

# NEW YORK STATE ASSOCIATION FOR BILINGUAL EDUCATION

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October 29, 2014

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Mr. Cosimo Tangorra  
NYSED, Office of P-12 Education  
State Education Building, 2M West  
89 Washington Avenue  
Albany, NY 12234

Dear Mr. Tangorra,

On behalf of the Executive Board, Delegate Assembly, Executive Director, and members of the New York State Association for Bilingual Education (NYSABE), I present to you our organization's recommendations for the proposed Revisions of Commissioner's Regulations Part 154-3.

One of NYSABE's main goals is to safeguard the educational rights of English language learners (ELLs)/bilingual learners. We are at a pivotal time in education in which we are facing major shifts. For this reason, it is imperative that we ensure that the unique needs of New York's more than 250,000 ELLs/bilingual learners, with and without disabilities, are at the forefront of these shifts. These students and their families must be provided access to the most appropriate, research-based, high quality education designed to ensure their academic success as well as their optimum socio-emotional development.

In accordance with this goal, we submit NYSABE's comments on the Proposed Revisions to the Commissioner's Regulations Part 154-3. Thank you for this opportunity to share our views and recommendations.

In closing, NYSABE applauds the work of the NYS Board of Regents and the New York State Education Department's staff which reflects their commitment to ensuring that ELLs/bilingual learners have equal access to all educational opportunities. We are also grateful for their unfailing support to the work of educators, parents and community members whom NYSABE represents.

Sincerely,

Tatyana Kleyn, Ed.D.  
NYSABE President



March 12-14, 2015 - Crowne Plaza Hotel - White Plains, New York  
[www.nysabeconference.net](http://www.nysabeconference.net)

## COMMENTS ON THE PROPOSED AMENDMENTS TO PART 154-3 OF COMMISSIONER'S REGULATIONS

### INTRODUCTION

The recommendations made in this document are based on the following crucial premises:

- ELL/bilingual learners with disabilities are not a monolithic group. They represent a wide range of disabilities and a broad spectrum of language development characteristics and needs, including English language proficiency. In this regard, the definition of English language proficiency may vary among ELLS/bilingual learners with disabilities.
- The main purpose of the assessment process is to ensure that appropriate educational opportunities are afforded to all students, including ELLs/bilingual learners with disabilities.

According to the Office of Civil Rights policy statements, 1990, appropriate services means that the program is based on the student's English proficiency needs and current program and instructional practices for second language learners.

- A great number of students with disabilities may not be able to initially demonstrate proficiency in the English language; however, these students meet the definition of an ELL (LEP) (section 9101 (25) of the ESEA, as amended under the No Child Left Behind Act (NCLB). A LEP is "an individual
  - A. who is aged 3-21;
  - B. who is enrolled or preparing to enroll in an elementary school or secondary school;
  - C. (i) who was not born in the United States or whose native language is a language other than English;
  - (ii) who is a Native American or Alaska Native, or a native resident of the outlying areas; and
  - (iii) who is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant; and
  - D. whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual-
    - (i) the ability to meet the State's proficient level of achievement on State assessments described in section 1111 (b) (3);
    - (ii) the ability to successfully achieve in classrooms where language of instruction is English; or
    - (iii) the opportunity to participate fully in society."
- The appropriate identification of a student's disability and language acquisition needs must be conducted by well trained professionals with expertise in both, disabilities and language development. This will prevent the students' misidentification and the denial of Bilingual Education/ESL services to which they are entitled.

- In accordance with the guidelines submitted by the US Department of Education on July 18, 2014, a Committee on Special Education (CSE)/IEP Team **cannot** make the determination that a student with disabilities should not participate in a State English Language Proficiency (ELP) assessment. All students with disabilities must “be included in all general State assessment programs, including assessments described under section 1111 of the ESEA, with **appropriate accommodations and alternate assessments, if necessary, as indicated in their respective IEPs** (section 612(a)(16)(A) of the IDEA, 34 CFR §300.160(a), and section 1111(b) of the ESEA).”
- The IDEA, Titles I and III of the ESEA, and Federal civil rights laws require that all students, including those with disabilities, take statewide assessments that are valid and reliable for the purpose for which they are being used, and these include the English Language Proficiency assessment. In accordance with these regulations, **the CSE/IEP Team will determine whether the students will participate in the statewide standardized assessment program, with or without accommodations.** In New York State the standardized assessment program includes the NYSITELL, for initial identification, and the NYSESLAT for continued classification of the student as an ELL. The CSE/IEP Team will also determine if **a student is unable to participate in the State’s standardized assessment program; in which case, alternate assessments must be provided,** in accordance with Federal laws and regulations. In both cases, the determination of the CSE/IEP Team must be included in the student’s Individualized Education Program (IEP).

## CONCERNS

Our concerns are specific to the identification procedure proposed for students with disabilities who are subject to the initial and reentry identification process as specified in Subpart 154-3.

- We find that the proposed Part 154.3 policy will impede the Committee on Special Education (CSE) from recommending appropriate services in accordance with the regulations set forth in Section 200.4 of this Title and federal IDEA guidelines, for students identified by the CSE as having a disability. The proposed policy suggests the following steps: Step 1, the administration of the home language survey; Step 2, an interview of the student; Step 3, the determination, for the student with a disability, of whether the disability is the determinant factor affecting the student’s ability to demonstrate proficiency in English; and Step 4, the administration of the statewide English language proficiency assessment. We are concerned that in Step 3 the student is referred to the CSE to determine if the student’s disability is the determinant factor affecting his or her ability to demonstrate proficiency in English. This step is expected to be completed before it is known officially that the student is an English Language Learner (ELL).

Both Federal [34 CFR 300.306 (b)] and New York State regulations (CR Part 200.4), state that for students who are designated as limited English proficient, the CSE must determine if a student is eligible for special education and that his or her “limited English proficiency” is not the determinant factor for the disability. Contrary to this assertion, the proposed Part 154-3 policy indicates that the CSE must determine the student’s disability prior to his/her **official**

identification as an ELL/bilingual learner through appropriate English language proficiency assessments. This is an important area that must be addressed promptly.

- According to Part 200.4.6 (xvi), the CSE is required to document that the materials and procedures used to assess a student with limited English proficiency were selected and administered to ensure that they measure the extent to which the student has a disability and needs special education, rather than measure the student's English language skills. However, we are unclear as to how Part 154.3 will ensure that the CSE will be able to follow Part 200.4.6 (xi) for a student who has been identified as a "potential" ELL. The concerns that arise in this regard are related to: (1) How the CSE will be able to comply with Part 200.4.6 regulations for a student who is a "potential" ELL but has not been **officially** identified as having second language needs, and (2) whether the CSE will not be legally bound to follow Part 200.4.6 regulations for the student described above.
- As proposed in Part 154.3, upon completion of the CSE's assessment (of the disability), the CSE is required to make a determination as to whether the disability is the determinant factor affecting the student's ability to demonstrate proficiency in English. However, the "determination as to whether the student may have second language needs OR will take the statewide English language proficiency identification assessment" (see Rule Making Activities, October 1, 2014, Local Government Mandates, p.35), will be determined by a group from outside of the CSE called a **Language Proficiency Team (LPT)**. The purpose of the LPT is to recommend to the principal whether a student identified as having a disability shall take the statewide language proficiency identification assessment (Part 154-3.3). In making this recommendation, the LPT must consider evidence of the student's English language development as outlined in, but not limited to, section 154-3.3 (b). If the LPT determines that the student does not have second language needs, the recommendation is sent to the principal, and subsequently to the superintendent, to review and make a final determination [154-3.3 (d), (e) and (f)]. In contrast, if the LPT finds that the student has second language needs and must take the English proficiency test, the CSE must determine, in accordance with the IEP developed for the 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 [154-3.3 (g)]. In this connection, we are extremely concerned with the ability of the members of the LPT, as described in section 154-3.2, to determine the second language needs of a student with a disability, and more so, those of a student with a severe disability who may use a different mode of communication such as sign language, communication devices, etc., as they may lack the professional expertise to be able to determine the proficiency level for such a student. We are extremely concerned that this procedure will lead to the LPT team automatically finding a student whose mode of communication is different from the norm not to have second language needs, when in fact the student does.
- We are equally concerned that the CSE's determination that "the disability is the determinant factor affecting whether the student can demonstrate proficiency" may be misconstrued to mean that a student with a disability, especially one with a severe disability, will never be able to show

English proficiency, as currently defined by the New York State Education Department (NYSED). We are aware that NYSED currently uses only one standardized English proficiency assessment, the NYSITELL, for the purpose of identification of students who are subject to the initial and reentry process. We are equally aware that (1) NYSED will be developing an alternate English language proficiency assessment in accordance with federal regulations (IDEA, Titles I and II of the ESEA and civil rights laws), and that (2) all students with disabilities must take statewide assessments that are valid and reliable for the purpose for which they are being used, including English language proficiency assessments. Consequently, NYSED's definition of what currently constitutes "proficiency" in English will need to be modified to include what "proficiency" will mean for a student with a severe disability. Otherwise, contrary to federal regulations, students with severe disabilities will be denied services due to the fact that (1) their disability is the determinant factor affecting whether they can **demonstrate** "proficiency", and that (2) NYSED's current definition does not take into consideration the various modes of communication and linguistic abilities of students with severe disabilities.

- In relation to the proposed procedure described above, we must note that Part 200.4.3 (ii) indicates that the CSE shall "in the case of a student with limited English proficiency, consider the language needs of the student as such needs relate to the student's IEP." In accordance with the proposed Part 154.3 procedures, the CSE will not be able to consider the language needs of the student in order to develop an IEP, as they would have to wait for the LPT to make an **official** determination of the student's second language needs, after the student is administered the appropriate assessment.
- Subtitle A of Title II of the Americans with Disabilities Act, Pub. L. 101-336, affirms that students with disabilities **cannot** be subjected to treatment which is **different** from the treatment to which similarly situated students without disabilities are subjected to. Thus, we are concerned that the initial and reentry procedures proposed for students with disabilities, who may have second language needs as outlined in section 154-3, are markedly different from the procedures followed for a student without a disability, as well as for a student with a disability who is monolingual.
- We are also concerned with the impact that the proposed Part 154-3 will have on the timeframe for the CSE's evaluation. In accordance with Part 200 of this Title, once the student has been referred to the CSE, the CSE must complete its evaluation, create an IEP, and place the student in the least restrictive environment within 60 days. Least restrictive environment placement options run through a continuum, and this proposed process has the potential of delaying the timeliness of the CSE's ability to provide the student with the services to which he or she is entitled under the law. The proposed regulation addresses a timeline of fifteen days (15) only for the Superintendent or his or her designee to review and make a final determination of the school principal's recommendation that the student will not take the English language proficiency identification assessment, and to notify the student's parents. However, the proposed regulation is vague in indicating the specific number of days during which the CSE has to forward the request for initial identification to the LPT, the number of days the LPT would have to forward their

recommendation to the school principal, and the number of days the school principal would have to forward his or her decision to the Superintendent.

- Furthermore, Part 154.3 is not clear in identifying the school principal to whom the LPT will be sending its recommendation. When a student with disabilities is assessed by a CSE, based on the student's disability and services required, there is a possibility that the student might be placed in a school different from the one he/she was originally referred. We are also raising the question about the identification of the school principal for a student who has never attended any school in New York State.
- Finally, as outlined in the NYS Register of July 9, 2014, it is evident that there will be costs to local governments to implement the proposed policy as written. For local governments with large numbers of students who come from homes where languages other than English are spoken, such as NYC with 41% of the over one million students who report speaking a language other than English at home, the cost will be substantial. However, if the process was carried out by the Committee on Special Education with due diligence, taking into consideration the various linguistic needs of students with disabilities who come from homes where languages other than English are spoken, "any additional costs to the CSE will be minimal, and capable of being absorbed by existing staff, fiscal and other resources."

## **RECOMMENDATIONS**

In accordance with Federal laws and regulations, NYSABE recommends that:

- I. The proposed initial identification process using a Language Proficiency Team (LPT) for entry or re-entry of a student who has as disability, and who may or may not have second language needs **be eliminated**.
- II. The process of initial identification must be conducted by the Committee on Special Education (CSE) which must include professionals with expertise in disabilities, home language, and new language development.
- III. The process of initial identification for ELLs/bilingual learners with disabilities must include, but not be limited to the following steps:

**Step 1:** The home language survey will be administered.

**Step 2:** The student will be interviewed in his/her preferred mode of communication, i.e. the student's home language, sign language, and communication boards.

**Step 3:** In consideration of the information obtained through Steps 1 and 2, and upon the suspicion that the student may have a disability, the student will be referred to the CSE. The CSE will:

- Conduct a review of the student's history of language use at home, school, and the community;

- Conduct an individual evaluation according to the procedures established in Section 200.4 (B) (6) of this Title, which shall include assessments administered in the student's home language;
  - Determine (1) if the student has a disability, (2) that the determinant factor is not his/her English language proficiency, (3) if the student has second language acquisition needs, and (4) whether the student will be able to participate in the New York State's standardized assessment program which includes the New York State Identification Test for English Language Learners (NYSITELL), with or without modifications. If the student with a disability and is unable to participate in the New York State's standardized assessment program, alternate assessments for English language proficiency must be provided;
  - Upon the review of the assessment results, the CSE will determine whether the student has or does not have second language acquisition needs. If the student has second language needs Bilingual/ESL instructional services must be part of the student's Individualized Education Program (IEP).
- IV. The determination of the CSE, in relation to the form of assessment in which the student is able to participate (standardized tests, with or without modifications, or alternate assessment), must be included in the student's IEP. The modifications and testing accommodations must also be specified.
- V. In order to assess ELLs/bilingual learners with severe disabilities whose IEPs specify the use of alternate assessments, NYSED must develop an alternate assessment for the initial or reentry identification of ELLs with severe disabilities.
- VI. In alignment with NYSED's *Blueprint for the English Language Learners Success* and in order to ensure the appropriate identification of ELLs/bilingual learners with disabilities, all NYS members of the CSE teams must participate in long term, continued, and meaningful professional development on the assessment and instruction of ELLs/bilingual learners with disabilities.

As we continue to serve the students, families, educators, members of community-based and private entities whom NYSABE represents, we reaffirm our commitment to ensuring equitable and meaningful access to high quality bilingual education programs for all ELLs/bilingual learners in New York State by submitting these comments on the Proposed Amendments to C.R. Part 154-3.

Respectfully,

Tatyana Kleyn. Ed.D.  
NYSABE President