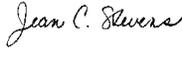




March 2011

To: District Superintendents
Superintendents of Public Schools
Superintendents of State-Operated and State-Supported Schools
Superintendents of Special Act School Districts
Principals of Public, Nonpublic and Charter Schools
New York City Department of Education
Impartial Hearing Officers
Special Education Parent Centers
Regional Special Education Technical Assistance Support Centers
Bilingual/English as a Second Language (ESL) Technical Assistance Centers
Special Education Parent Centers
Early Childhood Direction Centers
Commissioner's Advisory Panel for Special Education Services
Organizations, Parents and Individuals Concerned with Special Education

From: Rebecca H. Cort 
Associate Commissioner, Office of Special Education

Jean C. Stevens 
Associate Commissioner, Office of Curriculum, Instruction and Standards

Subject: Bilingual and English as a Second Language (ESL) Services for Limited English Proficient (LEP)/English Language Learners (ELLs) who are Students with Disabilities

The purpose of this memorandum is to clarify State policy regarding English as a Second Language (ESL) services for LEP/ELL students who are also identified as having disabilities. Part 154 of the Regulations of the Commissioner of Education establishes the State's requirements for services for students with limited English proficiency. The purpose of Part 154 is to ensure that all LEP/ELL students are provided opportunities to achieve the same educational goals and standards as the general student population. Each school district, in its comprehensive plan developed pursuant to section 154.3 of the Regulations of the Commissioner of Education, must provide assurances that each LEP/ELL student, including a student with a disability, has access to receive appropriate instructional and support services.

Committee on Special Education

When the Committee on Special Education (CSE) develops an individualized education program (IEP) for a LEP/ELL student with a disability, it must consider the

language needs of the student as they relate to the student's IEP as well as the special education supports and services a student needs to address his or her disability and to support the student's participation and progress in the general education curriculum. 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 and ESL instruction; and
- whether the student needs bilingual special education and/or related services.

LEP/ELL students are entitled to certain testing accommodations¹ during the period of time that they are designated LEP/ELL pursuant to Part 154 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 student's IEP any individual testing accommodations needed by the student **as a result of his or her disability**, which may include, but are not limited to, the same testing accommodations that the student is entitled to as a LEP/ELL or former LEP/ELL student.

To ensure that the IEPs for LEP/ELL students 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 CSE meetings.

ESL Program

ESL programs should be considered general education core instruction for all LEP/ELL students. In the first instance, each LEP/ELL student with a disability must be provided the opportunity to participate in the district's ESL 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 ESL program. It may also mean that the CSE may recommend that the ESL program be provided to the student in his/her special class(es).

When the CSE has determined that the student cannot, because of his/her disability, participate in the district's general bilingual education program or free-standing ESL program, it must consider specially designed instructional programs provided by appropriately qualified staff that 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

¹ 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).

- age, grade level, English language skills, and level of English proficiency;
and
(2) develop the cognitive skills of the LEP/ELL student.

This does not mean, however, that specially designed instruction (e.g., specialized reading instruction or supplemental instruction provided in a resource room) can replace a student's right to access the district's free-standing ESL program as a result of issues such as scheduling or availability of staff to provide such services.

Section 154.3(k)(2) of the Regulations of the Commissioner of Education gives parents the option to "withdraw their children only from participation in a bilingual education program," but not from ESL services. It does not give a CSE or any other district personnel the authority to determine that a student with a disability will not receive any ESL instruction unless the student has been re-designated English proficient pursuant to Part 154 of the Regulations of the Commissioner of Education.

Further, section 154.3(l) of the Regulations of the Commissioner of Education allows the CSE to determine whether the required Part 154 services can be met by participation in general education classes or must be met, in part or in total, through special education programs and services (e.g., a bilingual special class; a special class with ESL instruction provided by appropriately qualified staff in the special class; bilingual counseling). It does not authorize the CSE to determine that a LEP/ELL student with a disability will not receive any services pursuant to Part 154. This section of the Regulations also provides that a student with a disability who is also receiving services pursuant to Part 154 would be counted as both a LEP/ELL student and a student with a disability for purposes of calculating State aid pursuant to section 3602 of the Education Law.

Even if the students are in special classes in the school district, they are entitled to receive ESL and, as appropriate, bilingual education programs of the district. For a student with a disability placed by the CSE in an out-of-district program (e.g., BOCES, approved private school), the CSE should consider how bilingual and/or language arts instructional programs, as such terms are defined in section 154.2 of the Regulations of the Commissioner of Education, can be made available to the student in the out-of-district placement, including, but not limited to consideration of whether the student could participate in the sending public school district's free-standing ESL program.

Declassification from LEP/ELL Status

Part 154 of the Regulations of the Commissioner of Education establishes that for a student to be declassified from LEP/ELL status and therefore no longer be eligible to receive mandated bilingual education or free-standing ESL programs, the student must score proficient on the NYSESLAT. Scoring proficient on the NYSESLAT is the sole criterion for exiting LEP/ELL status in New York State. Therefore, until a LEP/ELL student, including a student 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 of the Commissioner of Education and the student is, for accountability reporting purposes, a LEP/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.

Committee on Preschool Special Education

To ensure that the IEPs for LEP preschool students 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 Committee on Preschool Special Education (CPSE) meetings. CPSEs and approved preschool programs are reminded that the requirement to consider the language needs of LEP/ELL students 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.

Resources for Further Information

Questions regarding this memorandum may be directed to Alexia Thompson in the Office of Special Education at (585) 344-2002 or to the Office of Bilingual Education and Foreign Language Studies at (518) 474-8775.

For technical assistance relating to the education needs of LEP/ELL students, you may contact the following regional centers funded by the New York State Education Department:

- Regional Special Education Technical Assistance Support Centers (RSE-TASC) - <http://www.p12.nysed.gov/specialed/techassist/rsetasc/locations.htm>
- Bilingual/ESL Technical Assistance Center (BETAC) - <http://www.p12.nysed.gov/biling/bilinged/betac.html>

To ensure dissemination to appropriate individuals within a school district, we ask Superintendents to please share this memorandum with individuals such as Directors of Special Education, School Psychologists, CSE and CPSE Chairpersons, Guidance Counselors and Directors of Pupil Personnel and Parent Teacher Associations.