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TO: BOCES District Superintendents  
School District Superintendents  
Superintendents of Special Act School Districts  
Superintendents of State-Operated Schools  
Superintendents of State-Supported Schools  
Public School Administrators  
Charter School Leaders  
Special Education Directors  
Chairpersons of Committees on Special Education  
Chairpersons of Committees on Preschool Special Education  
Administrators of Nonpublic Schools with Approved Special Education Programs  
Organizations, Parents, and Individuals Interested in Special Education

FROM: Elisa Alvarez

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SUBJECT: Bilingual and English as a New Language Services for English Language Learners who are Students with Disabilities

This memorandum supersedes the March 2011 joint field guidance and clarifies New York State Education Department (NYSED) policy regarding the right of English Language Learners (ELLs) who are identified as eligible for special education to continue receiving language acquisition services as required under Part 154 of the Regulations of the Commissioner of Education and federal civil rights law. Consistent with this mandate, section 154-2.4(b) directs each school district to provide assurances that each ELL, including an ELL with a disability, has access to appropriate instructional and support services.

#### Services under Part 154

Services under Part 154 should be considered general education core instruction for all ELLs. An ELL determined to be eligible for special education services must continue to participate in the district's bilingual education or English as a new language (ENL) program. This may mean that special education services, accommodations, program modifications and/or supplementary supports and services, for example, may be needed to support that student's participation and progress in the bilingual education or ENL program. It may also mean that for some ELLs with disabilities, the Committee on Special Education (CSE) may recommend that the bilingual education or ENL program be provided to the student in their special class(es).

When the CSE has determined that an ELL with a disability cannot, because of their disability, participate in the district's general bilingual education program or stand-alone ENL program without special education supports, it must consider specially designed instructional programs provided by appropriately qualified staff (e.g., personnel with certification in special education or, as appropriate, a certified reading teacher with bilingual extension and/or certification as a teacher of English to Speakers of Other Languages) who would:

- (1) support the development of the student's skills in the areas of understanding, speaking, reading, writing, and communicating in English, through the integration of academic content appropriate for the student's age, grade level, English language skills, and level of English proficiency; and
- (2) develop the cognitive skills of the student.

It is important to note that specially designed instruction (e.g., specialized reading instruction or supplemental instruction provided in a resource room, provided by an individual who does not hold a bilingual extension, certification in a language other than English, or English to Speakers of Other Languages (ESOL) certification) cannot replace a student's right to access the district's bilingual education or ENL program as a result of issues such as scheduling or availability of staff to provide such services.

Section 154-2.3(f)(2) of the Regulations of the Commissioner of Education allows a parent or person in parental relation to direct that their child be placed in an ENL program if the parent or person in parental relation does not want their child to be enrolled in a bilingual education program. However, the regulations do not give a CSE or any other district personnel the authority to terminate a student with a disability's placement in a bilingual education or ENL program unless the student has met the exit criteria outlined therein.

For an ELL with a disability placed in an out-of-district program (e.g., Board of Cooperative Educational Services, charter school, approved special education program), the school district should consider how bilingual and/or ENL programs will be made available to the student including, but not limited to, consideration of whether the student could participate in the public school district's stand-alone ENL program to receive the necessary units of instruction.

### Committee on Preschool Special Education

To ensure that the individualized education programs (IEPs) for preschool Emergent Multilingual Learners (EMLs) are appropriately developed, personnel with knowledge of second language needs and how these needs relate to the student's disability should be invited to participate in the Committee on Preschool Special Education (CPSE) meetings. The CPSE would have determined if the child needed a bilingual evaluation prior to the CPSE meeting and at the CPSE meeting would need to determine if the student needs bilingual special education and/or bilingual related services. CPSEs and approved preschool programs are reminded that the requirement to consider the language needs of EMLs when developing IEPs is a federal law requirement based on the Individuals with Disabilities Education Act (IDEA), applying to preschool students as well as school-age students. While the mandated services of Part 154 of the Regulations of the Commissioner of Education are applicable only to school-age students (K-12), the requirement that the language needs of the student as such needs relate to the student's IEP be considered in the IEP development process applies to students ages 3-21.

## Committee on Special Education

When the CSE develops an IEP for an ELL with a disability, it must consider whether the required Part 154 services must be met, in part or in total, through special education programs and services in which bilingual or ENL instruction are provided (e.g., a bilingual special class; a special class with ENL instruction provided by appropriately qualified staff in the special class; bilingual counseling; direct consultant teacher services in the ENL class; bilingual integrated co-teaching class, as defined in section 200.6(g) of the Regulations of the Commissioner of Education). Such considerations include, but are not limited to:

- the student's need for special education programs and services to support the student's participation and progress in English language arts instruction, content area instruction in English, ENL instruction, and for students in bilingual programs, content area and language arts instruction in the home/primary language; and
- whether the student needs bilingual special education and/or bilingual related services.

ELLs are entitled to certain testing accommodations<sup>1</sup> during the period of time that they are designated as an ELL pursuant to Part 154 to address their second language needs and for up to two years immediately after they have achieved proficiency on the New York State English as a Second Language Achievement Test (NYSESLAT). However, it is still the responsibility of the CSE to identify in the IEP of an ELL with a disability any individual testing accommodations needed by the student as a result of their disability, which may include, but are not limited to, the same testing accommodations that the student is entitled to as an ELL or former ELL student.

To ensure that the IEPs of ELLs with disabilities are appropriately developed under section 154-2.3(a)(9)(i), the CSE for such students must include at least one individual who is appropriately certified under Part 80 of the Regulations of the Commissioner of Education, to provide bilingual services or instruction or teach ESOL.

There is no minimum period that must pass prior to evaluating a newly enrolled ELL for special education services. An ELL suspected of having a disability or referred by a parent for an evaluation should be evaluated subject to the regulatory timeline, in accordance with section 200.4 of the Regulations of the Commissioner of Education.

## Declassification from ELL Status

Part 154-2.3(m)(1) of the Regulations of the Commissioner of Education establishes that for a student to be declassified from ELL status and therefore no longer be eligible to receive mandated bilingual education or stand-alone ENL programs, the student must either score at the Commanding level on the NYSESLAT or score at the Expanding level on the NYSESLAT and attain a proficient score on the annual English Language Arts (ELA) exam. These two pathways are the sole criteria for exiting ELL status in New York State. Therefore, until an ELL student, including an ELL with a disability, scores proficient on the NYSESLAT, the district is responsible to address the student's language needs pursuant to Part 154 of the Regulations

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<sup>1</sup> These accommodations include time extension; separate location; third reading of listening selection (English language arts (ELA) exams only); bilingual glossaries (all exams except foreign language); simultaneous use of English and alternative language editions (not allowed for ELA and Foreign Language examinations); oral translation for lower incidence languages (not allowed for ELA and Foreign Language examinations); and writing responses in the native language (not allowed for ELA examinations).

of the Commissioner of Education and the student is, for accountability reporting purposes, an ELL student. This is true regardless of whether the student attends the public school or has been placed in an out-of-district program by the CSE. The school district does not have the authority to cease providing the Part 154 services to these students when, for example, the CSE believes that the student's disability is the sole determinant factor for the student's score on the NYSESLAT.

### Resources for Further Information

Questions regarding the instruction and programming for ELLs may be directed to the Office of Bilingual Education and World Languages at (518) 474-8775 or [OBEWL@nysed.gov](mailto:OBEWL@nysed.gov).

Questions regarding special education services may be directed to the Office of Special Education Policy Unit at (518) 473-2878 or [SPECED@nysed.gov](mailto:SPECED@nysed.gov).

For technical assistance and/or professional development relating to the education needs of ELLs with disabilities, you may contact the following NYSED funded networks:

- [Office of Special Education Educational Partnership](https://osepartnership.org/)  
<https://osepartnership.org/>
- [Regional Bilingual Education Resource Network \(RBERN\)](https://www.nysed.gov/bilingual-ed/regional-supportrberns)  
<https://www.nysed.gov/bilingual-ed/regional-supportrberns>