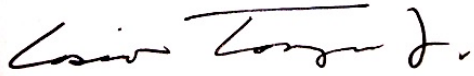




THE STATE EDUCATION DEPARTMENT/THE UNIVERSITY OF THE STATE OF NEW YORK/ALBANY, NY 12234

TO: The Honorable the Members of the Board of Regents
FROM: Cosimo Tangorra, Jr. 
SUBJECT: Graduation Requirements for English Language Learners
DATE: January 5, 2015

AUTHORIZATION(S):  

SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents amend section 100.5(d)(7) of the Commissioner's Regulations to allow English Language Learners (ELLs) who enter the United States in 9th grade or above in the 2010-11 school year and thereafter to graduate with a Local Diploma pursuant to an appeal process if they score between 55-61 on the Regents Exam in English and meet all other conditions for appeal of a Regents score?

Reason(s) for Consideration

Implementation of Policy.

Proposed Handling

The proposed amendment is being presented to the Full Board for adoption as a permanent rule at the January 2015 Regents meeting. In addition, a second emergency adoption is also necessary to ensure that the emergency rule remains in continuous effect until the effective date of its adoption as a permanent rule. A statement of the facts and circumstances which necessitate emergency action is attached.

Procedural History

The proposed amendment was adopted as an emergency rule at the October 2014 Regents meeting. A Notice of Emergency Adoption and Proposed Rule Making

was published in the State Register on November 5, 2014. A copy of the proposed amendment and an Assessment of Public Comment are attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

Over the past 10 years, New York State ELL student enrollment has increased by 20%. According to the U.S. Department of Education, ELL student enrollment has increased by 18% nationally. Currently in New York State, over 230,000 ELLs make up 8.9% of the total student population. Their linguistic diversity makes up over 140 languages spoken in New York State; 61.5% for whom Spanish is the home language. In addition, 41.2% were born in another country.

Throughout the process that resulted in the Regents taking action to amend Part 154, stakeholders raised concerns regarding the graduation rate of ELLs. While former ELLs generally achieve graduation rates almost equal to that of all non-ELLs, the graduation rate of current ELLs lags well below that of non-ELLs. In June 2013, only 31.4% of ELLs graduated, compared to 74.9% of all students. Many of the ELLs who are not graduating on time first entered school in the United States in high school. Extensive discussion with stakeholders suggests that late arriving ELLs who are able to pass other required Regents examinations with a score of 65 and who obtain a score of at least 55 on the Regents examination in English can benefit from the opportunity to obtain postsecondary education or enter a career in the same manner as other students who may earn a diploma through the appeal process.

Commissioners Regulation section 100.5(d)(7) currently allows for all students, ELLs and non-ELLs, to be eligible to apply for the Local Diploma via appeal if they:

- Score 65+ on three Regents exams; AND
- Score 62-64 on two Regents exams.

The proposed amendment would create the following additional ELL-specific pathway to graduation for qualifying students. ELL students would remain eligible for the current appeals process as well.

Summary of Proposed Amendments

Under the proposed amendment, ELLs who entered the United States in 9th grade or above in the 2010-11 school year and thereafter, and who score between 55-61 on the Regents Exam in English after two attempts at attaining a score of 65 or above,¹ are also eligible to receive the Local Diploma via appeal if they:

- Successfully appeal the Regents Exam in English AND score at least 65 on each of the four remaining required Regents exams; OR

¹ Students who score between 62-64 on a Regents exam already are eligible under current regulations to appeal that result.

- Successfully appeal the Regents Exam in English AND score at least 65 on three other required Regents exams AND score between 62 to 64 on one other required Regents exam and successfully appeal that exam.

To be eligible to appeal a score on the Regents Exam in English, ELLs would also have to meet these conditions:

- The student has received academic intervention services in English language arts; AND
- The student has an attendance rate of at least 95 percent for the school year during which the student last took the Regents examination in English; AND
- The student has attained a course average in English language arts that meets or exceeds the required passing grade by the school and is recorded on the student's official transcript with grades achieved by the student in each quarter of the school year; AND
- The student is recommended for an exemption to the passing score on the Regents examination by his or her teacher or department chairperson.

Appeals by ELLs under the proposed amendment would be reviewed by the same committee that reviews all other Regents appeals.

Summary of Comments

The Department received three (3) comments during the public comment period.

The comments were largely supportive of extending the appeal process to allow more students to benefit. A number of recommendations in these comments suggested ways to further extend the appeal process to additional categories of students (e.g., to ELLs who entered high school in and after 2009, or to all students). Other recommendations included relaxing other criteria to qualify for the appeal (e.g., reducing the attendance requirement from 95% to 90%, or reducing the number of required attempts to score a 65 on the Regents Exam in English from two to one). SED staff have taken these comments under consideration, but are not recommending changes to the proposed regulation at this time.

Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: That paragraph (7) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education be amended as submitted, effective January 28, 2015; and it is further

VOTED: That paragraph (7) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education be amended as submitted, effective

January 19, 2015 upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the October 2014 Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule.

Timetable for Implementation

The proposed amendment was adopted at the October 2014 Regents meeting as an emergency rule, effective October 21, 2014, and will expire on January 18, 2015. If adopted at the January 2015 Regents meeting, the emergency rule will take effect on January 19, 2015 and the permanent rule will take effect on January 28, 2015.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 208, 209, 305, 308, 309 and 3204

Paragraph (7) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective January 28, 2015, as follows:

(7) Appeals process on Regents examinations passing score to meet Regents diploma requirements.

(i) School districts shall provide unlimited opportunities for all students to retake required Regents examinations to improve their scores.

(a) A student who first enters grade nine in September 2005 or thereafter and who fails, after at least two attempts, to attain a score of 65 or above on a required Regents examination for graduation shall be given an opportunity to appeal such score in accordance with the provisions of this paragraph, provided that no student may appeal his or her score on more than two of the five required Regents examinations and provided further that the student:

[[a)] (1) has scored within three points of the 65 passing score on the required Regents examination under appeal and has attained at least a 65 course average in the subject area of the Regents examination under appeal;

[[b)] (2) provides evidence that he or she has received academic intervention services by the school in the subject area of the Regents examination under appeal;

[[c)] (3) has an attendance rate of at least 95 percent for the school year during which the student last took the required Regents examination under appeal;

[[d)] (4) has attained a course average in the subject area of the Regents examination under appeal that meets or exceeds the required passing grade by the

school and is recorded on the student's official transcript with grades achieved by the student in each quarter of the school year; and

[(e)] (5) is recommended for an exemption to the passing score on the required Regents examination under appeal by his or her teacher or department chairperson in the subject area of such examination.

(b) A student who first enters school in the United States (the 50 States and the District of Columbia) in grade nine, ten, eleven or twelve in September 2010 or thereafter, is identified as an English Language Learner pursuant to Part 154 of this Title, and fails, after at least two attempts, to attain a score of 65 or above on the Regents comprehensive examination in English or the Regents examination in English language arts (common core), as required by this section for graduation, shall be given an opportunity to appeal such score in accordance with the provisions of this paragraph, provided that no such student may appeal his or her score on more than two of the five required Regents examinations and provided further that the student:

(1) has scored between 55 and 61 on the required Regents comprehensive examination in English or Regents examination in English language arts (common core) under appeal;

(2) provides evidence that he or she has received academic intervention services by the school in English language arts;

(3) has an attendance rate of at least 95 percent for the school year during which the student last took the required Regents comprehensive examination in English or Regents examination in English language arts (common core);

(4) has attained a course average in English language arts that meets or

exceeds the required passing grade by the school and is recorded on the student's official transcript with grades achieved by the student in each quarter of the school year;
and

(5) is recommended for an exemption to the passing score on the required Regents comprehensive examination in English or Regents examination in English language arts (common core) by his or her teacher or department chairperson in English language arts.

[(ii)] (c) An appeal may be initiated by the student, the student's parent or guardian, or the student's teacher, and shall be submitted in a form prescribed by the commissioner to the student's school principal.

[(iii)] (d) The school principal shall chair a standing committee comprised of three teachers (not to include the student's teacher in the subject area of the Regents examination under appeal) and two school administrators (one of whom shall be the school principal). The standing committee shall review an appeal within 10 school days of its receipt and make a recommendation to the school superintendent or, in the City School District of the City of New York, to the chancellor of the city school district or his/her designee, to accept or deny the appeal. The standing committee may interview the teacher or department chairperson who recommended the appeal, and may also interview the student making the appeal to determine that he or she has demonstrated the knowledge and skills required under the State learning standards in the subject area in question.

[(iv)] (e) The school superintendent or, in the City School District of the City of New York, the chancellor of the city school district or his/her designee, shall make a

final determination to accept or deny the appeal. The school superintendent or chancellor or chancellor's designee may interview the student making the appeal to determine that the student has demonstrated the knowledge and skills required under the State learning standards in the subject area in question.

[(v)] (f) Diplomas.

(1) A student whose appeal is accepted for one required Regents examination pursuant to clause (a) of subparagraph (i) of this paragraph, and who has attained a passing score of 65 or above on each of the four remaining required Regents examinations, shall earn a Regents diploma.

(2) A student whose appeal is accepted for two required Regents examinations pursuant to clause (a) of subparagraph (i) of this paragraph, and who has attained a passing score of 65 or above on each of the three remaining required Regent examinations, shall earn a local diploma.

(3) A student whose appeal is accepted for the required Regents comprehensive examination in English or Regents examination in English language arts (common core) pursuant to clause (b) of subparagraph (i) of this paragraph, and who has attained a passing score of 65 or above on each of the four remaining required Regents examinations, shall earn a local diploma.

(4) A student whose appeal is accepted for the required Regents comprehensive examination in English or Regents examination in English language arts (common core) pursuant to clause (b) of subparagraph (i) of this paragraph and for one other required Regents examination pursuant to clause (a) of subparagraph (i) of this paragraph, and who has attained a passing score of 65 or above on each of the three remaining

required Regents examinations shall earn a local diploma.

[(vi)] (g) Each school shall keep a record of all appeals received and granted and report this information to the State Education Department on a form prescribed by the commissioner. All school records relating to appeals of scores on required Regents examinations shall be made available for inspection by the State Education Department.

8 NYCRR Subpart 100.5(d)(7)

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on November 5, 2014, the State Education Department received the following comments:

1. COMMENT:

Recommends that the proposed amendment apply to *all* English Language Learners (ELLs), regardless of the date they arrived in the United States. In particular, recommends that the proposed amendment apply to ELLs who arrive in the United States during middle school, because research suggests that students often require more than four years to develop English language skills. Also, many new immigrant students arrive late in the school year, in May or June, and ELLs who arrive late in their eighth grade year should not be excluded.

DEPARTMENT RESPONSE:

The proposed amendment is targeted specifically to those late arriving ELLs who are able to pass other required Regents examinations with a score of 65 and who obtain a score of at least 55 on the Regents examination in English. Extensive discussion with stakeholders suggests that this specific category of ELLs is able to benefit from the opportunity to obtain postsecondary education or enter a career in the same manner as other students who may earn a diploma through the appeal process. While we recognize that there will be immigrant students who arrive shortly before the cut-off for eligibility to receive a local diploma through the appeals process, that would

be true no matter where the line is drawn, and those students will have the benefit of a full year of ninth grade instruction.

2. COMMENT:

Recommends that the proposed amendment apply to all ELLs who entered high school in 2009 and thereafter, so that current fifth and sixth-year ELLs may benefit from the proposal.

DEPARTMENT RESPONSE:

The Department will consider this recommendation for future rulemaking and guidance.

3. COMMENT:

Recommends the expansion of access to the appeal process for all students.

DEPARTMENT RESPONSE:

As described above, the proposed amendment is targeted specifically to late arriving ELLs who are able to pass other required Regents examinations with a score of 65 and who obtain a score of at least 55 on the Regents examination in English. Extensive discussion with stakeholders suggests that this specific category of ELLs is able to benefit from the opportunity to obtain postsecondary education or enter a career in the same manner as other students who may earn a diploma through the appeal process.

4. COMMENT:

Recommends revising the proposed amendment to make clear that it is available to all ELLs, including those who meet graduation assessment requirements through any available alternative pathway (such as, performance based and other alternative

assessments). As currently drafted, the proposed amendment could be interpreted as applying only to students who take all five Regents Exams.

DEPARTMENT RESPONSE:

The intent of the proposed amendment is not to exclude those ELLs who meet graduation assessment requirements through available alternative pathways. The Department will issue guidance to clarify that ELLs who satisfy one or more graduation requirement via an alternate pathway and who satisfy all other requirements of the proposed amendment may also earn a Local Diploma via appeal.

5. COMMENT:

Recommends reduction of the attendance requirement to qualify for the appeal procedure set forth in the proposed amendment to 90 percent, because a 95 percent attendance rate is unduly onerous and does not take into account illness or other life circumstances that may prevent a student's attendance at school.

DEPARTMENT RESPONSE:

The requirement of a 95% attendance rate conforms to existing requirements for all students to access the appeal process. The intent of the proposed amendment is merely to make a Local Diploma via appeal available to qualifying late arriving ELLs, not to change the underlying requirements of the appeal process for any student.

6. COMMENT:

Recommends that days missed for mandated immigration court appearances are not counted toward the 95 percent attendance requirement.

DEPARTMENT RESPONSE:

Commissioner's Regulation section 100.4(i) directs each school district to adopt a comprehensive attendance policy that, among other things, specifies which pupil absences, tardiness, and extended departures shall be excused and unexcused. It is not the intent of the proposed amendment to change the requirements of Commissioner's Regulation section 100.4(i) by dictating what kinds of absences are excused and what kinds of absences are unexcused.

7. COMMENT:

Recommends reduction of the number of required attempts to score a 65 or above on the Regents Exam in English from two to one, because requiring two attempts creates incentives for students to spend time and resources on test preparation rather than learning new material and students may feel discouraged and drop out altogether after the first attempt.

DEPARTMENT RESPONSE:

The requirement of two attempts to score a 65 or above on the Regents Exam in English conforms to existing requirements for all students to access the appeal process. The intent of the proposed amendment is merely to make a Local Diploma via appeal available to qualifying late arriving ELLs, not to change the underlying requirements of the appeal process for any student.

8. COMMENT:

Making available the Local Diploma via appeal does not go far enough in establishing meaningful alternatives for students who cannot adequately demonstrate their knowledge and skills on standardized tests, but who can demonstrate proficiency

via other rigorous forms of assessment. Recommends reducing the number of exit exams required to graduate from five to three.

DEPARTMENT RESPONSE:

This comment is beyond the scope of the proposed amendment. The intent of the proposed amendment is to make a Local Diploma via appeal available to qualifying late arriving ELLs, not to change the underlying graduation requirements by reducing the total number of mandated exit exams from five to three.

9. COMMENT:

Recommends development of a pathway that allows all students to demonstrate their knowledge and skills through a State-developed and/or approved performance-based assessment in lieu of each required exit exam.

DEPARTMENT RESPONSE:

This comment is beyond the scope of the proposed amendment. The intent of the proposed amendment is to make a Local Diploma via appeal available to qualifying late arriving ELLs, not to change the underlying graduation requirements by developing additional pathways for graduation such as performance-based assessments in lieu of required exit exams. However, the Department will take this recommendation under advisement for possible future rulemaking.

10. COMMENT:

Opposes the proposed amendment, and recommends that the Regents Exam in English should remain a requirement for all ELLs, except those who are classified as special education and unable to achieve proficiency in their native language.

Commenter argues that the proposed amendment waters down the use of English as a

national language and sets a precedent for bilingual education, which is discriminatory toward speakers of all other non-English languages.

DEPARTMENT RESPONSE:

The Department disagrees. The Regents Exam in English remains a graduation requirement for ELLs, and the proposed amendment merely extends to qualifying late arriving ELLs the ability to earn a Local Diploma via appeal. Furthermore, bilingual education is not limited to any particular language and is not discriminatory toward any speakers of non-English languages. In fact, under Section 154-1.3(g) of the Commissioner's Regulations, school districts with 20 or more ELL students with the same native language are legally mandated to provide bilingual education in all languages in which that population threshold is met.

8 NYCRR §100.5(d)(7)

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE EMERGENCY ACTION

The proposed amendment would create an additional English Language Learner (ELL) specific pathway to graduation for qualifying ELL students who are otherwise eligible to graduate but for their score on the English Language Arts (ELA) Regents examination. Under the proposed amendment, ELLs who entered the United States in 9th grade or above in the 2010-11 school year and thereafter, and who score between 55-61 on the Regents Exam in English after two attempts at attaining a score of 65 or above, are also eligible to receive a local diploma via an appeal process if they:

- Successfully appeal the Regents Exam in English AND score at least 65 on each of the four remaining required Regents exams; OR
- Successfully appeal the Regents Exam in English AND score at least 65 on three other required Regents exams AND score between 62 to 64 on one other required Regents exam and successfully appeal that exam.

The proposed amendment was adopted at the October 20-21, 2014 Regents meeting as an emergency rule, effective October 21, 2014, and has now been adopted as a permanent rule at the January 12-13, 2015 Regents meeting. Pursuant to SAPA section 203(1), the earliest effective date of the permanent rule is January 28, 2015, the date a Notice of Adoption is published in the State Register. However the emergency rule adopted at the October 2014 Regents meeting will expire on January 18, 2015. A lapse in the rule's effect date may disrupt the ability of English Language Learners

(ELLs) who enter the United States in 9th grade or above in the 2010-11 school year and thereafter to graduate with a Local Diploma pursuant to an appeal process, as set forth in the proposed amendment, if they score between 55-61 on the Regents Exam in English and meet all other conditions for appeal of a Regents score. Emergency action is necessary for the preservation of the general welfare in order to ensure that the emergency rule adopted at the October 2014 Regents meeting remains continuously in effect until the effective date of the rule's adoption as a permanent rule.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 208, 209, 305, 308, 309 and 3204

Paragraph (7) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective January 19, 2015, as follows:

(7) Appeals process on Regents examinations passing score to meet Regents diploma requirements.

(i) School districts shall provide unlimited opportunities for all students to retake required Regents examinations to improve their scores.

(a) A student who first enters grade nine in September 2005 or thereafter and who fails, after at least two attempts, to attain a score of 65 or above on a required Regents examination for graduation shall be given an opportunity to appeal such score in accordance with the provisions of this paragraph, provided that no student may appeal his or her score on more than two of the five required Regents examinations and provided further that the student:

[(a)] (1) has scored within three points of the 65 passing score on the required Regents examination under appeal and has attained at least a 65 course average in the subject area of the Regents examination under appeal;

[(b)] (2) provides evidence that he or she has received academic intervention services by the school in the subject area of the Regents examination under appeal;

[(c)] (3) has an attendance rate of at least 95 percent for the school year during which the student last took the required Regents examination under appeal;

[(d)] (4) has attained a course average in the subject area of the Regents examination under appeal that meets or exceeds the required passing grade by the

school and is recorded on the student's official transcript with grades achieved by the student in each quarter of the school year; and

[(e)] (5) is recommended for an exemption to the passing score on the required Regents examination under appeal by his or her teacher or department chairperson in the subject area of such examination.

(b) A student who first enters school in the United States (the 50 States and the District of Columbia) in grade nine, ten, eleven or twelve in September 2010 or thereafter, is identified as an English Language Learner pursuant to Part 154 of this Title, and fails, after at least two attempts, to attain a score of 65 or above on the Regents comprehensive examination in English or the Regents examination in English language arts (common core), as required by this section for graduation, shall be given an opportunity to appeal such score in accordance with the provisions of this paragraph, provided that no such student may appeal his or her score on more than two of the five required Regents examinations and provided further that the student:

(1) has scored between 55 and 61 on the required Regents comprehensive examination in English or Regents examination in English language arts (common core) under appeal;

(2) provides evidence that he or she has received academic intervention services by the school in English language arts;

(3) has an attendance rate of at least 95 percent for the school year during which the student last took the required Regents comprehensive examination in English or Regents examination in English language arts (common core);

(4) has attained a course average in English language arts that meets or

exceeds the required passing grade by the school and is recorded on the student's official transcript with grades achieved by the student in each quarter of the school year;
and

(5) is recommended for an exemption to the passing score on the required Regents comprehensive examination in English or Regents examination in English language arts (common core) by his or her teacher or department chairperson in English language arts.

[(ii)] (c) An appeal may be initiated by the student, the student's parent or guardian, or the student's teacher, and shall be submitted in a form prescribed by the commissioner to the student's school principal.

[(iii)] (d) The school principal shall chair a standing committee comprised of three teachers (not to include the student's teacher in the subject area of the Regents examination under appeal) and two school administrators (one of whom shall be the school principal). The standing committee shall review an appeal within 10 school days of its receipt and make a recommendation to the school superintendent or, in the City School District of the City of New York, to the chancellor of the city school district or his/her designee, to accept or deny the appeal. The standing committee may interview the teacher or department chairperson who recommended the appeal, and may also interview the student making the appeal to determine that he or she has demonstrated the knowledge and skills required under the State learning standards in the subject area in question.

[(iv)] (e) The school superintendent or, in the City School District of the City of New York, the chancellor of the city school district or his/her designee, shall make a

final determination to accept or deny the appeal. The school superintendent or chancellor or chancellor's designee may interview the student making the appeal to determine that the student has demonstrated the knowledge and skills required under the State learning standards in the subject area in question.

[(v)] (f) Diplomas.

(1) A student whose appeal is accepted for one required Regents examination pursuant to clause (a) of subparagraph (i) of this paragraph, and who has attained a passing score of 65 or above on each of the four remaining required Regents examinations, shall earn a Regents diploma.

(2) A student whose appeal is accepted for two required Regents examinations pursuant to clause (a) of subparagraph (i) of this paragraph, and who has attained a passing score of 65 or above on each of the three remaining required Regent examinations, shall earn a local diploma.

(3) A student whose appeal is accepted for the required Regents comprehensive examination in English or Regents examination in English language arts (common core) pursuant to clause (b) of subparagraph (i) of this paragraph, and who has attained a passing score of 65 or above on each of the four remaining required Regents examinations, shall earn a local diploma.

(4) A student whose appeal is accepted for the required Regents comprehensive examination in English or Regents examination in English language arts (common core) pursuant to clause (b) of subparagraph (i) of this paragraph and for one other required Regents examination pursuant to clause (a) of subparagraph (i) of this paragraph, and who has attained a passing score of 65 or above on each of the three remaining

required Regents examinations shall earn a local diploma.

[(vi)] (g) Each school shall keep a record of all appeals received and granted and report this information to the State Education Department on a form prescribed by the commissioner. All school records relating to appeals of scores on required Regents examinations shall be made available for inspection by the State Education Department.