



TO: The Honorable the Members of the Board of Regents

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: January 3, 2019

AUTHORIZATION(S):

SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents amend §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 full Board for adoption as a second emergency rule at its January 2019 meeting. A copy of the proposed amendment and a Statement of Facts and Circumstances Justifying the Emergency are included as Attachments A and B, respectively.

Procedural History

A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on November 21, 2018. Supporting materials are available upon request from the Secretary to the Board of Regents. Following the 60-day public comment period required under the State Administrative Procedure Act, the Department received comments on the proposed amendment. An assessment of the public comment received through December 28, 2018 is attached as Attachment C.

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 issued 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.

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:

[June 2014](http://www.regents.nysed.gov/common/regents/files/614p12d2.pdf) (<http://www.regents.nysed.gov/common/regents/files/614p12d2.pdf>)

[September 2014](http://www.regents.nysed.gov/common/regents/files/914p12d7.pdf)
(<http://www.regents.nysed.gov/common/regents/files/914p12d7.pdf>)

[October 2018](http://www.regents.nysed.gov/common/regents/files/1118p12a3.pdf)
(<http://www.regents.nysed.gov/common/regents/files/1118p12a3.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 February 4, 2019, 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 and to ensure that the emergency rule adopted at the November 2018 meeting remains continuously in effect until it can be adopted as a permanent rule.

Timetable for Implementation

If adopted at the January 2019 meeting, the second emergency action will be effective on February 4, 2019. If adopted at the March meeting, the proposed amendment will become effective as a permanent rule on March 27, 2019.

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 January 2019 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 and to ensure that the emergency rule adopted at the November 2018 meeting remains continuously in effect until it can be adopted as a permanent rule. 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.

ASSESSMENT OF PUBLIC COMMENT

Following the public comment period required under the State Administrative Procedure Act, the Department received the following comments:

1. COMMENT:

One commenter expressed the position that the regulation puts students at a disadvantage by grouping them in more than two continuous grades, on account of both developmental and instructional appropriateness. The commenter felt that the skills covered across three grade spans would be too broad to cover in a single classroom.

DEPARTMENT RESPONSE:

The Department agrees that it is critical to provide instruction that is both developmentally and instructionally appropriate. The Department has limited the waiver's availability to districts with low English Language Learner enrollment of thirty or less students district-wide. 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.

The Department also issued 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. The Department is also available for technical assistance and support as districts implement this temporary waiver.

2. COMMENT:

Two commenters expressed support for the regulation, on account of benefits to smaller districts and schools. One commenter expressed that the regulation will help smaller schools which may not have sufficient resources to meet the two grade span requirement. The commenter further expressed that developmental differences may not be as great in higher grades and that differences in instructional needs can be accommodated by differentiation of lesson plans. Another commenter observed that in small districts, English as a New Language teachers often have to work in more than one school or even more than one district and across many grades, in which case it can be instructionally beneficial to group students based on proficiency across multiple grades.

DEPARTMENT RESPONSE:

It is not necessary for the Department to respond as these comments are in support of the proposed regulation.