



**TO:** P-12 Education Committee

**FROM:** Cosimo Tangorra, Jr. *Cosimo Tangorra Jr.*

**SUBJECT:** Proposed Addition of Subpart 154-3 of the Commissioner's Regulations

**DATE:** November 10, 2014

**AUTHORIZATION(S):** *Richard A. Trentacosta* *John B. P. Jr.*

**SUMMARY**

**Issue for Decision**

Should the Board of Regents add a new Subpart 154-3 of the Commissioner's Regulations to establish criteria for determining whether a student with a disability shall take the statewide English language proficiency identification and criteria for exiting students with disabilities from identification as an English Language Learner?

**Reason(s) for Consideration**

Implementation of Policy.

**Proposed Handling**

The proposed rule is being presented to the P-12 Education Committee for action at the November Regents meeting.

**Procedural History**

The proposed rule was discussed by the P-12 Education Committee at the June Regents meeting. A Notice of Proposed Rule Making was published in the State Register on July 9, 2014, for a 45-day public comment period.

The proposed rule was revised in response to public comment and guidance issued by the United States Department of Education on July 18, 2014, and discussed by the P-12 Education Committee at the September Regents meeting. A Notice of

Revised Rule Making was published in the State Register on October 1, 2014 for an additional 30-day public comment period.

A copy of the proposed rule and an Assessment of Public Comment are attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

### **Background Information**

The proposed new Subpart 154-3, along with the new Subparts 154-1 and 154-2 that were adopted at the September Regents meeting, are part of the Department's effort to improve instruction and programming for English Language Learner (ELL) students to ensure stronger outcomes for this student population. The new Subpart 154-3 will establish criteria for determining whether a student with a disability shall take the statewide English language proficiency identification assessment and criteria for exiting students with disabilities from identification as an ELL.

The Department's process leading to the proposed regulations began in early 2012 with focus group discussions representing over 100 key stakeholders from around the state. Those discussions informed the development of a statewide survey of policy options that was released in June 2012, and resulted in over 1,600 responses from teachers, principals, superintendents, advocates and others interested in the education of ELL students. The Department then used the survey results and focus group discussions to develop proposed policy changes and enhancements. Proposed changes were then shared with stakeholders for feedback and were also shared with the U.S. Department of Justice Office of Civil Rights, U.S. Department of Education staff responsible for Titles I and III of ESEA, and members of the Board of Regents for review and feedback.

### **Summary of Comments**

The Department received nine (9) comments during the public comment period.

A number of these comments expressed concerns about the proposed regulations relating to matters about which guidance from the Department will be forthcoming, or for which the Department is exploring pathways to address. Other comments stemmed from confusion over the scope of the proposed Part 154-3, or to provisions beyond the scope of the proposed Part 154-3. For example, some comments relate to provisions in Part 154-2, which was approved in September 2014.

Finally, some comments expressed concerns about changes that the Department was required to implement in order to comply with guidance issued by the United States Department of Education on July 18, 2014 regarding assessment and exit procedures for ELLs with disabilities.

### **Recommendation**

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

VOTED: That Subpart 154-3 of the Regulations of the Commissioner of Education be added as submitted, effective December 3, 2014.

### **Timetable for Implementation**

If adopted at the November meeting, the rule will take effect on December 3, 2014.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 207, 208, 215, 305, 2117, 2854(1)(b) and 3204

Subpart 154-3 of the Regulations of the Commissioner of Education is added, effective December 3, 2014, as follows:

SUBPART 154-3

IDENTIFICATION AND EXIT PROCEDURES FOR STUDENTS WITH DISABILITIES FOR ENGLISH LANGUAGE LEARNER PROGRAMS OPERATED IN THE 2015-2016 SCHOOL YEAR AND THEREAFTER

154-3.1 Scope of Subpart and applicability.

The provisions of this Subpart shall apply to students with disabilities who are subject to the initial and reentry process and determination of English proficiency pursuant to section 154-2.3(a) of this Part and the exit procedures pursuant to section 154-2.3(m) of this Part in programs operated beginning with the 2015-2016 school year and thereafter. Except as otherwise provided in this Subpart, all other provisions of Subpart 154-2 of this Part shall apply to students with disabilities who are English Language Learners in programs operated beginning with the 2015-2016 school year.

154-3.2 Definition.

Language Proficiency Team (LPT) shall mean a committee that makes a recommendation regarding the initial assessment of English Language Learner status for a student with a disability. The LPT shall be minimally comprised of a school/district administrator; a teacher or related service provider with a bilingual extension and/or a teacher of English to Speakers of Other Languages, certified pursuant to Part 80 of this

Title; the director of special education or individual in a comparable title (or his or her designee); and the student's parent or person in parental relation. A qualified interpreter or translator of the language or mode of communication the parent or person in parental relation best understands, as defined in section 154-2.2(t) of this Part, shall be present at each meeting of the LPT.

154-3.3 Determination of whether a student with a disability shall take the statewide English language proficiency identification assessment.

(a) For students with disabilities who are subject to the initial and reentry identification process and determination of English language proficiency pursuant to section 154-2.3(a) of this Part, following the administration of Steps 1 and 2 and prior to the administration of Step 4 pursuant to section 154-2.3(a) of this Part, the following provisions shall apply:

(1) For a student identified as having a disability, a Language Proficiency Team (LPT), as defined in section 154-3.2 of this subpart, shall make a recommendation as to whether there is evidence that the student may have second language acquisition needs.

(2) In making this recommendation, the LPT shall, in accordance with guidance prescribed by the commissioner, consider evidence of the student's English language development, including, but not limited to:

(i) the results of Steps 1 and 2 in section 154-2.3(a)(1) and (2) of this Part;

(ii) the student's history of language use in school and home or community;

(iii) the individual evaluation of the student conducted in accordance with the procedures in section 200.4(b)(6) of this Title, which shall include assessments administered in the student's home language; and

(iv) information provided by the Committee on Special Education (CSE) as to whether the student's disability is the determinant factor affecting whether the student can demonstrate proficiency in English.

(3) Based on the evidence reviewed in paragraph (2) of this subdivision , the LPT must make a recommendation as to whether student may have second language acquisition needs or whether the student's disability is the determinant factor affecting whether the student could demonstrate proficiency in English during step 2 in section 154-2.3(a)(2) of this Part.

(4) If the LPT recommends that the student does not have second language acquisition needs and therefore should not take the English language proficiency identification assessment to identify the student as an English language learner, such recommendation shall be referred to the school principal for review.

(5) If, upon review, the school principal agrees with the recommendation of the LPT that the student is not an English Language Learner and will not take the English language proficiency identification assessment, the school principal shall inform the parent or person in parental relation of this recommendation, in the language or mode of communication the parent or person in parental relation best understands.

(6) Upon receipt of a recommendation by the school principal, the Superintendent or his or her designee shall review the school principal's recommendation and make a final determination to accept or reject the school

principal's recommendation within ten (10) days of receiving the school principal's recommendation. If the Superintendent determines that the student is not an English Language Learner, notice of such determination shall be provided to the parent or person in parental relation in the language or mode of communication the parent or person in parental relation best understands within five (5) days of such final determination.

(7) If the LPT determines that the student with a disability may have second language acquisition needs, the student shall take the initial English language proficiency identification assessment. The CSE shall determine, in accordance with the individualized education program (IEP) developed for such student pursuant to Part 200 of this Title, whether the student shall take the assessment with or without testing accommodations or an alternate assessment as may be prescribed by the commissioner.

#### 154-3.4 Exit Criteria for Students with Disabilities.

(a) Each school district will annually determine if a student with a disability who has been identified as an English Language Learner pursuant to section 154-3.3 of this Subpart will continue to be identified as an English Language Learner.

(b) Following the initial identification of a student with a disability as an English Language Learner, the CSE shall annually make an individual determination as to which of the following methods of assessment shall be used to determine if such student will continue to be identified as an English Language Learner:

(1) the annual English language proficiency assessment without the use of testing accommodations; or

(2) the annual English language proficiency assessment with appropriate testing accommodations to be provided in accordance with the individualized education program (IEP) developed for such student pursuant to Part 200 of this Title; or

(3) an alternate assessment as may be prescribed by the commissioner.

## 8 NYCRR Subpart 154-3

### ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Revised Rule Making in the State Register on October 1, 2014, the State Education Department (“the Department”) received the following comments:

#### 1. COMMENT:

The proposed Subpart 154-3 seems to suggest that the primary or sole purpose of administering a language proficiency identification test, and for providing language services to an English Language Learner (ELL), is for the student to become proficient in English. This is erroneous, as the purpose for providing language instruction is to afford ELLs the same access to learning - e.g., to content area instruction, curriculum, etc. as other students. Therefore, the definition of ELL must be modified to state that “in order to become proficient in English or in order to achieve the same educational goals

#### DEPARTMENT RESPONSE:

This comment is beyond the scope of the proposed rule making, as the definition of ELL is set forth in section 154-2.1(f) of the Commissioner’s Regulations, and is not addressed in Subpart 154-3. Subpart 154-2, including section 154-2.1(f), was added to the Commissioner’s Regulations as part of a separate rule making adopted by the Board of Regents in September 2014 (State Register, October 1, 2014; EDU-27-14-00011-A).

#### 2. COMMENT:

Subpart 154-3 will impede the committee on special education (CSE) from recommending appropriate services in accordance with section 200.4 of the

Commissioner's Regulations and federal Individuals with Disabilities Act (IDEA) guidelines. Section 154-3.3 requires the CSE to determine if a student's disability is the determining factor affecting his or her ability to demonstrate English proficiency *before* a student is officially designated an ELL. This contravenes both federal law and section 200.4, which state that for a student who is limited English proficient, the CSE must determine if s/he is eligible for special education and that his or her "limited English proficiency" is not the determining factor for the disability. Furthermore, the CSE will not be able to consider an ELL's language needs in order to develop his or her IEP as required under section 200.4(d)(3)(ii), because ELL status will be identified *after* an IEP is in place.

#### DEPARTMENT RESPONSE:

The Department disagrees. Subpart 154-3 *only* applies to students who have *already* been identified as having a disability. Students who have not yet been identified as having a disability will go through the standard ELL identification process set forth in section 154-2.3. For ELLs who are suspected of having a disability, but not yet identified as having a disability, districts must follow their existing CSE referral process, consistent with section 200.4(a).

#### 3. COMMENT:

Section 200.4(b)(6)(xvi) requires the CSE to document the materials and procedures used to assess a student with limited English proficiency to ensure that they measure the extent of the disability and the need for special education, rather than the student's English language skills. It is unclear how section 200.4(b)(6)(xvi) will apply for a student who is a "potential ELL", since the official determination of ELL status will

occur *after* a student is found to have a disability. Further, it is unclear whether the CSE will be even legally bound to follow section 200.4(b)(6)(xvi) in the above example.

DEPARTMENT RESPONSE:

As described above, Subpart 154-3 *only* applies to students who have *already* been identified as having a disability. Students who have not yet been identified as having a disability will go through standard ELL identification process set forth in section 154-2.3. For ELLs who are suspected of having a disability, but not yet identified as having a disability, districts must follow their existing CSE referral and evaluation process, consistent with section 200.4.

4. COMMENT:

CSEs and bilingually certified personnel do not have the knowledge or skills to distinguish between a disability and second language acquisition. Past experience in New York City reveals that standardized scores drive disability determinations, and current evaluators do a poor job of distinguishing disability from second language acquisition or limited prior experience due to lower socioeconomic status. Recommend instead that a central team under the district's division of ELLs, or a Department/ school district collaboration team, assess and determine knowledge and skills.

DEPARTMENT RESPONSE:

The Department disagrees. Proposed section 154-3.3 provides that, as part of the initial screening process, the Language Proficiency Teams (LPTs), and not the CSEs (the composition of which is defined by section 200.3), would make a recommendation as to whether the student has second language needs and therefore needs to move to the next step in the process of taking the statewide English language

proficiency assessment. If the student will take the statewide assessment, the CSE would determine whether the student would take the assessment with or without accommodations or an alternate assessment where one has been prescribed by the Commissioner. Certified Bilingual and ESOL teachers are qualified to determine second language acquisition needs.

5. COMMENT:

Under section 154-3.2, the LPT must determine the second language needs of students with disabilities, including students with severe disabilities who may use a different mode of communication such as sign language, communication devices, etc. However, the LPT members may lack professional expertise to determine the English proficiency level of such students. As a result, there is a danger that the LPT team may automatically find a student with a mode of communication that is different from the norm to *not* have second language needs. Further, in order to assess ELLs/bilingual learners with severe disabilities whose IEPs specify use of alternate assessments, NYSED must develop an alternate assessment for initial or reentry identification of ELLs with severe disabilities.

DEPARTMENT RESPONSE:

Subpart 154-3 is intended to create an alternate pathway for identification and exit of ELLs with disabilities, and further guidance will be provided for the identification of students with severe disabilities.

6. COMMENT:

In compliance with IDEA, the CSE must determine the student's dominant language in order to rule out whether the student has a disability, and ensure that

English language proficiency assessments utilized for this purpose are valid and reliable for the population being assessed. Furthermore, the CSE must ascertain that such assessments are conducted by qualified and trained professionals, knowledgeable about second language acquisition.

#### DEPARTMENT RESPONSE:

IDEA does not include a requirement that the CSE determine the student's dominant language. However, it does require that the CSE ensure that assessments and other evaluation materials used to assess a student are provided and administered in the student's native language, which for this purpose is defined as the language normally used by the student in the home or learning environment [see section 200.1(ff)]. The Part 117 screening process and Part 154 identification process for ELLs would inform the CSE as to the student's native language.

In the event the student appears to have an obvious and severe disability and has not first completed the ELL screening and identification process, the CSE must, in consultation with the student's parents, determine the native language of the student for purposes of administering assessments and other evaluation materials to the student. All other students who are suspected of both having a disability and suspected of being an ELL, but not yet identified as either a student with a disability or an ELL, will *first* go through the standard ELL identification process pursuant to Part 154-2.3(a)(1),(2), and (4).

#### 7. COMMENT:

The definition in section 154-3.2 continues to discuss the LPT and the CSE as if they are two separate entities, yet the members of each are identical except for the

TESOL teacher and a qualified interpreter/translator. Recommend instead that all the necessary decisions be made at the CSE meeting, with the TESOL teacher and qualified interpreter/translator present.

DEPARTMENT RESPONSE:

Sections 154-3.2 and 154.3-3 are in accordance with guidance issued by the United States Department of Education (USDE) on July 18, 2014, which among other things clarified how ELLs with disabilities are to be assessed and exited, as well as the proper role of school and district bodies like the LPT and CSE in assessing ELLs with disabilities.

8. COMMENT:

Section 154-3.3 provides that the LPT must consider evidence of a student's English language development by reviewing the Home Language Questionnaire (HLQ), individual interview, language use history at home and school, information provided by the CSE, and an individual evaluation "which shall include assessments administered in the student's home language." Commenter seeks clarification: (1) if the Department will provide assessments in low incidence languages; (2) if the Department will provide qualified personnel to administer and explain results in any language for which a district does not have qualified personnel; and (3) how quickly may districts reasonably have to complete those in-language assessments to avoid a delay in final placement.

Furthermore, the LPT needs more guidance when there are no prior student records, for reviewing work samples, for Students with Interrupted Formal Education (SIFE) determinations, and for determining "literacy" in home language.

DEPARTMENT RESPONSE:

Under the existing Subpart 154-2, it is the district's responsibility to provide interpretation and translation. The Department is currently working with the United States Department of Education to develop a pathway to help districts secure appropriate assessments in other languages. Guidance from the Department on the above will be forthcoming.

9. COMMENT:

According to the proposed regulations, the principal must send a letter to ELL parents recommending placement in an ESL program. After the Superintendent reviews this recommendation, another letter must be sent. Sending two letters, within one week of each other is redundant. Recommend that this requirement be reduced to one letter, communicating the district's final decision.

DEPARTMENT RESPONSE:

The requirements in section 154-3.3 (e) and (f) for an initial notice of identification within ten (10) days, followed by a second and final determination within five (5) days, applies to a recommendation that a student with a disability is *not* an ELL. The Department's goal in requiring two notifications is for the first communication to inform parents of the initial determination, in order that parents can raise any concerns they may have *prior* to final identification. Collapsing this notice requirement into a single notice after the final identification decision would deny parents this opportunity.

10. COMMENT:

Subpart 154-3 is not clear in identifying the school principal to whom the LPT must send his or her recommendation, as there is a possibility a student may be placed

in a different school than the one to which s/he was originally referred. This concern is also an issue for students who have never attended a New York State school.

DEPARTMENT RESPONSE:

The principal of the school the student is currently attending at the time of identification pursuant to proposed Subpart 154-3 shall make the initial recommendation to the superintendent and shall send out notification to the parent of the recommendation.

11. COMMENT:

Subpart 154-3 may delay the timeframe for the CSE's evaluation. The proposed regulation does not indicate the specific number of days during which the CSE must forward the request for initial identification to the LPT, the number of days the LPT has to forward their recommendation to the school principal, and the number of days the principal has to forward his or her decision to the superintendent. In New York City, this timeline could result in a violation of federal court rulings in Jose P. et al. v. Gordon M. Ambach, et al.

DEPARTMENT RESPONSE:

In clarification, the ELL identification process under Subpart 154-2 for all potential ELLs, including those with IEPs, is ten (10) days. Accordingly, the Department disagrees that Subpart 154-3 will delay the timeframe for the CSE's evaluation.

12. COMMENT:

Regarding how to identify a suspected disability, there are timing concerns on how to complete the evaluation within the 10 day placement timeframe. Recommend

an extension for placement when a disability is suspected, as working through CSE may take longer than 10 days.

DEPARTMENT RESPONSE:

The Department acknowledges this concern. However, the ELL identification process under Subpart 154-2 for all potential ELLs, including those with IEPs, is ten (10) days. This timeline is beyond the scope of the proposed Subpart 154-3.

13. COMMENT:

The 45 day period for which to request an identification review should begin after student placement, not the first day of school.

DEPARTMENT RESPONSE:

Pursuant to section 154-2.3(b)(i-iii), within 45 school days *of a student's initial or reentry ELL determination*, a district must initiate a review of the determination upon receiving a written request from a parent, teacher, with written parental consent, or the student if over 18 years of age.

14. COMMENT:

There should be at least two members who speak the same language as the student on CSE teams that assess students with disabilities as potential ELLs.

DEPARTMENT RESPONSE:

The makeup of the CSE team is determined by section 200.3, and is beyond the scope of the proposed Subpart 154-3. However, the Department notes that districts are required to provide interpretation and translation services under section 154-2.3. Additionally, under section 154-2.3(a)(9)(i), if a student is identified as an ELL, the CSE must include at least one individual, certified pursuant to Part 80, to provide bilingual

services or instruction or teach English to Speakers of other Languages (ESOL), who is knowledgeable of the student's English and home language development needs.

15. COMMENT:

A student with a disability's IEP itself must include the form of entry and exit assessment s/he is able to participate in (e.g., standardized test, with or without modifications, or alternate assessment).

DEPARTMENT RESPONSE:

The IEP of an ELL with a disability must be developed in consideration of the language needs of the student as such needs relate to the student's IEP. The IEP must also indicate if: (1) the student will participate in an alternate assessment on a particular State or districtwide assessment of student achievement, and (2) whether the student needs any individual testing accommodations in the administration of districtwide assessments of student achievement and, in accordance with Department policy, State assessments of student achievement necessary to measure the academic achievement and functional performance of the student.

16. COMMENT:

The Department must issue specific guidance for pre-school students entering kindergarten. Districts must assess all possible ELLs entering kindergarten and determine/re-evaluate ELL eligibility after 6 months.

DEPARTMENT RESPONSE:

This comment is beyond the scope of the proposed Subpart 154-3. However, the Department is currently collaborating with the Office of Early Learning to create protocols that will address this area.

17. COMMENT:

Districts should be required to obtain work samples for evaluation in at least the top five languages spoken in New York State.

DEPARTMENT RESPONSE:

Pursuant to section 154-2.3(c), interview notes, academic and assessment history and work samples derived from the ELL identification process are to be maintained in each student's cumulative record.

18. COMMENT:

The Department must clarify possible conflicts with Response to Intervention (RTI) legislation.

DEPARTMENT RESPONSE:

The requirement that all school districts develop and implement RTI programs in grades K-4 in the area of reading does not conflict with the proposed additions in Part 154-3.

19. COMMENT:

The process of using an LPT for potential identification as an ELL of a student with a disability must be eliminated. Instead, initial identification must be conducted by the CSE (including professionals with expertise in disabilities, home language, and new language development). This process must include, but not be limited to, the following:

- (1) Home language survey;
- (2) Student interview in his or her preferred mode of communication;
- (3) Taking into account 1) and 2), above, the student may be referred to the CSE.

The CSE, in turn would:

- (a) Conduct a review of the student's language history at home, school and in the community;
- (b) Conduct an individual evaluation under Section 200.4(B)(6), including assessments in home language;
- (c) Determine if the student has a disability, and if so that the determinant factor is not his or her English language proficiency. Determine if the student has 2<sup>nd</sup> language acquisition needs, and if so whether the student can participate in the state's standard assessment program, with or without modifications. If not, the CSE must provide the student with an alternate assessment;
- (d) Upon review of the assessment results, the CSE will determine if the student does or does not have second language acquisition needs. If so, Bilingual Education/ESL must be part of his or her IEP.

**DEPARTMENT RESPONSE:**

Under federal guidance issued by the USDE on July 18, 2014, the CSE is prohibited from making a language identification determination. Therefore, the LPT team is necessary.

**20. COMMENT:**

Under Subtitle A of Title II of the Americans with Disabilities Act, students with disabilities are entitled to equal treatment as similarly situated students without disabilities. The initial and reentry procedures for potential ELLs with disabilities under Subpart 154-3 are markedly different from the procedures followed for potential ELLs without disabilities, as well as for monolingual students with disabilities.

**DEPARTMENT RESPONSE:**

The Department disagrees. The ELL identification process under Subpart 154-2 applies to all students, including those with and without IEPs.

21. COMMENT:

It is possible that there will be an occasional unintended error with a student's placement. The proposed regulations do not address this possibility, which would need to be reversed without forcing the student to spend an entire year in an incorrect placement.

DEPARTMENT RESPONSE:

Pursuant to section 154-2.3(b)(i-iii), within 45 school days of a student's initial or reentry ELL determination, a district must initiate a review of the determination upon receiving a written request from a parent, teacher, with written parental consent, or the student if over 18 years of age.

22. COMMENT:

Section 154-3.4 states that the CSE will determine whether a student with a disability who has been determined to be an ELL should take the NYSESLAT with or without accommodations or should take, "an alternate assessment as may be prescribed by the commissioner." Commenter recommends that the ELA Exam or the English Regents in grades 3-12 may be used as the alternate assessment, and seeks clarification as to whether the 3-8 ELA Exam or Regents Examination in English may be used as the "alternate assessment" in grades 3-12 under the proposed regulation as currently drafted.

DEPARTMENT RESPONSE:

The “alternate assessment” referred to in proposed section 154-3.4 must be an alternate assessment of the English language acquisition skills necessary to access the State’s learning standards. The Grades 3-8 ELA Exams and Regents Examination in English measure student proficiency on the standards, not English language acquisition skills per se, and may not be used as the “alternate assessment as may be prescribed by the commissioner” under section 154-3.4.

23. COMMENT:

Local districts should be permitted to devise and initiate a truthful and valid alternate assessment for exiting ELLs with disabilities, rather than using a statewide, “one size fits all” assessment.

DEPARTMENT RESPONSE:

The Department is exploring pathways toward identifying and developing alternate English proficiency assessments for ELLs with disabilities. The USDE has clarified that, “as part of a general State assessment program, all ELLs with disabilities must participate in the annual State ELP assessment with or without appropriate accommodations or by taking an alternate assessment, if necessary, consistent with their IEPs. The IDEA, Titles I and III of the ESEA, and Federal civil rights laws require that all children, including children with disabilities, take Statewide assessments that are valid and reliable for the purpose for which they are being used, and this includes the annual ELP assessment.”

24. COMMENT:

In cases where students with severe disabilities (who may use a different mode of communication such as sign language or communication devices) are determined to have second language needs and identified as ELLs, they may *never* be able to exit ELL status because they cannot show proficiency under the current definition of English “proficiency”. Therefore, the Department’s definition of English “proficiency” needs to be modified for students with severe disabilities, taking into account the various modes of communication and linguistic abilities of such students.

DEPARTMENT RESPONSE:

Guidance issued by the USDE on July 18, 2014 clarified that ELLs with disabilities may *only* be exited from ELL status when they meet the state’s definition of “proficient” in English and hence no longer fall within the definition of an ELL. The proposed regulation conforms with this guidance and provides that ELLs with disabilities may only be exited upon achieving proficiency in English as set forth in section 154-3.4(b).

25. COMMENT:

The district planning and reporting requirements in section 154.3 will provide districts with additional information with which to assess programs and plan instruction. However, it is undefined what this change will lead to and it is necessary to further define tracking and reporting requirements.

DEPARTMENT RESPONSE:

The Department will develop and release guidance on this topic.

26. COMMENT:

CSEs and IEP teams may mistakenly think that *only* students who take the New York State Alternate Assessment (NYSAA), as per their IEPs, are allowed to take the NYSESLAT alternate assessment. Further, this misunderstanding may cause the CSEs and IEP teams to change a student's IEP from participating in state assessments to participating in NSAA exams in order to access the NYSESLAT alternate assessment.

DEPARTMENT RESPONSE:

The Department understands this concern, and will develop and release guidance to ensure that the term "alternate assessment" under Subpart 154-3 is clearly defined to identify the population of students for whom this alternate assessment would be appropriate.

27. COMMENT:

The implementation of Subpart 154-3 will require costs to local governments, especially those like New York City with large numbers of students from homes where languages other than English are spoken. However, if the process is carried out by the CSE with due diligence, taking into consideration students' various linguistic needs, any additional costs to the CSE will be minimal, and capable of being absorbed by existing staff, fiscal and other resources.

DEPARTMENT RESPONSE:

In previous presentations to the Regents, the Department has highlighted that the proposed regulations contain provisions that will likely save many districts money in addition to those provisions that may increase costs for some districts. The Department will continue to work with districts to identify best practices and shared resources. If the

proposed regulations are approved by the Board of Regents, guidance will be created and released by the Department.

28. COMMENT:

In alignment with the Department's Blueprint for ELLs' Success, all CSE members must participate in long term, continued, and meaningful professional development on the assessment and instruction of ELLs/bilingual learners with disabilities.

DEPARTMENT RESPONSE:

Comment is supportive, as professional development requirements are set forth in section 154-2.3(k).

29. COMMENT:

The Department must develop guidelines which include input from experts in language acquisition and in the provision of services to students with disabilities, in order to ensure that federal policies are implemented at the state and/or school levels.

DEPARTMENT RESPONSE:

The Department will develop and release guidance.