utah State Board of Education

Sydnee Dickson, Ed.D.
State Superintendent of Public Instruction

attachment: Initial waiver request submitted May 2018

cc: Jason Botel, Principal Deputy Assistant Secretary, Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary of Elementary and Secondary Education

May 1, 2018

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington D.C. 20202

Dear Secretary DeVos:

This letter is to request a waiver for Utah from specific statutory and regulatory requirements established under the Elementary and Secondary Education Act (ESEA) as amended by the Every Student Succeeds Act (ESSA).

The waiver request, if granted, would enable the state to maintain one coherent accountability system, allow Utah to more accurately identify schools in need of improvement, and avoid undermining the transparency of our accountability system, including the ability of policymakers, educators, parents, and students to make informed decisions.

Background

Utah policymakers strongly support parents' rights in directing and overseeing a student's education. State law authorizes a parent to excuse a student from taking a statewide assessment (U.C.A. § 53G-6-803). State law also requires the Utah State Board of Education (USBE) to prevent negative impact to a local education agency's (LEA) or an LEA's employees through the school accountability system due to parental opt-out (U.C.A. § 53G-6-803).

ESEA section 1111(c)(4)(E) requires that, for the purpose of measuring, calculating, and reporting on the achievement indicator in the school accountability system, a state education agency must include in the denominator the greater of the number of students participating in the assessments or the number equal to 95 percent of all students. This methodology essentially requires states to include non-tested students as zeros, or non-proficient, in the calculation of the achievement indicator for a school when the assessment participation rate of a school is below 95 percent. See Appendix A, Figure 1 for a depiction of the impact of including non-tested students as non-proficient in the accountability calculations and the negative impact on school accountability scores, in violation of state law.

USBE has taken steps to encourage ethical testing behaviors and address student motivation while protecting parental rights. Specifically, USBE's Testing Ethics Policy (which has the effect of law) requires educators and LEAs to ensure all eligible students are tested, and that no student is discouraged from

participating in a statewide assessment.[1] Additionally, the Board recently enacted a rule that allows a parent to request that an LEA allow a student's demonstration of proficiency on a statewide assessment to fulfill a requirement in a course, such as a local end-of-course assessment (R277-404-6).

USBE is making several changes to Utah's assessment system that may result in higher assessment participation. USBE is currently changing assessment service providers for the statewide assessment in grades 3-10. USBE is changing from the end-of-course assessments that are administered following high school level English, mathematics, and science courses to an end-of-level assessment that is more closely aligned to performance on the state's college readiness assessment (ACT). Also, USBE has reduced the number of grades in which writing is assessed, which has reduced the time that students spend on testing. USBE is also developing communication materials for parents and educators regarding the purpose and value of assessment as a means to improve education.

Parental opt-out in Utah is not highly concentrated in Title I schools or among traditionally underserved student groups. Only twelve percent of the schools with an opt-out rate above five percent are Title I schools (about one-third of our schools overall are Title I schools). Additionally, students who are not economically disadvantaged and not minority are choosing to opt-out of statewide assessments at higher rates than other student groups (see Appendix A, Figure 4).

Authority

Section 8401(a)(3) of ESEA as amended by ESSA allows the Secretary of the U.S. Department of Education to waive, with the exceptions outlined in section 8401(c), "any statutory or regulatory requirement of this Act for which a waiver request is submitted." Section 8401(a)(1) of ESEA as amended by ESSA establishes that a state educational agency (SEA) may submit such a waiver request.

Waiver Request Components

I. Identify the federal programs affected by this waiver request.

This waiver request will affect Title I, Part A of ESEA.

II. Describe which federal statutory or regulatory requirements are to be waived.

ESEA section 1111(c)(4)(E) requires that, for the purpose of measuring, calculating, and reporting on the achievement indicator, a state education agency must include in the denominator the greater of:

- the number of students participating in the assessments, or 95 percent of all such students in the student group, as the case may be; or
- the number equal to 95 percent of all students.

III. Describe how the waiving of the requirements indicated above will advance student academic achievement.

[1] Utah State Board of Education Standard Test Administration and Testing Ethics Policy. Incorporated by reference in rule R277-404.

Utah's accountability system operates under the theory of action that the accountability indicators accurately measure school performance and therefore: 1) accurately identify gaps in achievement; and 2) accurately identify the lowest performing schools in need of state support and improvement resources. Counting non-tested students as non-proficient in school accountability calculations undermines the validity of the accountability system by inferring that non-tested students are non-proficient. The reality is that the proficiency of the non-tested student is unknown. The intent of the ESSA requirement is presumably to eliminate perverse incentives to discourage low performing or targeted groups of students from participating in statewide assessments. However, this policy does not translate as intended in a state with liberal parental opt-out laws. Utah has other policies in place to protect against this perverse incentive.[2] Accountability systems are intended to promote action at the school level to improve student academic achievement. That action is less likely to occur when the validity of the accountability system is questioned by educators, parents, and stakeholders.

The accountability system is used to identify low performing schools and direct school improvement resources to the lowest performing five percent of schools in the state, with the intention of advancing student academic achievement. Counting non-tested students as non-proficient in school accountability calculations (ESSA methodology) may redirect resources away from schools where students have the lowest proficiency levels and highest academic needs to the schools with high opt-out rates. Charter schools and online schools in Utah would be disproportionately impacted by applying this methodology because opt-out rates are highest in these educational settings (see Appendix A, Figure 2 and Figure 3). Specifically, preliminary estimates indicate that applying the ESSA methodology moves several online schools with high opt-out rates into the lowest performing five percent of schools, and excludes some schools with high assessment participation rates and low proficiency rates from the lowest five percent. Directing school improvement resources away from schools with truly low proficiency rates and high academic needs to schools with high opt-out rates does not align with the state's theory of action. Further, it would undermine the transparency of the accountability system to, for example, identify higher than the lowest 5 percent of schools to accommodate for this potential misidentification. These factors impede Utah's efforts to advance student academic achievement.

IV. Describe the methods that will be used to monitor and regularly evaluate the effectiveness of the implementation of this waiver request.

The effectiveness of the implementation of this waiver request depends on the extent to which the state is able to avoid compromising the validity of the accountability system in evaluating school performance by counting non-tested students as non-proficient in school accountability calculations. Utah will monitor and evaluate the effectiveness and continuing necessity for this waiver by annually monitoring assessment opt-out rates at the school level and student group level.

[2] Utah State Board of Education Standard Test Administration and Testing Ethics Policy. Incorporated by reference in rule R277-404.

USBE appreciates the concern that low performing students or specific student groups may be unethically discouraged, directly or indirectly from actions taken by the school or LEA, from test participation. As described in the Background Section, our current data demonstrate that this is not presently the case at the state level (see Appendix A, Figure 4). As mentioned in section III, Utah has policies in place to protect against such practices. The Utah Testing Ethics Policy specifically prohibits schools from targeting or encouraging non-participation and parental opt-out. To monitor and prevent perverse incentives and unethical practices, which we are calling institutional exclusion, USBE will also develop a mechanism for identifying schools and LEAs that are out of compliance with state law or the Testing Ethics Policy, particularly among student groups within a school, and impose appropriate remediation while recognizing the rights of parents and students. Schools or LEAs with a consistent pattern of disproportionate rates of opt-out among student groups will be subject to remediation to address low participation rates resulting directly from action taken by the school or LEA. USBE will develop policies to address institutional exclusion within the boundaries of state law.

V. Describe how schools will continue to provide assistance to the same populations served by programs for which waivers are requested.

Schools will continue to provide assistance to eligible students under ESSA Title I, Part A. The waiver further supports Utah's efforts to correctly identify the schools that are the lowest performing five percent of schools and most in need of support.

VI. If the waiver is related to provisions of subsections (b) or (h) of Section 1111 of ESEA-ESSA, describe how the SEA requesting the waiver will maintain or improve transparency in reporting to parents and the public on student achievement and school performance, including the achievement of the subgroups of students identified in section 111(b)(2)(B)(xi) of ESEA-ESSA.

Requesting this waiver will improve transparency in reporting to parents and the public on student achievement and school performance. Counting non-tested students as non-proficient in school accountability calculations undermines transparency by inferring that non-tested students are non-proficient. The reality is that the proficiency of the non-tested student is unknown. Applying this methodology to the achievement indicator would cause stakeholders to draw inappropriate conclusions when interpreting school or student group proficiency rates. For a school with less than 95 percent participation at the student group level, counting non-participating students as non-proficient distorts the accountability data in ways that mask the true performance of students, and therefore the true achievement gaps that may exist.

To maintain transparency, Utah will continue to maintain and improve the data and transparency reporting tools currently in place in the state. USBE maintains a robust Data Gateway that is designed to provide the public, especially parents, with the tools they need to understand how Utah public schools are performing on key academic indicators. These online tools allow for examination of performance on key academic indicators by student

group, comparison to state and district averages, comparison to "like schools," and comparison of school and LEA performance over time. The Data Gateway is the primary point of access for parents and other public stakeholders to access school report cards that display accountability indicators, overall school ratings, details related to accountability indicators, including disaggregation of student group performance, and other school quality indicators. Additionally, state law requires that schools provide students and parents with individual score reports for each assessment in a timely manner that meaningfully communicates student performance.

Utah's statewide assessment system was recently identified as among the most "honest" states by The Honesty Gap, meaning the statewide assessment system results in Utah are consistent with the NAEP assessment results. Utah has comprehensive assessment items aligned to Utah's core standards. Counting non-tested students as non-proficient in school accountability calculations will foster loss of confidence in the system's results.

VII. Describe how the public was informed of this waiver request and provided opportunity to provide public comment on the request.

On February 1, 2018, the USBE provided notice of the intent to submit this waiver during its regularly scheduled public meeting. That intent was also publicized by the local news outlets during that day's news cycle. On February 14, 2018, notice of the draft waiver and opportunity for public comment was distributed by USBE through a press release and posted to the homepage of USBE's website. The waiver comment period closed on March 16, 2018.

Comments were received via essacomments@schools.utah.gov.

VIII. Attach or describe the public comments received regarding this waiver request.

USBE received 13 formal comments throughout the public comment period. All of the comments were supportive of using USBE's proposed method for calculating the achievement indicator. See Appendix B for the full text of the public comments.

The State Board of Education appreciates your consideration of this waiver quest.

Sincerely,

Sydnee Dickson, Ed.D.
State Superintendent of Public Instruction

Appendix A. Additional Details Related to Opt-Out Rates in Utah

Figure 1: Impact of Applying ESSA Methodology to Calculate Proficiency Rates

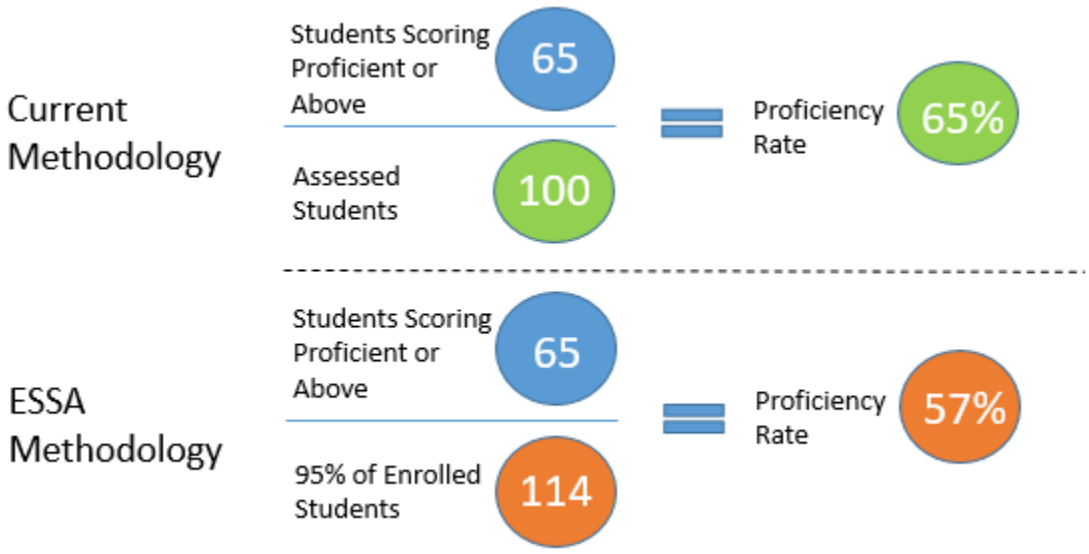


Figure 2: State Opt-Out Rates (2016-17).

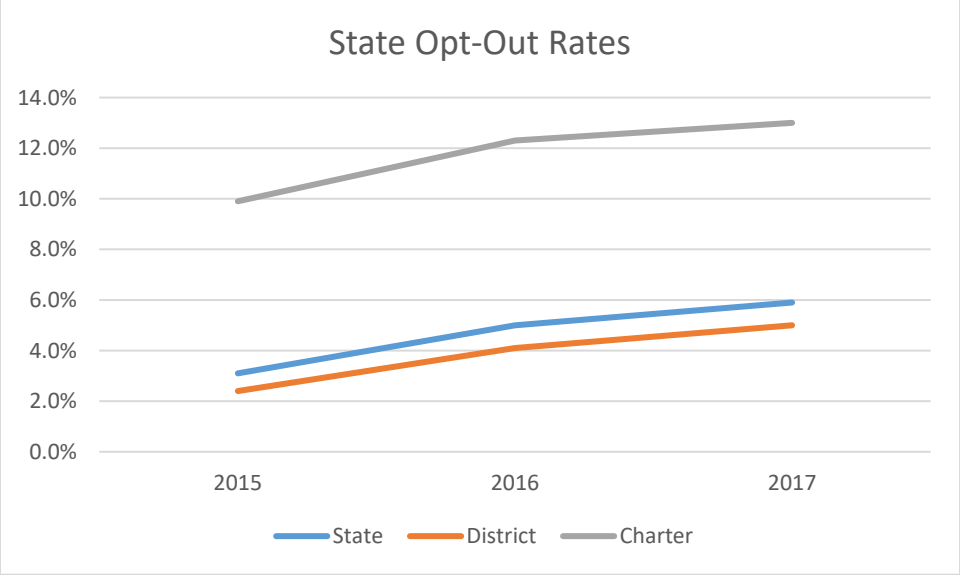


Figure 3: Opt-Out Rates by School Type (2016-17).

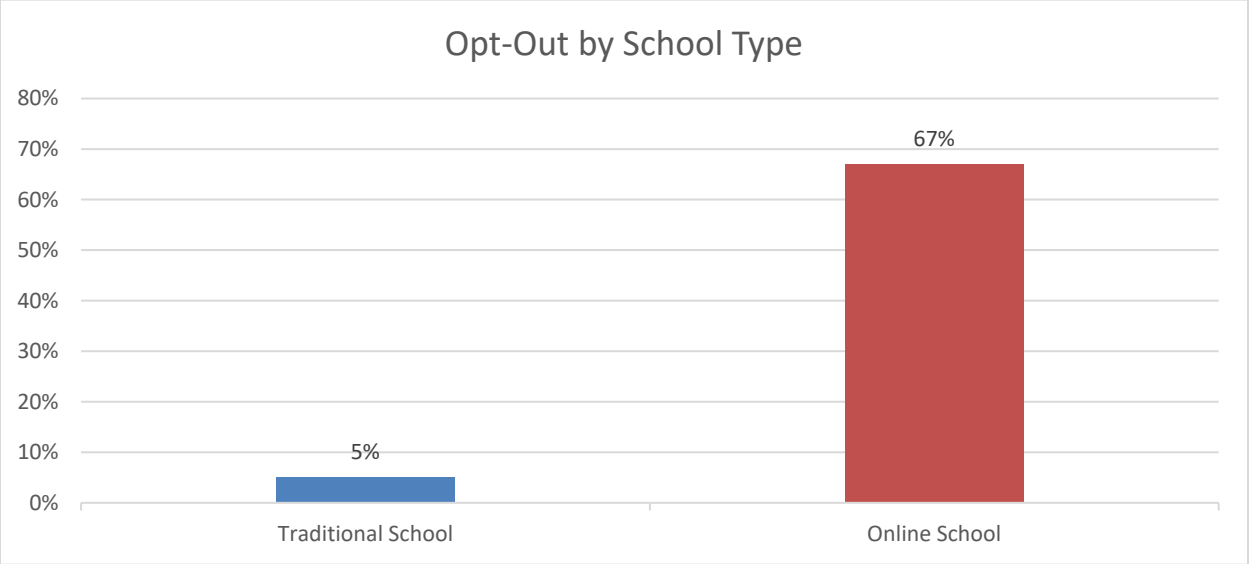
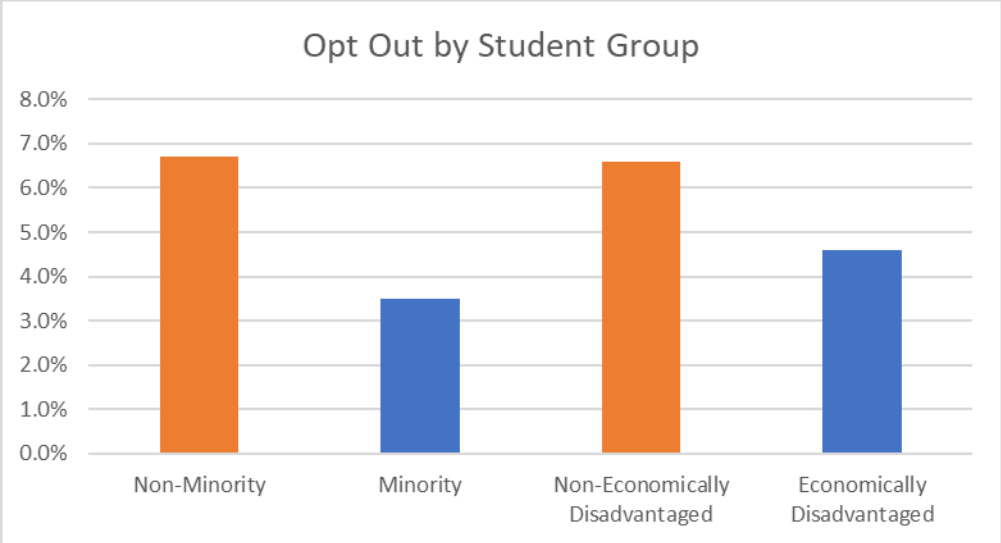


Figure 4: Opt-Out Rates by Student Group (2016-17).



Appendix B. Comments Received During Public Comment Period

A waiver from this provision is a necessity for most charter schools. Our opt-outs have grown from 11% to 20%. There is no convincing the core of these parents to reconsider. We've had parent night meetings to discuss the benefits of taking the exam, sent home multiple emails etc. Osmond's SB122 is an awful, self-serving piece of legislation. Once parents heard that "The State Board of Education shall ensure through board rule that neither an LEA nor its employees are negatively impacted through school grading ..." ...the die was cast and now we've crossed the Rubicon, there's no way we're going to get parents to opt back in. Without a waiver, the grade reduction is a foregone conclusion. We've never had 95%+ participation and heretofore have not been docked a letter grade. What has changed that a waiver is now needed to avoid that penalty in the future?
To whom it may concern; This is a very well thought out, and drafted waiver. And, it is necessary! Representing a school that has a significant opt-out rate, the current formula creates challenges that are beyond our control, yet has a significant impact on our school. The only test that we have had 95% participation is the DIBELs test, for which our results exceeded the State Target of 49%, by 7-points! Yet, with our very high opt-our rate, it significantly impacts both our reported SAGE passage, as well our report card. We have significant room for improvement, and we strive every day to address areas of improvement. A far more accurate reflection of our work, and what we can control would significantly improve our teacher and parent moral.
Hello USBE, This note is in full support of the waiver request that would not count students who opt out of testing as scores of zero. The existing ESSA mandate pollutes and invalidates assessment data on a school level. It is merely a backhanded attempt at forcing compliance with a less-than-ideal testing regimen. It also punishes schools whose parents and families are actively involved in decisions regarding their child's education. As a government, if we find that our test participation is not to our liking, we should devote our attention to fixing the assessment system, rather than trying to use schools to coerce families into participating.
Having read the draft and navigated the powerful figures outlined in the draft, this effort has my full support. I feel strongly that counting non-tested students as zeros in school accountability

calculations compromises the validity and intention of this system. Not only is it plausibly inaccurate to infer that non-tested students are not proficient but it's seemingly unethical too. I read through the draft a couple times and do not have input on editing or otherwise. Thank you for your continued work.
I fully support [my charter school] in not being penalized for allowing me, as a parent, to exercise my right by opting out of testing. Schools should not be punished for parents being involved and taking action they believe to be in the best interest of their student. Please provide waiver for [my charter school].
We have opted out of state testing for our children. Unfortunately, any student opted out of a test will be given a score of zero on that state test which affect our school's overall grade. This is due to a provision in the federal 'Every Student Succeeds Act' (ESSA). The Utah State Board of Education has created a draft letter requesting a waiver from this provision. We support this request.
I appreciate your hard work in writing up this waiver. I am a parent with a student at a charter school where I also teach part-time. We have a high opt-out rate and the current scoring is punishing our school. I've also done some research on my own and when the SAGE testing was first introduced, the number being discussed was having 85%+ taking the test or the results were invalid. As we had a 65% opt-out rate last year, our test results are not valid and this is punishing us. Frankly I also feel that the Standardized Testing is already biased against Charter schools as that is the very essence of having charters is to be not-standard. As a parent and teacher, I appreciate this opportunity for Utah to be granted a waiver.
Since there is no inherent educational value for the student or family in taking the test, the student should not be forced by the state to take the test as a part of Utah's compulsory education laws. I support allowing students to opt out of this testing and not punishing a school by the grade they receive.
As an educator, I am supportive of NOT having opt out rates included in assessing schools. It is unfortunate some students opt out, but educators cannot control that. If grades reflect performance or mastery for students as well as schools, why would we factor in parent decisions? I see doing so as similar to assigning a grade to a permission slip.
As a parent, I believe that my children should be able to opt out of sage testing without the school receiving a score of zero. There is no evidence that high stakes testing helps academic performance or the school's performance (and may even hurt it by focus on perverse goals of test performance instead of education). I should be able to opt out my children as a parent. Choosing to re-enroll my

children at the same school is my testament to the fact that I continue to believe that school the best one for my child. My adopted children are special needs and have learning disorders (all three of them). Their scores should not reflect negatively on the school whether they take the tests or not (and I prefer not as that serves all of them best right now). And that should be my choice. Please stop this authoritarian and punitive attempt to grab control of a process that works so much better from an organic and local level. You are hurting the very children you are supposed to be helping.
I feel this proposed waiver is a good move as it assures more reliable testing results.
I want to personally thank all Utah Policymakers for standing up for parent rights. Having had five children in the school system (two remaining), we felt strongly about parent rights, and appreciate lawmakers who continue to help retain them!