



**TO:** The Honorable Members of the Board of Regents

**FROM:** Angelique Johnson-Dingle *Angelique Johnson-Dingle*

**SUBJECT:** Proposed Amendment of Section 154-2.3 of the Regulations of the Commissioner of Education Relating to the Timeline for Initial Enrollment or Reentry Identification and Parent Notification, Orientation, and Placement of English Language Learners (ELLs)

**DATE:** November 2, 2023

**AUTHORIZATION(S):**

**SUMMARY**

**Issue for Decision (Consent)**

Should the Board of Regents adopt the proposed amendment of Section 154-2.3 of the Regulations of the Commissioner of Education relating to the timeline for initial enrollment or reentry identification and parent notification, orientation, and placement of English Language Learners (ELLs)?

**Reason for Consideration**

Review of Policy.

**Proposed Handling**

The proposed amendment is submitted to the Full Board for adoption as an emergency rule at its November 2023 meeting. A copy of the proposed rule is included (Attachment A) and a statement of facts and circumstances justifying emergency action is included (Attachment B).

**Procedural History**

The proposed amendment was presented to the P-12 Education Committee for discussion and recommendation to the Full Board for adoption as an emergency rule at the September 2023 meeting of the Board of Regents. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on September 27, 2023, for a 60-day public comment period.

Because the September emergency action will expire on December 10, 2023, a second emergency action is necessary to ensure the emergency rule remains continuously in effect until it can be permanently adopted at the January 2024 Regents meeting. A Notice of Emergency Adoption will be published in the State Register on December 27, 2023. Supporting materials are available upon request to the Secretary of the Board of Regents.

### **Background Information**

Due to the widespread influx of recently arrived and asylum-seeking students and families to New York State and a corresponding increase in the enrollment of speakers of languages other than English, school districts throughout the state are experiencing difficulties conforming to the 10-day timeline for identifying English Language Learners (ELLs) and placing them in appropriate language acquisition programs pursuant to section 154-2.3(g) of the Commissioner's regulations. These circumstances, like the exigencies introduced by the onset of the COVID-19 crisis, illustrate a need for greater flexibility regarding the ELL identification and placement timeline.

Therefore, the Department proposes to amend subdivision (g) of section 154-2.3(g) of the Commissioner's regulations to provide that where exigent circumstances exist, as identified by the Commissioner, the Commissioner may allow school districts to seek an extension of the 10-day timeline prescribed in such subdivision provided that such extension cannot exceed 20 additional days.<sup>1</sup> A school district seeking such extension must submit an extension request (in a format and according to a timeline as prescribed by the Commissioner) that includes evidence that the exigent circumstances are impacting such district's ability to meet the 10-day timeline.

### **Related Regent's Items**

September 2023: [Proposed Amendment of Section 154-2.3 of the Regulations of the Commissioner of Education Relating to the Timeline for Initial Enrollment or Reentry Identification and Parent Notification, Orientation, and Placement of English Language Learners \(ELLs\)](https://www.regents.nysed.gov/sites/regents/files/923p12a2.pdf)

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### **Recommendation**

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

VOTED: That section 154-2.3(g) of the Regulations of the Commissioner of Education be amended, as submitted, effective December 11, 2023, as an emergency rule upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare to immediately provide flexibility to school districts experiencing an unanticipated increase in enrollment of speakers of languages other than English due to the current influx of asylum seekers.

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<sup>1</sup> Section 3113(b)(2) of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Students Succeeds Act (ESSA), requires that all students who may be ELLs, be assessed for such status within 30-days of enrollment in a school in the State.

### **Timetable for Implementation**

If adopted as an emergency rule at the November 2023 Regents meeting, the emergency rule will become effective December 11, 2023. It is anticipated that the proposed amendment will be presented for permanent adoption at the January 2024 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act. If adopted at the January meeting, the proposed amendment will become effective as a permanent rule on January 24, 2024.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

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

1. Paragraphs (2) and (5) of subdivision (a) of section 154-2.3 of the Regulations of the Commissioner of Education are amended to read as follows:

(2) Step 2: An individual interview with the student by qualified personnel in English and the student's home language, and a review of the student's abilities or work samples in reading and writing in English and the home language and math that are collected or generated during the interview, and for students reentering the New York State public school system, a review of prior experience in home language and/or English instruction, to determine if the student shall be administered the statewide English language proficiency identification assessment and to determine the student's grade level of literacy in their home language and grade level in math. [The individual interview is waived in circumstances when the school district can document that video conferencing was used to remotely conduct an individual interview during a school closure ordered pursuant to an Executive Order(s) of the Governor pursuant to a State of emergency for the COVID-19 crisis. In such cases, qualified personnel as defined by Part 154-2.2(q) will review the previously completed Home Language Questionnaire with the parent or person in parental relation];

(5) If the student receives a score below a State designated level of proficiency established by the commissioner on the Statewide English language proficiency identification assessment, or in the case of a student with a disability, the process defined in Subpart 154-3 of this Part has led to a determination that the student shall be initially identified as an English language learner, within five school days of such

identification, the school district must provide the student, if the student is 18 years of age or older, or the student's parent or person in parental relation written notice of such identification determination the right to seek review of such identification determination pursuant to subdivision (b) of this section. [Day(s) during a school closure ordered pursuant to an Executive Order(s) of the Governor pursuant to a State of emergency for the COVID-19 crisis and day(s) where a school or a local educational agency central office, where such office is responsible for implementing and completing the English Language Learners (ELLs) identification process, temporarily shifted from in-person or hybrid instruction to full remote instruction due to an increase in COVID-19 cases in a school or surrounding geographic area shall not count towards the five-day timeline prescribed in this paragraph.]

2. Paragraph (10) of subdivision (a) of section 154-2.3 of the Regulations of the Commissioner of Education is REPEALED.

3. Paragraphs (8) and (9) of subdivision (b) of section 154-2.3 of the Regulations of the Commissioner of Education are REPEALED.

4. Paragraph (3) of subdivision (f) of section 154-2.3 of the Regulations of the Commissioner of Education is amended to read as follows:

(3) Upon notification of the parent or person in parental relation, the school district shall provide the parent or person in parental relation 10 school days to sign and return to the district a statement that the parent or person in parental relation is either in agreement with the child being placed in a Bilingual Education program or directs the district to place the child in an English as a New Language program. If a parent or person in parental relation does not return the signed notification form within 10 school days of receiving the notice, the student shall be placed in a Bilingual Education

program if there is one in the school that serves the grade and home language spoken by the student or in an English as a New Language program if the school is not required to provide a Bilingual Education program. If a parent or person in parental relation does not return the signed notification form within 10 school days, the parent or person in parental relation shall retain the right to make a final decision regarding the placement of their child in a Bilingual Education or English as a New Language program. [Day(s) during a school closure ordered pursuant to an Executive Order(s) of the Governor pursuant to a State of emergency for the COVID-19 crisis and day(s) where a school or a local educational agency central office, where such office is responsible for implementing and completing the English Language Learners (ELLs) identification process, temporarily shifted from in-person or hybrid instruction to full remote instruction due to an increase in COVID-19 cases in a school or surrounding geographic area shall not count towards the 10-day timeline prescribed in this paragraph.]

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

(g) Placement.

(1) Except as otherwise provided in this Part, the process for initial enrollment or reentry identification and parent notification, orientation, and placement shall be completed such that a student is placed in either a Bilingual Education or an English as a New Language program within 10 school days after the student's initial enrollment or reentry in the school district. [Day(s) during a school closure ordered pursuant to an Executive Order(s) of the Governor pursuant to a State of emergency for the COVID-19 crisis and day(s) where a school or a local educational agency central office, where such office is responsible for implementing and completing the English Language

Learners (ELLs) identification process, has temporarily shifted from in-person or hybrid instruction to full remote instruction due to an increase in COVID-19 cases in a school or surrounding geographic area shall not count towards the 10-day timeline prescribed in this paragraph.]

(2) Except as otherwise provided in this Part, the process for initial or reentry identification and parent notification, orientation, and placement shall be completed such that a student is placed in either a Bilingual Education program or an English as a New Language program by the first day of school in September for students identified more than 10 business days prior to such date.

(3) Notwithstanding [paragraph (1) of this subdivision, due to the COVID-19 crisis for the 2020-2021 school year, the process for initial enrollment or reentry identification and parent notification, orientation, and placement shall be completed such that a student who was either newly enrolled during the COVID-19 closures in the 2019-2020 school year, Summer 2020 or the first twenty (20) days of the 2020-2021 school year is placed in either a Bilingual Education or an English as a New Language program within thirty (30) school days after the commencement of the 2020-2021 school year for school districts with one hundred-fifty (150) or more ELLs or where ELLs constitute ten percent (10%) or more of the district's population.

(4) School districts with one hundred forty-nine (149) or fewer ELLs, or where ELLs constitute less than ten percent (10%) of the district's population may seek an exemption from the timeline requirements of paragraph (1) of this subdivision for the newly enrolled students identified in paragraph (3) of this subdivision on an application form and in a timeframe prescribed by the commissioner; provided that such school demonstrates sufficient need for such exemption notwithstanding the size and

percentage of its ELL population] the provisions of this subdivision, where exigent circumstances exist, as identified by the commissioner, the commissioner may allow school districts to seek an extension of the 10-day timeline prescribed in this subdivision provided, however, that such extension to the 10-day timeline shall not exceed 20 additional days. A school district seeking such extension shall submit an extension request, in such format and according to such timeline as prescribed by the commissioner, that includes evidence that the exigent circumstances are impacting such district's ability to meet the 10-day timeline.

6. Paragraph (4) of subdivision (h) of section 154-2.3 of the Regulations of the Commissioner of Education is REPEALED.

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

(l) Annual assessment. Each school district with English language learners shall annually assess the English language proficiency of each such student using such assessment as prescribed by the commissioner for this purpose. [For the 2019-2020 school year, there will be no annual assessment due to the assessment being suspended as a result of COVID-19 crisis.]



STATEMENT OF FACTS AND CIRCUMSTANCES JUSTIFYING  
EMERGENCY ACTION

Due to the widespread migration of families seeking asylum to New York State and a corresponding increase in the enrollment of speakers of languages other than English, school districts throughout the state have experienced difficulties conforming to the 10-day timeline for identifying English Language Learners (ELLs) and placing them in appropriate language acquisition programs pursuant to section 154-2.3(g) of the Commissioner's regulations. These circumstances, like the exigencies introduced by the onset of the COVID-19 crisis, illustrate a need for greater flexibility regarding the ELL identification and placement timeline.

Therefore, the Department proposes to amend subdivision (g) of section 154-2.3(g) of the Commissioner's regulations to provide that where exigent circumstances exist, as identified by the Commissioner, the Commissioner may allow school districts to seek an extension of the 10-day timeline prescribed in such subdivision provided that such extension cannot exceed 20 additional days. A school district seeking such extension must submit an extension request (in a format and according to a timeline as prescribed by the Commissioner) that includes evidence that the exigent circumstances are impacting such district's ability to meet the 10-day timeline.

The proposed amendment was presented to the P-12 Education Committee for recommendation to the Full Board for adoption as an emergency rule at the September 2023 meeting of the Board of Regents, effective September 12, 2023. Since the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be adopted by regular (nonemergency) action after expiration of the 60-day public

comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5) would be the January 2024 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earliest effective date of the proposed rule, if adopted at the January meeting, would be January 24, 2023, the date the Notice of Adoption would be published in the State Register.

However, the emergency rule will expire on December 10, 2023. Therefore, a second emergency action is necessary at the November 2023 meeting, effective December 11, 2023, for the preservation of the general welfare in order to immediately provide flexibility to school districts experiencing an unanticipated increase in enrollment of speakers of languages other than English due to the current influx of asylum seekers and to ensure that the emergency action taken at the September 2023 meeting remains continuously in effect.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at the January 2024 Regents meeting, which is the first scheduled meeting after expiration of the 60-day public comment period mandated by SAPA for state agency rulemaking.