

September 26, 2022

Betty A. Rosa
Commissioner of Education
NYS Education Department
Room 111, Education Building
89 Washington Avenue
Albany, NY 12234

Ms. Rosa:

I am writing to appeal your agency's constructive denial of Empire Center for Public Policy's request under the Freedom of Information Law for records containing full statewide test results for grades 3-8 in English Language Acquisition (ELA) and mathematics for the 2021-22 school year, submitted on September 8, 2022 (FL-EM-22/1359).

Your agency's Records Access Officer acknowledged the request on September 15, 2022 and advised that it would be granted or denied in whole or in part by October 14, 2022.

Eight days letter, your agency sent another letter. This time the Director of Educational Data and Research wrote to inform us that your agency would not be responding to the FOIL request until January 31, 2023.

As you know, if records cannot be disclosed within 20 business days of acknowledging a request, FOIL § 89(3)(a) requires an agency to explain in writing its inability to provide the records. It must also set a date certain for disclosure that is reasonable under the circumstances. Ms. LeRoy did not provide adequate reasons for delaying your agency's response. Her letter simply states that, "Due to the scope and nature of your request, and the effort required to identify and collate the appropriate records, it will take the Department additional time to complete your request." Furthermore, the date she provides for responding is clearly unreasonable.

The FOIL request seeks records reflecting data sent to school districts in August. This is the same data that your agency required school districts to embargo until last Thursday, the day before Ms. LeRoy sent her letter.

In prior years, your agency posted on its website statewide data as early as August, and usually not later than mid-September. And in a memo dated June 30, 2022, Deputy Commissioner Jason Harmon advised the information Empire Center has requested will be available this fall.

Mr. Harmon in his memo introduces a new distinction between "preliminary" and "final" test data. No such distinction was made in prior years. Our concern is that the "preliminary" designation was applied as a pretext for delaying public release of the results.

Empire Center is looking for the same information that NYSED made public most years by this time in the form of a "comprehensive 3-8 ELA and Math Researcher File, [t]he 3-8 Assessment Database with all public statewide, district and school level aggregate data of the test results." I note, for example, that the 2018-2019 researcher file was last modified on August 8, 2019.

Not only is your agency violating the letter and spirit of the state's transparency law, its concealing data regarding student learning during the Covid-19 pandemic that's of great public interest and concern.

As you know, you have ten business days to respond to this appeal.

Sincerely yours,



Peter Warren
Director of Research
Empire Center for Public Policy
30 S Pearl St., Suite 1210
Albany, NY 12207
data@seethroughny.net
(o): 518.434.3100