

Addendum to Questions and Answers Regarding Inclusion of English Learners with Disabilities in English Language Proficiency Assessments and Title III Annual Measurable Achievement Objectives Issued July 18, 2014 (2014 Qs and As)¹

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¹ The Qs and As can be accessed at the following link:

<http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/q-and-a-on-elp-swd.pdf>.

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Questions and Answers:

Initial Identification

Consistent with obligations under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, schools must take affirmative steps to ensure that students with limited English proficiency can meaningfully participate in their educational programs and services. This requires a mechanism for initially identifying a student as an English learner (EL).² Some States and local educational agencies (LEAs) use an EL screening assessment or tool to determine whether students are ELs who are in need of language assistance services. Other States and LEAs use the annual English Language Proficiency (ELP) assessment required in section 1111(b)(7) of the ESEA for this purpose. The term “EL screener” will be used in questions 14 and 15 to encompass both identification mechanisms. Question 14 addresses the importance of the EL screener for students with disabilities or for students suspected of having a disability under the IDEA, and question 15 addresses whether it could be permissible to use IDEA funds in connection with the EL screening process. Questions 16 and 17 address the appropriate and timely evaluation and identification of ELs as students with disabilities under the IDEA.

14. Why is it important to consider the results of an EL screener for students with disabilities or students suspected of having a disability?

Under the IDEA, a student may not be determined to be a student with a disability if the determinant factor is the student’s limited English proficiency, and if the student does not otherwise meet the IDEA’s definition of a “child with a disability” (34 CFR §300.306(b)(1)(iii) and (2)). To ensure that the IDEA eligibility determination is based on the student’s disability and need for special education and related services, and not solely on a student’s limited English proficiency, providing accommodations on the regular EL screener or administering an alternate form of the EL screener could be necessary to give a

² As noted in the 2014 Qs and As, the term “English Learner” (EL) means a student who is considered limited English proficient (LEP) as defined in section 9101(25) of the ESEA. The term “students with disabilities,” as used in this document, refers to children who meet the definition of “child with a disability” in section 602(3) of the IDEA and 34 CFR §300.8 of the IDEA Part B regulations.

student with a disability, or a student suspected of having a disability, a meaningful opportunity to accurately demonstrate his or her English language proficiency.

An EL screener may be necessary after a child is found eligible for services under the IDEA but has not yet been determined to be an EL. In developing, reviewing, or revising the IEP for a student with limited English proficiency, one of the special factors that the IEP Team must consider is how the language needs of the student relate to the student's IEP (34 CFR §300.324(a)(2)(ii) and (b)(2)). For a description of the IEP Team participants, see 2014 Qs and As question four. Thus, the student's ELP level indicated by the EL screener could provide information that the IEP Team could use in ascertaining the student's language needs and ensuring that the student receives a program of special education and related services, and supplementary aids and services, designed to enable the student to advance appropriately toward attaining his or her annual IEP goals and to be involved and make progress in the general education curriculum (34 CFR §300.320(a)(4)(iv)). Also, it may be necessary to revisit EL determinations for students with disabilities who were previously identified as ELs based on a regular EL screener, but who may have been inappropriately identified as ELs based on their disabilities due to lack of accommodations or an alternate EL screener.

15. Can IDEA funds be used to identify a student with a disability, or a student suspected of having a disability, as an EL?

Yes. It may be possible to use IDEA funds in connection with the EL screening process, as long as using those funds is consistent with the requirements in Part B of the IDEA.³ IDEA Part B consists of the Grants to States program for children with disabilities ages three through 21, authorized by section 611 of the IDEA, and the Preschool Grants program for children with disabilities ages three through five, authorized by section 619 of the IDEA.

There are two possible funding sources:

- IDEA Part B funds reserved for other State-level activities (34 CFR §§300.704(b) (Grants to States) and 300.814 (Preschool Grants)); and
- Subgrants to eligible LEAs for the provision of special education and related services (34 CFR §§300.705 (Grants to States) and 300.815-300.816 (Preschool Grants)).

It may be permissible for States and LEAs to use a portion of these funds to support the development and provision of an EL screener designed specifically for students with disabilities, and for appropriate accommodations for students with disabilities on the regular EL screener.

³ Funds paid to a State under Part B of the Act, including Part B funds reserved for other State-level activities, must be expended in accordance with all of the provisions of 34 CFR Part 300 (34 CFR §300.162(a)). Amounts provided to the LEA under Part B of the Act must be expended in accordance with the applicable provisions of 34 CFR Part 300 (34 CFR §300.202(a)(1)).

16. Does Federal law provide that ELs may not be evaluated for special education services for a certain period of time?

No. There is no such requirement in either the ESEA or the IDEA. Specifically, under the IDEA, States and LEAs are required to have policies and procedures to ensure that all children with disabilities residing in the State, and who are in need of special education and related services, are identified, located, and evaluated (34 CFR §§300.111 and 300.201). This obligation, known as “child find,” is fully applicable regardless of a child’s ELP level, and includes highly mobile children and migrant children suspected of having a disability under the IDEA (34 CFR §300.111(c)(2)).

The LEA proposing to conduct an initial evaluation to determine whether a child qualifies as a child with a disability under 34 CFR §300.8 must, after providing notice, obtain informed consent from the child’s parent before conducting the evaluation (34 CFR §300.300(a)).⁴ Once parental consent is obtained, the evaluation must occur in a *timely* manner. Specifically, under 34 CFR §300.301(c), the initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation or, if the State has established a timeframe within which the evaluation must be conducted, within the State-established timeframe.

17. How can States ensure the appropriate identification of ELs with disabilities and prevent the over/under identification of ELs for special education services?

To ensure that EL students with disabilities are appropriately evaluated and determined eligible for special education and related services, public agencies must adhere to applicable IDEA procedures in conducting evaluations and reevaluations of ELs (34 CFR §§300.300-300.311).

As explained in the *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* jointly issued on January 7, 2015, by the Department and the Department of Justice (2015 DCL):⁵

The Departments are aware that some school districts have a formal or informal policy of “no dual services,” *i.e.*, a policy of allowing students to receive either EL services or special education services, but not both. Other districts have a policy of delaying disability evaluations of EL students for special education and related services for a specified period of time based on their EL status. These policies are impermissible under the IDEA and Federal civil rights laws... (p. 25)

⁴ Notice must be provided consistent with 34 CFR §§300.503 and 300.504. Parental consent must be obtained consistent with 34 CFR §300.9.

⁵ The DCL can be accessed at the following link: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf> .

Delaying a referral for an evaluation can result in the under-identification of ELs as “children with disabilities” under the IDEA. There is also the possibility of over-identification of ELs as having a disability if a school district wrongly determines that a student’s language difficulties are due to a disability rather than lack of English language proficiency. Such determinations are inconsistent with the IDEA, which provides that a child’s limited English proficiency may not be the determinant factor in the child’s disability determination (34 CFR §300.306(b)(1)(iii) and (2)).

To ensure that students, including ELs, are appropriately evaluated, the IDEA specifies that, among other requirements, assessments and other evaluation materials must be selected and administered so as not to be discriminatory on a racial or cultural basis, and be provided and administered in the student’s native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to do so (34 CFR §300.304(c)(1)).

Under the IDEA, a group of qualified professionals and the child’s parent determines whether a child is a “child with a disability,” as defined in the IDEA (34 CFR §300.306(a)). In interpreting evaluation data for the purpose of determining a student’s eligibility and educational needs, this group must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, and social or cultural background (34 CFR §300.306(c)(1)(i)). Therefore, proper application of these IDEA evaluation and eligibility requirements should ensure the appropriate identification of ELs as children with disabilities under IDEA.

The following resources address practices that are important in avoiding misidentification of ELs as students with learning disabilities:

- “Tools and Resources for Identifying All English Learners,” available at <http://www2.ed.gov/about/offices/list/oela/english-learner-toolkit/index.html>;
- A report titled, “Processes and Challenges in Identifying Learning Disabilities Among English Language Learner Students in Three New York State Districts,” prepared for the Institute of Education Sciences at the U.S. Department of Education in February 2010, available at <http://ies.ed.gov/ncee/edlabs/projects/project.asp?projectID=116>; and
- A report titled, “Identifying and Supporting English Learner Students with Learning Disabilities: Key Issues in the Literature and State Practice,” prepared for the Institute of Education Sciences at the U.S. Department of Education in July 2015, available at <http://ies.ed.gov/pubsearch/pubsinfo.asp?pubid=REL2015086>.

Role of the IEP Team

18. What guidance and resources are available to assist IEP Teams in determining whether an EL with a disability should take the regular ELP assessment with accommodations or an alternate assessment?

As explained in the 2014 Qs and As question eight, States are required to develop guidelines for IEP Teams to use in determining what are appropriate accommodations on the annual ELP assessment and whether an EL with a disability needs to take an alternate assessment to the annual ELP assessment (34 CFR §300.160(b)-(c)).

Federal resources to support States in this area are offered through Department-funded technical assistance centers such as the National Center for Educational Outcomes (NCEO) and the Center for Parent Information and Resources (CPIR). CPIR provides an annotated list of resources that address how to make determinations regarding accommodations and alternate assessments.⁶ While these resources do not necessarily address ELP assessments, their content is generally applicable to ELP assessments.

The following are examples from the list:⁷

Accommodations Manual: How to Select, Administer, and Evaluate Use of Accommodations for Instruction and Assessment of Students with Disabilities

This includes fact sheets and teacher tools.

www.osepideasthatwork.org/toolkit/accommodations_manual.asp;

Online Accommodations Bibliography

NCEO resource on the range of possible accommodations and what empirical research studies have to say about the effects of various testing accommodations for students with disabilities.

www.cehd.umn.edu/NCEO/OnlinePubs/AccommBibliography/AccomStudies.htm;

Special Topic Area: Accommodations for Students with Disabilities

NCEO answers frequently asked questions about testing accommodations for students with disabilities, connects you with State policies and research in this area, and offers a number of research-based publications to guide policy and decision-making.

www.education.umn.edu/NCEO/TopicAreas/Accommodations/Accomtopic.htm;

Alternate Assessments – Frequently Asked Questions

This FAQ is available as part of the OSEP Ideas That Work Toolkit.

www.osepideasthatwork.org/parentkit/AltAssessFAQ.asp; and

⁶ These resources can be accessed at the following link: www.parentcenterhub.org/repository/assessment-accommodations/.

⁷ Information about resources included in the responses to questions 17 and 18 is provided for the reader's convenience and is included here to offer examples of the many resources that educators, parents, advocates, administrators, and other interested parties may find helpful and use at their discretion. The inclusion of links to resources does not reflect their importance, nor is such inclusion intended to endorse any views expressed or materials provided.

The National Alternate Assessment Center

The Center offers information and technical assistance on the design and administration of high-quality alternate assessments.

www.naacpartners.org/Default.aspx.

Accommodations and Alternate Assessments

19. May States develop alternate ELP standards for ELs with disabilities to define what they know in English and are able to do in English?

No. Under Title III of the ESEA, States must develop and implement one set of ELP standards, which must be aligned to the State's academic content and student academic achievement standards (section 3113(b)(2) of the ESEA).

20. Are all ELs with disabilities expected to have their ELP assessed in the same way as ELs without disabilities?

The same ELP standards are the basis for the annual ELP assessment under section 1111(b)(7) of the ESEA, and are required for all ELs with and without disabilities. However, appropriate accommodations can be provided on the regular ELP assessment, or an alternate assessment can be developed for an EL with disabilities who cannot take the regular ELP assessment even with accommodations as determined by the student's IEP Team, so that the student can demonstrate growth and proficiency in the English language. See 2014 Qs and As eight through 10.

21. May a State use different cut scores or achievement standards on the State ELP assessment for determining whether ELs with disabilities are proficient in English?

No. There is no provision in the ESEA that permits alternate achievement standards on the annual ELP assessment. However, to ensure that the language proficiency of ELs with disabilities is validly and reliably assessed, the IEP Team must determine whether an EL with a disability needs to receive appropriate accommodations on the regular annual ELP assessment, or needs to take an alternate assessment to the regular ELP assessment if he or she cannot take the regular ELP assessment, even with appropriate accommodations.

22. May a State use Title III funds to develop an alternate ELP assessment for students with disabilities?

As stated in the Department’s October 2008 supplement, not supplant guidance,⁸ most States will not be able to use Title III funds to pay for the cost of developing ELP assessments without violating the supplement, not supplant provision under section 3115(g) of the ESEA because Title I requires States to administer annual ELP assessments.

While States cannot generally use Title III funds to develop alternate ELP assessments, section 6111(2)(B) of the ESEA provides funds for developing or improving ELP assessments, including alternate ELP assessments, necessary to comply with section 1111(b)(7) of the ESEA.

23. May a State use Title III funds for SEA capacity-building activities, such as funding a meeting to gather stakeholders to make determinations about how to develop an alternate ELP assessment?

A State may be able to use Title III funds for these types of activities, depending on the circumstances. For example, States may use Title III State-level activity funds for planning and interagency coordination activities related to the formula subgrants, under section 3111(b)(2)(B) of the ESEA. See question 22, however, regarding the limitations on using Title III funds to develop ELP assessments.

Other Considerations

24. What responsibilities do States and LEAs have for students who were identified as ELs with disabilities but whose parents/guardians refused EL services, with regard to the annual ELP assessment?

The ESEA does not require that parents provide consent before an LEA or school screens and assesses a child as a potential EL in need of language acquisition services. In addition, section 1111(b)(7) of the ESEA requires an annual assessment of English proficiency of all students with limited English proficiency in the schools served by the State.

Parents can refuse to have their children enrolled in an EL program. However, LEAs may not recommend that parents decline all or some services within an EL program for any reason, and a parent’s decision to opt out must be knowing and voluntary. See 2015 DCL, pp. 29-32. When a parent declines participation in services funded by Title III, the LEA must still assess the EL student’s ELP with the annual ELP assessment, until that student no longer meets the definition of EL. If the EL is a student with a disability, the same analysis outlined in the 2014 Qs and As questions eight through 10 applies regarding whether the student should be provided accommodations or an alternate assessment to the annual ELP assessment.

⁸ This guidance can be accessed at the following link: <http://www2.ed.gov/programs/sfgp/legislation.html>.

Even if parents opt their children out of an EL program or specific EL services, the children retain their status as EL students. The LEA retains a responsibility to take the “affirmative steps” required by Title VI of the Civil Rights Act of 1964 and the “appropriate action” required by the Equal Educational Opportunities Act of 1974 to provide these children access to its educational programs. To ensure the needs of opt-out EL students are being met, LEAs must periodically monitor the progress of students who have opted out of EL programs or certain EL services and must inform the EL student’s parents if the EL student does not demonstrate appropriate growth in English proficiency or academic subjects due to language barriers. LEAs may meet their obligation to serve opt-out EL students in a variety of ways (*e.g.*, adequate training to classroom teachers on second language acquisition). See 2015 DCL, pp. 29-32.

For additional information on the rights of EL students, see the Office for Civil Rights *Questions and Answers on the Rights of Limited-English Proficient Students*, which can be accessed at the following link: <http://www2.ed.gov/about/offices/list/ocr/qa-ell.html>.

Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.