



**TO:** P-12 Education Committee

**FROM:** Angelica Infante-Green *A. Infante - Green*

**SUBJECT:** Proposed Amendment to Section 154-2.3(i) of the Regulations of the Commissioner of Education to Authorize School Districts Enrolling Fewer Than 30 English Language Learners to Apply for a One Year Renewable Waiver to Expand the Maximum Allowable Grade Span for English As a New Language and Bilingual Education Classes From Two to Three Contiguous Grades

**DATE:** October 25, 2018

**AUTHORIZATION(S):**



## SUMMARY

### Issue for Decision

Should the Board of Regents amend section 154-2.3(i) of the Commissioner's regulations to allow school districts enrolling fewer than 30 English language learners (ELLs) to apply for a one-year renewable waiver to expand the maximum allowable grade span for English as a New Language (ENL) and Bilingual Education (BE) classes from two to three contiguous grades?

### Reason(s) for Consideration

Review of policy.

### Proposed Handling

The proposed amendment is being presented to the P-12 Education Committee for recommendation to the Full Board for adoption as an emergency rule at its November 2018 meeting. A Notice of Proposed Rule Making will be published in the State Register on November 21, 2018. A copy of the proposed amendment is attached.

## **Background Information**

In January 2017, the New York State Council of School Superintendents (NYSCOSS) contacted the Department to request regulatory flexibility in meeting the requirement in section 154-2.3(i) of the Commissioner's regulations which provides that the maximum allowable grade span for grouping instruction in grades 1-12 English as a new language ("ENL") or bilingual education ("BE") classes is two contiguous grades, except for English language learners ("ELLs") in a special class. NYSCOSS expressed concerns about the challenge of hiring additional staff in order to limit ENL and BE classes to two contiguous grades, given the statewide shortage of certified ENL and BE teachers.

The Department understands these concerns, and in particular the challenges that smaller districts and districts with few ELLs may face in meeting the two contiguous grade span requirement in section 154-2.3(i) of the Commissioner's regulations. However, the Department must counterbalance these concerns with the need to ensure that ELLs in ENL and BE classes have access to age and grade appropriate instruction. In accordance with the Department's *Blueprint for ELL Success*, ELLs – like other students – are entitled to "materials and instructional resources that are linguistically age/grade appropriate." The proposed amendment seeks to balance these concerns by creating a one-year renewable waiver allowing districts with fewer than 30 ELLs to seek approval from the Commissioner to expand the allowable grade span for ENL and BE classes to three contiguous grades.

Districts seeking the waiver will be required to provide key demographic information such as the total number and percentage of ELLs in the district as well as in particular schools, and the number of available certified BE and English for speakers of other languages ("ESOL") teachers to serve them. Districts will also be required to submit a justification explaining how they will ensure that all ELLs receive appropriate support if a waiver is granted, as well as the efforts the district has made to comply with the two grade span requirement of section 154-2.3(i) given its current staffing.

In order to better enable districts to meet the two grade span requirement of section 154-2.3(i), as well as to set forth best practices to support districts that apply for this waiver, the Department will issue an accompanying guidance document entitled "School District Justification to Expand the Maximum Allowable Grade Span to Three Contiguous Grades in 1-12 English as a New Language (ENL) or Bilingual Education (BE) Classes." Contained in this guidance are questions and answers regarding which districts qualify for the waiver, best practices and guidance regarding instructional grouping practices, and recommended solutions for common challenges.

A copy of the draft waiver application form, as well as the proposed guidance document are attached.

## **Related Regents' Items**

Board of Regents Items regarding the amendment of Subpart 154-2 to create the two grade span requirement can be found at:

<http://www.regents.nysed.gov/common/regents/files/614p12d2.pdf>

<http://www.regents.nysed.gov/common/regents/files/914p12d7.pdf>

## **Recommendation**

It is recommended that the Board take the following action:

VOTED: That subdivision (i) of section 154-2.3 of Commissioner's Regulations be amended, effective November 6, 2018, in order to alleviate the difficulty that districts with fewer than 30 English Language Learners may have in meeting the requirement that bilingual education and English as a New Language classes limit enrollment to a maximum of two contiguous grades, by allowing such districts to apply for a waiver on an annual basis to expand the maximum allowable grade span to three contiguous grades beginning in the 2018-2019 school year.

## **Timetable for Implementation**

If adopted as an emergency measure at the November 2018 Regents meeting, the proposed amendment will become effective as an emergency measure on November 6, 2018 and the waiver will be available to districts beginning with the 2018-19 school year. Following the 60-day public comment period, it is anticipated that the proposed amendment will be presented to the Board of Regents for adoption as a permanent rule at the March 2019 meeting. If adopted at the March meeting, the proposed amendment will become effective as a permanent rule on March 27, 2019. A second emergency action may be needed at the January 2019 meeting to ensure that the emergency rule remains continuously in effect until it can be adopted as a permanent rule.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 207, 208, 315, 305, 2117, 2854(1)(b), and 3204.

1. Subdivision (i) of section 154-2.3 of the Regulations of the Commissioner of Education is amended, to read as follows:

(i) *Grade Span.*

(1) The maximum allowable grade span for grouping instruction in grades 1-12 English as a new language or bilingual education classes is two contiguous grades, except for English language learners in a special class, as defined by section 200.1(uu) of this Title. Provided, however, that beginning with the 2018-2019 school year the Commissioner may waive such requirement for school districts with enrollment of fewer than thirty English language learner students and permit such districts to utilize a maximum allowable grade span for instruction in grades 1-12 English as a new language or bilingual education classes of three contiguous grades, except for English language learners in a special class, as defined by section 200.1(uu) of this Title. A district seeking permission for such a waiver shall annually submit to the commissioner for approval an application on a form prescribed by the commissioner which must include:

(i) data regarding the number and percentages of English language learners enrolled in the district, along with data regarding the number of certified bilingual education and English to speakers of other languages teachers in the district;

(ii) evidence that the district will ensure that all English language learners receive grade and age appropriate instructional support if the waiver is granted; and

(iii) evidence regarding the district's efforts to meet the two grade span requirement of this subparagraph prior to seeking a waiver.

**8 NYCRR §154-2.3(i)**

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE  
EMERGENCY ACTION

The proposed amendment is necessary, beginning with the 2018-2019 school year, to implement Regents policy to permit certain eligible school districts to seek a waiver from the requirement in Commissioner's Regulations section 154-2.3(i) which provides that the maximum allowable grade span for grouping instruction in grades 1-12 English as a new language or bilingual education classes is two contiguous grades, except for English language learners in a special class.

Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for regular (non-emergency) adoption, after expiration of the required 60-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the March 2019 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the March meeting, would be March 27, 2019, the date a Notice of Adoption would be published in the State Register

Therefore, emergency action is necessary at the November 2018 Regents meeting for the preservation of the general welfare in order to ensure that eligible school districts have enough notice that they may seek such waiver for the 2018-2019 school year. It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the March 2019 Regents meeting, which is the first scheduled

meeting after expiration of the 60-day public comment period prescribed in the SAPA for State agency rule makings.



Lissette Colón-Collins, Assistant Commissioner  
Office of Bilingual Education and World Languages

55 Hanson Place, Room 594  
Brooklyn, New York 11217

89 Washington Avenue, Room 528 EB  
Albany, New York 12234

Tel: (718) 722-2445 / Fax: (718) 722-2459

(518) 474-8775/ Fax: (518) 474-7948

**School District Justification to Expand the Maximum Allowable Grade Span to Three Contiguous Grades in I-12 English as a New Language (ENL) or Bilingual Education (BE) Classes**

Under Commissioner’s Regulations (CR) Section 154-2.3 (i), “[t]he maximum allowable grade span for grouping instruction in grades 1-12 English as a New Language or Bilingual Education classes is two contiguous grades, except for English Language Learners in a special class, as defined by section 200.1(uu) . . .” Section 154-2.3(i) allows school districts to seek flexibility from this requirement on an annual basis “for school districts with enrollment of fewer than thirty English language learner students.” The New York State Education Department’s (NYSED) data analysis indicates that a number of school districts throughout New York State have fewer than thirty (30) English Language Learners (ELLs) spread across grade levels, which makes it challenging to group ENL and BE classes with a maximum of two grade spans. As a result, New York State is providing flexibility to such qualifying districts from the two grade span requirement of Part 154-2.3(i). Using this form, districts with fewer than thirty (30) ELLs may apply for a **one year** waiver to expand the two contiguous grade span requirement for ENL or BE classes to three contiguous grades, renewable on an annual basis.

*Note: School districts are advised to prioritize the learning needs of individual students over grouping considerations, within the two grade span requirement of CR Part 154 to the fullest extent possible. Districts facing staffing shortages and other class grouping challenges are encouraged to reach out to local Regional Bilingual Education Resource Networks (RBERNs) and Institutions of Higher Education to identify possible solutions. After making such efforts, qualifying districts may utilize this waiver to seek relief if they are unable to find appropriate staff resources to satisfy the two grade span requirement.*

**Fill out all fields. Forms that are incomplete must be resubmitted or will not be considered for review.**

**Section 1. District Information**

<b>District Name:</b>			<b>BEDS Code:</b>
<b>Street:</b>	<b>City:</b>	<b>Zip Code:</b>	
<b>School Year:</b>			
<b>Contact Person Info:</b>	<b>Name:</b>	<b>Email:</b>	<b>Phone:</b>

**Section 2: Student and Program Information**

- All Local Education Agencies (LEAs)** must maintain a Part 154 Comprehensive Plan on file and have it available for review upon request by the New York State Education Department (NYSED), parents, or any other school or community member. Indicate date **Part 154 Comprehensive ELL Education Plan** submitted, and for which school year

--

**For the following information, please use data reported for spring BEDS Day:**

- Indicate the total number of students enrolled in the district
- Indicate the total number of ELLs enrolled in the district
- Indicate the percentage of ELLs in the district’s or BOCES’ total student population
- Indicate the number of Bilingual Education (BE) certified teachers in your district by FTE
- Indicate the number of English to Speakers of Other Languages (ESOL) certified teachers in your district by FTE


7. If your district contracts itinerant ESOL or BE teachers from BOCES or another agency, please indicate the number of teachers and the FTE

8. Indicate why you feel that your district should receive a waiver for the two contiguous grade span requirement and how your district will ensure that all ELLs receive appropriate support:

9. Describe the efforts that the district has put in place to meet the current staffing requirements under Part 154-2.3(i):

**Provide the following information for all school buildings for which you are requesting a waiver.**

**Instructions:** Indicate grades served and number of ELLs per grade. Add rows as needed. **The first two rows have been completed as an example.**

School Building Name	BEDS code	Current Grouping		Proposed Grouping	
		Grades	Number of ELLs	Grades	Number of ELLs
<i>Example: Big Apple School</i>	000	2 and 3	5	2, 3, and 4	10
		5 and 6	10	4, 5, and 6	12

**Sign this form and submit electronically by June 15, 2018 to: [OBEWLDocSubmit@nysed.gov](mailto:OBEWLDocSubmit@nysed.gov)  
In the subject line, please write "Part 154-2.3(i) Gradespan Waiver <insert name of LEA>"**

**Superintendent/Chief Administrative Officer or designee electronic signature.**

By entering your name below, you are signing this form electronically. You agree that your electronic signature is the legal equivalent of your manual signature on this form.

<b>Name:</b>	<b>Title:</b>	<b>Date:</b>
<b>Email:</b>		
<b>To be completed by the Office of Bilingual Education and World Languages</b>		
Request <input type="checkbox"/> Approved <input type="checkbox"/> Not Approved		
<b>Comments:</b>		

Signature: \_\_\_\_\_ Date: \_\_\_\_\_  
OBEWL authorized signature



# Commissioner's Regulations CR Part 154

## Guidance

**School District Justification to Expand the  
Maximum Allowable Grade Span to Three  
Contiguous Grades in 1-12  
English as a New Language (ENL) or  
Bilingual Education (BE) Classes**

## INTRODUCTION

The presence and population of English Language Learners/Multilingual Learners (ELLs/MLLs) vary considerably among New York State schools. Some communities have no ELLs/MLLs, while others have small numbers of ELLs/MLLs of wide-ranging ages; for instance, a district might have many ELLs/MLLs in grade 2 but none in grade 1. Others have enough ELLs/MLLs in a given grade to create one self-contained ENL classroom per grade or across two grades, with higher proficiency ELLs/MLLs distributed across the remaining classes. This demographic reality must, however, be balanced with what we know about best practices to use with this growing subset of our student body.

The New York State Education Department (NYSED) understands that districts with small numbers of ELLs/MLLs may face challenges for finding appropriate staffing for ENL or BE classes. However, it is critical to keep in mind possible unintended consequences that can arise from grouping too many grades together for instructional purposes. This document was created in response to feedback that the NYSED Office of Bilingual Education and World Languages (OBEWL) has received from the field regarding Commissioner’s Regulations (CR) Part 154, to support all districts’ efforts in meeting the grade span requirement of Part 154-2.3(i) and to provide guidance to qualifying districts with less than 30 ELLs/MLLs in applying for a one year waiver to expand the maximum allowable grade span from two to three grades.

## QUALIFYING FOR THE WAIVER

**Q:** What do the regulations state about the grouping of ELLs/MLLs for instruction and the qualifications for the waiver?

**A:** According to CR section 154-2.3 (i), “The maximum allowable grade span for grouping instruction in grades K-12 English as a New Language or Bilingual Education classes is two contiguous grades, except for English Language Learners in a special class, as defined by section 200.1(uu) of this Title.” NYSED data analysis indicates that a number of school districts throughout New York State have fewer than thirty ELLs/MLLs spread across grade levels, which makes it challenging to group ENL and BE classes with a maximum of two grade spans. As a result, New York State is providing flexibility to such qualifying districts from the two grade span requirement of Part 154-2.3(i). Districts with fewer than thirty (30) ELLs may apply for a **one year** waiver to expand the two contiguous grade span requirement for ENL or BE classes to three contiguous grades, renewable on an annual basis.

**Q:** Which districts qualify for this waiver?

**A:** Only districts with fewer than 30 ELLs/MLLs may apply for this waiver.

## INSTRUCTIONAL GROUPING

**Q:** What grades can be grouped into grade spans of three contiguous years?

**A:** Schools that have an approved waiver may extend the maximum allowable grade span for grouping instruction in Grades 1-12 English as a New Language or Bilingual Education to **three** contiguous grades, except for ELLs/MLLs in a special class as defined by section 200.1(uu).

**Q:** What type of student groupings will this waiver allow? To which instructional settings is it applicable?

**A:** This waiver allows for the grouping of three contiguous grades of ELLs/MLLs for the Stand-alone English as a New Language component of an ENL or a BE program. For example, in addition to applying other language and content-focused lessons and instructional strategies, an ENL teacher may group students in Grades 1, 2, and 3 who all need to learn or review content like the similarities and differences between urban and rural life. In another possible scenario, an ENL teacher might work with this small group to build their background knowledge and pertinent vocabulary on this curricular focus.

While content area high school students might be grouped in courses that include different grade levels (e.g. 9<sup>th</sup> grade science), care must be taken to group ELLs/MLLs appropriately in content area courses, especially at the secondary level. It would not be beneficial for an ELL/MLL to be placed into a group with learning targets or materials that are either too easy or difficult for them.

**Q:** What are recommended “best practices” for grouping ELLs/MLLs?

**A:** Best practices focus on instruction and certification. Instruction should be grade appropriate for the individual students in an instructional group. The NYSED OBEWL *Blueprint for ELL Success* recommends that “districts and schools engage all English Language Learners in instruction that is grade-appropriate, academically rigorous, and aligned with the New York State Prekindergarten Foundation for the Common Core and P-12 Common Core Learning Standards.”<sup>1</sup>

Providing small-group reading instruction in five core reading elements (phonological awareness, phonics, reading fluency, vocabulary, and comprehension) can help ELLs/MLLs in the elementary grades (U.S. Department of Education, n.d.). Small group instruction should be rigorous for all student members. The Blueprint advises districts and schools to “[use] academic language and content-area supports to strategically move ELLs along the language development continuum utilizing New York State Bilingual Progressions.” (p. 3) There is strong evidence for the use of small group literacy instruction at the elementary level (Gersten, R., Baker, S.K., Shanahan, T., Linan-Thompson, S., Collins, P., & Scarcella, R. (2007)).

“Small group instruction is beneficial for ELLs/MLLs across all grades and creates a supportive learning environment.” (Abbott et al. 2007; Kamps, Spaulding, et al., 2004).

---

<sup>1</sup> Currently, New York State utilizes the [New York State Next Generation Learning Standards](#).

## CHALLENGES & SOLUTIONS

**Q:** What are some potential instructional issues created by grouping students of three grades in one instructional group?

**A:** Schools must be mindful of the unforeseen consequences of grouping three grades into one instructional group, which must be prevented by avoiding:

- **Inappropriate English proficiency level:** Avoid grouping students from all five English proficiency levels (Entering, Emerging, Transitioning, Expanding, and Commanding<sup>2</sup>). Students in a group may be at opposite ends of the language learning continuum and will therefore have different linguistic needs. Instead, individualized instruction should be provided for most student groups.
- **Developmental inappropriateness:** Students of different ages may have different developmental needs, especially at the younger grades. For example, students in grade 1 can be five years old and students in grade 2 can be eight years old. This is a developmentally wide range. Thus, care must be taken to ensure developmental appropriateness of content to be learned and skills to be developed. In addition, younger students generally have shorter attention spans that require shorter activity duration. These issues may, however, lessen as students get older.
- **Instructional inappropriateness:** Students in different grades will bring different types and levels of background knowledge along with varying ability to complete tasks independently. Teachers must be mindful in differentiating instruction to account for background knowledge and ability to learn independently (e.g. by reading a book or by watching a video).

**Q:** What are some potential solutions for staffing shortages while long term solutions are developed by individual districts?

**A:** Potential solutions for districts include:

- *Sharing Teachers Across Districts:* Two nearby districts may consider sharing a teacher to work with ELLs/MLLs in both districts.
- *Encouraging Teachers to Seek Additional Certification:* Districts should encourage current teachers to obtain additional certification. Teachers can earn an additional content area certification, a certification in English to Speakers of Other Languages (ESOL), or a BE Extension by taking as few as 12 to 15 credits. The [Bilingual Extension](#) allows individuals who are fluent in English and an additional language to teach in a BE program and requires an existing valid base certification (e.g. Childhood Education or Initial Literacy Certification).
  - Districts should consider working with nearby institutions of higher education to host courses on-site so that a cohort of staff members can earn a BE extension or ESOL certification at the school site where they work.

---

<sup>2</sup> Students who score at the Commanding level are proficient in English and not ELLs/MLLs. However, some Commanding level students may be in ENL classes in order to receive Former ELL services under Part 154-2.3(h).

- *Specific Resources and Initiatives for Teacher Recruitment, Training, and Certification:* Districts should consider the following resources and initiatives for teacher recruitment, training, and certification:
  - Supplementary certification pathways are available to allow content area teachers to obtain [ESOL certification](#), and for ESOL teachers to receive [content area certification](#), as described above.
  - [Clinically Rich Intensive Teacher Institutes](#) prepare candidates for BE extensions and ESOL certification and are available across the state. A fully online program is available through Queens College, with more to become available soon. Tuition for the ITI program is subsidized by NYSED grants. NYSED has also published a list of institutions providing [Transitional B](#) and [Transitional C](#) programs.
  - [The Teachers of Tomorrow Program](#) provides a variety of incentives that encourage prospective teachers to teach in a school district that is experiencing a teacher shortage or subject area shortage.
  - [Teacher Opportunity Corps \(TOC\)](#) is a program with the goal of enhancing the preparation of teachers and prospective teachers to address the learning needs of students at risk of truancy, academic failure, or dropping out of school, as well as increasing the participation rate of historically underrepresented and economically disadvantaged individuals in teaching careers.
  - [Search Certification Requirements](#): This system allows individuals to review requirements for specific New York State teaching certificates.
  - [Office of Teaching Initiatives web site](#): This site has up to date information on certification changes and many pages regarding NYS certification.

## CONCLUSION

In some cases, schools or districts may need to hire additional ESOL or BE teachers to comply with CR Part 154. However, the suggestions and solutions contained herein may address the staffing difficulties facing districts and schools across New York State. We at the NYSED's Office of Bilingual Education and World Languages are here to support you in your efforts to meet the needs of our ELLs/MLLs.

## REFERENCES

The State Education Department/The University of the State of New York, Office of Bilingual Education and World Languages. (2016). *Blueprint for ELL Success*. Accessed 6-27-17 at <http://www.nysed.gov/common/nysed/files/programs/bilingual-ed/nysblueprintforellsuccess.2016.pdf>

Berg, H. Petron, M. and Greybeck, B. (2012) Setting the Foundation for Working with English Language Learners in the Secondary Classroom. *American Secondary Education*, v40 n3 p34-44.

de Jong, E. and Comminshtt, N.L. (2006). *How should ELLs be grouped for instruction?* Accessed 6-26-17 at <http://www.colorincolorado.org/article/how-should-ells-be-grouped-instruction>.

Gersten, R., Baker, S.K., Shanahan, T., Linan-Thompson, S., Collins, P., & Scarcella, R. (2007). *Effective Literacy and English Language Instruction for English Learners in the Elementary Grades: A Practice Guide* (NCEE 2007-4011). Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education. Retrieved from <http://files.eric.ed.gov/fulltext/ED497258.pdf>.

Kamps, D. Abbott, M et al. (2007). Use of Evidence-Based, Small-Group Reading Instruction for English Language Learners in Elementary Grades: Secondary-Tier Intervention. *Learning Disability Quarterly*; Summer 2007; 30, 3.

NYC Department of Education. (2008). *Designing Better High Schools for ELLs*. Accessed 6-26-17 at [http://schools.nyc.gov/NR/rdonlyres/CB259AF4-6008-4170-BBC7-D31E283D999B/39554/HSResearchSummary\\_2008\\_FINALReadOnly.pdf](http://schools.nyc.gov/NR/rdonlyres/CB259AF4-6008-4170-BBC7-D31E283D999B/39554/HSResearchSummary_2008_FINALReadOnly.pdf).

Snow, K. 2011. *Developing Kindergarten Readiness and Other Large-Scale Assessment Systems: Necessary Considerations in the Assessment of Young Children*. Washington, DC: National Association for the Education of Young Children.

U.S. Department of Education. (n.d.) *Best Practice for ELLs: Small-Group Interventions*. <http://www.readingrockets.org/article/best-practice-ells-small-group-interventions>



For additional questions, please contact the Office of Bilingual Education and World Languages  
[OBEWL@nysed.gov](mailto:OBEWL@nysed.gov) or your Regional Bilingual Education Resource Network (RBERN)  
<http://www.p12.nysed.gov/biling/bilinged/betac.html>.