



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

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: September 12, 2014 *John B. P. Jr.*

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SUMMARY

Issue for Discussion

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 discussion at the September 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.

In response to public comment and to guidance issued by the United States Department of Education on July 18, 2014 addressing the inclusion of English Language Learners with disabilities in English language proficiency assessments under Titles I and III of the ESEA, substantial revisions have been made to the proposed rule as further discussed in the Background Information section below. It is anticipated that a Notice of Revised Rule Making will be published in the State Register on October 1, 2014 for an additional 30-day public comment period.

A copy of the revised 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 proposed new Subparts 154-1 and 154-2 (which are being presented to the Committee in a separate Regents item), 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.

In response to public comment and guidance issued by the United States Department of Education on July 18, 2014 which clarified that all students with disabilities are required to be included in all general State and districtwide assessment programs including the English language proficiency assessment with appropriate accommodations and alternate assessments, the proposed Subpart 154-3 has been substantially revised as follows:

- Revise the role of the Language Proficiency Team (LPT) in the initial identification of a student with a disability as an ELL so that, beginning in the 2015-16 school year, the LPT is responsible for recommending to the principal

whether a student identified as having a disability shall take the statewide English language proficiency identification assessment (i.e., the NYSITELL).

- Consistent with the above, delete the provision that beginning in the 2016-2017 school year and thereafter, the Committee on Special Education (CSE) shall individually determine whether a student identified as having a disability shall take the statewide English language proficiency identification assessment.
- Delete the provision that beginning in the 2015-2016 school year and thereafter, the LPT shall individually determine whether a student should continue to be identified as ELL, subject to review by the school principal and superintendent.
- Delete the provision that beginning in the 2016-2017 school year and thereafter, the CSE shall individually determine whether a disability is the determinant factor affecting whether a student can demonstrate proficiency in English and if so, allowing the CSE to exit the student from ELL status without having to take the English language proficiency assessment.
- Revise the provisions to clarify that the CSE shall annually make an individual determination as to which of the following methods of assessment shall be used to determine if a student with a disability will continue to be identified as ELL:
 - (1) the annual English language proficiency assessment (i.e., the NYSESLAT) 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.

Timetable for Implementation

It is anticipated that the revised proposed rule will be presented for adoption at the November Regents meeting, after publication of a Notice of Revised Rule Making and expiration of the 30-day public comment period. 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.

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ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Proposed Rule Making in the State Register on July 9, 2014, the State Education Department received the following comments:

COMMENT:

Approves of rule's procedures for incoming and enrolled students with disabilities to determine whether the disability is the determining factor affecting a student's ability to demonstrate proficiency in English, and procedures for determining whether a student with a disability should continue to receive English as a Second Language services.

DEPARTMENT RESPONSE:

No response is necessary as the comment is supportive, however, as discussed below, the Department has revised the proposed Subpart 154-3 Identification and exit procedures for students with disabilities.

COMMENT:

In accordance with guidelines submitted by the U.S. Department of Education on July 18, 2014, a Language Proficiency Team (LPT) or a Committee on Special Education (CSE) cannot make the determination that a student with disabilities should not participate in a State English Language Proficiency assessment. All students with disabilities must "be included in all general State assessment programs, including assessments described under section 1111 of the Elementary and Secondary Education Act (ESEA), with appropriate accommodations and alternate assessments, if necessary, as indicated in their respective IEPs."

DEPARTMENT RESPONSE:

In response to public comment and guidance issued by the United States Department of Education on July 18, 2014, which clarified that all students with disabilities are required to be included in all general State and districtwide assessment programs including the English language proficiency assessment with appropriate accommodations and alternate assessments, the proposed Subpart 154-3 has been substantially revised to reflect the guidance.

COMMENT:

Revise the rule to provide for the opting out from ESL testing (NYSESLAT) of students with severe disabilities that are not language related who are alternately-assessed, similar to what is done with such students for the ELA and Math State examinations.

DEPARTMENT RESPONSE:

The Department has revised the proposed rule to clarify that the CSE shall annually make an individual determination regarding the method of assessment to be used to determine if a student with a disability will continue to be identified as ELL, including the use of an alternate assessment as may be prescribed by the Commissioner.

COMMENT:

It is not always readily apparent at time of initial entry whether or not a disability impedes a student's ability to learn English. It is preferable to err in favor of providing English Language Learner (ELL) instruction for the vast majority of students with disabilities, then over time special education and English as a Second Language (ESL)

educators, parents and students (where appropriate) can ascertain whether or not a disability is the main determinate of English language acquisition.

DEPARTMENT RESPONSE:

In situations where the Language Proficiency Team (LPT) is uncertain whether the disability is the determinant factor, the student should be identified as a student to take the English language proficiency assessment. However, when the LPT determines that the student with a disability has no second language acquisition needs, requiring that ELL instruction be provided to such students would not benefit them academically and would be an inefficient and non-cost effective use of school district fiscal and staff resources.

COMMENT:

The time for student placement when a disability is suspected should be extended. The 45-day period should begin after student placement, not the first day of school.

DEPARTMENT RESPONSE:

The 45-school day review period is not referenced in this rulemaking.