

## **Addendum to September 23, 2016 Non-Regulatory Guidance: English Learners and Title III of the Elementary and Secondary Education Act (ESEA), as Amended by the Every Student Succeeds Act (ESSA)**

### **Selected Topics - Entrance and Exit of English Learners from Language Instruction Educational Programs, Reporting, and Former English Learners**

#### ***Purpose***

Under section 3113(b)(2) of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA),<sup>1</sup> each State educational agency (SEA) is required to establish and implement standardized statewide procedures for English learners (ELs) to enter and exit from EL status and language instruction educational programs (LIEPs). This document serves as an addendum to the Non-Regulatory Guidance on English Learners and Title III issued on September 23, 2016 (hereafter referred to as “2016 EL Guidance”<sup>2</sup>) and specifically addresses statewide entrance and exit procedures for ELs. Additionally, this document addresses select topics on reporting and former ELs under Title III of the ESEA.

The purposes of this document are to (1) assist SEAs in establishing and implementing entrance and exit procedures and (2) provide responses to the numerous questions the U.S. Department of Education (the Department) has received from SEAs regarding standardized statewide entrance and exit procedures for ELs, reporting and former ELs. Because these topics also relate to requirements in other laws, including Title VI of the Civil Rights Act of 1964 (Title VI), Section 504 of the Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act of 1990 (Title II of the ADA) and the Individuals with Disabilities Education Act (IDEA), relevant provisions in these laws are also referenced below. The Department hopes that this document will strengthen State and local efforts to improve educational outcomes for ELs by clarifying statutory requirements and providing technical assistance.

#### ***EL Entrance and Exit Procedures Generally***

##### **1. What are the requirements for an SEA to establish standardized statewide entrance and exit procedures for ELs under the ESEA?**

Under section 3113(b)(2) of the ESEA, each SEA receiving a Title III, Part A State formula grant must establish and implement standardized statewide entrance and exit procedures for ELs after conducting timely and meaningful consultation with local educational agencies (LEAs) representing the geographic diversity of the State. The requirement that the procedures be “statewide” means they must be consistently applied across the State. The ESEA also requires that all students who may be ELs be assessed for such status within 30 days of enrollment in a school in the State.

Statewide procedures for entrance might include, for example, the process for identification of ELs, the timeline for implementing that process, the home language survey the LEAs use, the

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<sup>1</sup> References in this document to the ESEA are to the ESEA as amended by the ESSA.

<sup>2</sup> September 23, 2016 Non-Regulatory Guidance: English Learners and Title III available at: [www2.ed.gov/policy/elsec/leg/essa/essatitleiiienglishlearners92016.pdf](http://www2.ed.gov/policy/elsec/leg/essa/essatitleiiienglishlearners92016.pdf).

***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.***

specific English language proficiency (ELP) screener the LEAs administer and the scores on the ELP screener that will result in the identification of a student as an EL. For exit, the statewide procedures might include, for example, the timeline for administering the annual ELP assessment, the score on the ELP assessment that corresponds to proficiency, and how the four domains of language (*i.e.*, speaking, listening, reading and writing) are factored into that score. The exit procedures would also include other statewide measures, if any, used to reclassify an EL and to exit that student from language services.

An SEA must ensure, in establishing the statewide entrance and exit procedures, that the procedures are consistent with Federal civil rights obligations under Title VI.<sup>3</sup> Further information specific to exit procedures is provided under the EL Exit Procedures heading below.

## **2. What is the timeline by which ELs must be identified?**

Under section 3113(b)(2) of the ESEA, a student who may be an EL must be assessed for such status within 30 days of enrollment in a school in the State. An SEA should also have procedures in place to identify in a timely manner ELs who may not have been identified during this initial identification period. An SEA should make every effort to identify students who are ELs as soon as possible in order to provide timely support for students who may be in need of language services. Title VI's implementing regulations have been interpreted by case law to require that LEAs have in place procedures that accurately identify in a timely manner all students who may be ELs and determine if they are ELs through a valid and reliable assessment that includes all four domains of language (*i.e.*, speaking, listening, reading and writing).<sup>4</sup>

Each LEA that uses funds under either ESEA Title I or Title III to supplement its LIEP must provide a parent of an EL student with notification that outlines their child's identification as an EL and placement in an LIEP.<sup>5</sup> The notification must also include the child's level of English proficiency, the methods of instruction used in the program the child will participate in and the specific exit requirements for the program, along with other statutorily required information. The ESEA requires that this notification be provided no later than 30 calendar days after the beginning of the school year or within the first two weeks of placement in an LIEP for a student who enrolls after the start of the school year.<sup>6</sup> See Q&A E-5 of the 2016 EL Guidance (referenced in footnote 2) for further information about the parental notification requirement.

## **3. May an LEA use Title III funds for EL identification?**

No. The obligation to identify all EL students is part of an LEA's civil rights obligations.<sup>7</sup> Because of the supplanting prohibition in ESEA section 3115(g) (which was not changed by the ESSA), as in the past, Title III funds may not be used to satisfy an LEA's civil rights obligations

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<sup>3</sup> Title VI prohibits race, color and national origin discrimination in any program or activity receiving Federal financial assistance; as recipients of Federal financial assistance, SEAs are required to comply with Title VI. 42 U.S.C. § 2000d to d-7.

<sup>4</sup> *Rios v. Read*, 480 F. Supp. 14, 23 (E.D.N.Y. 1978); *Cintron v. Brentwood*, 455 F. Supp. 57, 64 (E.D.N.Y. 1978).

<sup>5</sup> ESEA section 1112(e)(3).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Lau v. Nichols*, 414 U.S. 563 (1974).

to ELs. The legal obligations of an SEA and an LEA under the civil rights laws are independent of the amount or type of State or Federal funding received. Therefore, an LEA may not use Title III funds for identification of ELs, including costs of administering a screening assessment, home language survey, or related tools.<sup>8</sup>

#### **4. May an LEA remove a student’s EL designation if that student was erroneously identified as an EL, even if the student does not score proficient on the annual ELP assessment?**

An erroneously identified EL is a student who was identified as an EL but should not have been because the student does not in fact meet the definition of “English learner” in ESEA section 8101(20). The erroneous identification may have occurred as part of the initial identification process, *e.g.*, due to a parent’s inaccurate completion of the home language survey, administration of an EL screening assessment without providing for appropriate accommodations for a student with disabilities, inaccurate scoring on the annual ELP assessment, or other reasons.

In instances where a student is considered to be erroneously identified as an EL, an LEA should determine how to proceed based on the individual circumstances. For example, if the LEA discovers that appropriate accommodations on the EL screening assessment were not provided to a student with a disability, the logical step would be to re-test the student with appropriate accommodations. If the results of the screener assessment show that the student is not an EL, the EL designation would be removed.

Erroneous identification may also occur when a parent misunderstands the home language survey and indicates that languages other than English are spoken at home because there is occasional use of a language other than English, even though English is the dominant language used at home and the student does not speak or understand any language other than English. In that case, the LEA could remove the EL designation since the student should not have been identified as an EL in the first place.

These are rare exceptions to the general rule that, after a student is identified as an EL, the LEA may not remove the EL designation before that student scores proficient on the assessment of the four language domains, even if the student’s parents object to the EL designation (although parents have the right to decline services).<sup>9</sup>

#### **5. Where can States and LEAs find more information on procedures for identifying ELs?**

Tools and resources for identifying all ELs are located in Chapter One of the Department’s English Learner Toolkit.<sup>10</sup>

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<sup>8</sup> See 2016 EL Guidance, Q&A A-8.

<sup>9</sup> See ESEA section 1112(e)(3); Q&A E-5 of the 2016 EL Guidance.

<sup>10</sup> See English Learner Toolkit available at: <https://www2.ed.gov/about/offices/list/oela/english-learner-toolkit/index.html>.

## ***EL Exit Procedures***

### **6. When must a student be exited from EL status for ESEA purposes?**

An EL must be exited from EL status for ESEA purposes (*i.e.*, for purposes of Title I and Title III requirements) when the student satisfies the State’s standardized statewide exit procedures. Because section 3113(b)(2) of the ESEA requires a State to implement statewide exit procedures, a student who meets the exit procedures is no longer an EL for ESEA purposes, and the State may no longer use Title III funds for services for that student. Title VI’s implementing regulations have been interpreted by case law to require that a student demonstrate proficiency on a valid and reliable ELP assessment in order to be exited from EL status.<sup>11</sup> Under the ESEA, in a State that adopts additional exit procedures, a student who scores proficient on the ELP assessment is not exited until the student meets those additional objective procedures. In such a State, for example, if a student scored proficient on the ELP assessment but a statewide teacher rubric that is a part of the exit procedures indicated that the student should not be exited, then that student would remain an EL for all ESEA purposes, until she meets all the exit procedures.

The requirement that an EL be exited from EL status for ESEA purposes when the student satisfies the criteria included in the State’s standardized statewide exit procedures applies to an EL with a disability<sup>12</sup> as well. To ensure that the language proficiency of such a student is validly and reliably assessed, the Individualized Education Program (IEP)<sup>13</sup> Team or, in the case of a student served only under Section 504 or Title II of the ADA, the Section 504 Team or individual or group designated to make those decisions under Title II of the ADA,<sup>14</sup> must determine whether an EL with a disability needs to receive appropriate accommodations on the regular annual ELP assessment or, for an EL who is a student with a most significant cognitive disability as identified under 34 CFR §200.6(a)(1)(ii), 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.<sup>15</sup> An IEP Team, a Section 504 team, or the individual or group designated to make those decisions under Title II of the ADA must make this determination on a case-by-case basis in light of the particular needs of an EL with a disability.<sup>16</sup>

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<sup>11</sup> *Rios v. Read*, 480 F. Supp. at 23.

<sup>12</sup> As used in this document, the term “EL with a disability” or “ELs with disabilities” refers to students who are children with disabilities under the IDEA as well as students who are not IDEA-eligible but who have disabilities under Section 504 or Title II of the ADA.

<sup>13</sup> An IEP is a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with 34 C.F.R. §§300.320-300.324 (34 C.F.R. §300.320(a)). This paragraph specifically discusses the responsibilities of a student’s IEP team. Where a student has been identified as a student with a disability under Section 504 or Title II of the ADA but not under IDEA, the student’s 504 team, or the team or individual designated by the LEA under Title II of the ADA would have similar responsibilities.

<sup>14</sup> See 34 C.F.R. §200.6(a)(1) and (h)(4).

<sup>15</sup> 34 C.F.R. §200.6(h)(5). Please note that the SEA must provide the alternate ELP assessment (34 C.F.R. §200.6(h)(5)), and may develop alternate ELP achievement standards for the alternate ELP assessment for ELs with the most significant cognitive disabilities. Alternate ELP achievement standards set expectations of performance that differ in complexity from grade-level ELP achievement standards. See *A State’s Guide to the U.S. Department of Education’s Assessment Peer Review Process* at [https://www2.ed.gov/admins/lead/account/saa.html#Standards\\_and\\_Assessments\\_Peer\\_Review](https://www2.ed.gov/admins/lead/account/saa.html#Standards_and_Assessments_Peer_Review) for further information.

<sup>16</sup> The IDEA and the IDEA Part B regulations require that all eligible students with disabilities be included in all

### **7. May a student receive English language services after he or she has exited from EL status?**

A student may continue to receive English language services with local or State funds even after exiting from EL status. However, if exited students need continued language support, an LEA should verify that ELs are not being exited prematurely due to a score of proficiency on the State ELP assessment that is set too low to ensure actual English language proficiency and, therefore, a student's ability to succeed in the classroom.

### **8. May an LEA administer a local ELP assessment to satisfy the ESEA requirement for an annual ELP assessment?**

Each SEA must require that its LEAs administer a uniform, valid and reliable statewide ELP assessment annually to all ELs in schools served by the State, in grades kindergarten through grade twelve.<sup>17</sup> An SEA therefore may not permit one or more LEAs to use locally administered ELP assessments in lieu of the statewide ELP assessment. An LEA may, however, use a local ELP assessment for other purposes, such as to help identify the needs of and provide appropriate instructional supports for ELs so that they can attain ELP.

### **9. May an EL with a disability whose disability precludes his or her assessment in one or more domains of the State ELP assessment be exited from language services?**

Under 34 C.F.R. §200.6(h)(4)(ii), if it is determined on an individualized basis that an EL has a disability that precludes assessment in one or more domains of the ELP assessment (speaking, listening, reading and writing), such that there are no appropriate accommodations for the affected domain or domains, an SEA must assess the child's English language proficiency based on the remaining domains in which it is possible to assess the student.<sup>18</sup> This is also consistent with obligations under Federal civil rights laws. A determination that a disability precludes assessment in one or more domains must be made on an individualized basis by the child's IEP Team, the student's 504 team or, for students covered under Title II of the ADA, by the team or individual designated by the LEA to make those decisions. Under the very rare circumstances when a student's disability precludes assessment in one or more domains, the student may be exited under the State's exit procedures based on a score of proficient on the remaining domains in which the student is able to be appropriately assessed. An SEA that uses a composite or weighted score across the domains should determine what revised composite or weighting is needed for exit in less than all four domains.

The Department expects that only in very rare circumstances will children need to be assessed in fewer than four domains due to a disability that precludes assessment in a particular domain, and

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general State and districtwide 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 and 34 C.F.R. §300.160(a); see also section 614(d)(1)(A)(i)(VI) of the IDEA and 34 C.F.R. §300.320(a)(6)).

<sup>17</sup> 34 C.F.R. §§200.5(a)(2), 200.6(h)(1).

<sup>18</sup> See the example provided in 34 C.F.R. §200.6(h)(4)(ii) of a non-verbal EL who because of an identified disability cannot take the speaking portion of the ELP assessment.

that the vast majority of ELs with disabilities will be able to be assessed in all four domains, with appropriate accommodations as needed, or by taking an alternate ELP assessment for ELs who are students with the most significant cognitive disabilities. The Department’s assessment peer review process will evaluate the technical quality of the ELP assessment, including that it provides valid and reliable results. This includes the State’s procedures for assessing ELs with disabilities on less than the four domains (see *A State’s Guide to the U.S. Department of Education’s Assessment Peer Review Process* referenced in footnote 15 above).

**10. May a SEA exit an EL from language services using only the student’s score on the State reading/language arts assessment?**

No. Section 1111(b)(1)(F) of the ESEA requires each SEA to adopt ELP standards that “are derived from the four recognized domains of speaking, listening, reading and writing,” “address the different proficiency levels of ELs” and “are aligned with the challenging State academic standards.” The ESEA thus recognizes that English language proficiency and State academic content standards are distinct concepts. While assessments on ELP and reading/language arts content are related, they fundamentally measure different skills. The annual ELP assessment must be a valid and reliable measure of ELP, including speaking, listening, reading and writing skills, and must be aligned with the ELP standards.<sup>19</sup>

Title VI’s implementing regulations have been interpreted by case law to require that a student demonstrate proficiency on a valid and reliable ELP assessment in order to be exited from EL status.<sup>20</sup>

**11. Does an SEA have the option of including in its exit procedures other objective, valid and reliable procedures in addition to the State’s ELP assessment?**

An SEA may include additional measures in its standardized statewide exit procedures that are valid, reliable objective and applied and weighted the same way across the State.<sup>21</sup> For example, an SEA may include local input such as the use of a teacher rubric or objective portfolio as part of its statewide exit procedures, as long as such the local input is applied and weighted consistently across the State. A state should not use additional procedures in its exit procedures that do not measure English language proficiency, such as the results of the mathematics content assessment.

***Reporting***

See Section H of the 2016 EL Guidance for additional questions and answers regarding reporting requirements.

**12. In an LEA that receives a Title III subgrant and provides services to ELs in pre-kindergarten (pre-k), when counting the number of years that an EL has received services**

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<sup>19</sup> ESEA section 1111(b)(2)(G), 34 C.F.R. §200.6(h)(1).

<sup>20</sup> *Rios v. Read*, 480 F. Supp. at 23.

<sup>21</sup> ESEA section 3113(b)(2).

**for the purposes of reporting, should the LEA count pre-k or kindergarten as the first year of classification as an EL?**

Under ESEA section 3121(a)(6), an LEA receiving a Title III subgrant must report the number and percentage of ELs who have not yet attained ELP within five years of initial classification as an EL and first enrollment in the LEA. Although an LEA may use Title III funds to serve ELs as young as age three, it is not required to do so. Additionally, under 34 C.F.R. §200.5(a)(2), an SEA must administer the ELP assessment annually to all ELs in schools served by the State in all grades in which there are ELs, kindergarten through grade twelve. Therefore, an SEA should only include students in kindergarten through grade twelve for all reporting requirements under Title III, Part A, including reporting on ELs who have not attained ELP within five years of initial classification as an EL.

**13. If a child has been identified as an EL but the parents decline to allow the child to participate in language services, should the LEA count this child as Title III-served in its biennial report to the State?**

No. Under ESEA section 3121, an LEA receiving a Title III subgrant must report on the activities conducted and ELs receiving language services in the LEA. An LEA must report, among other measures, the number and percentage of ELs who exit LIEPs and the number and percentage of ELs meeting State standards for each of the four years after such children no longer receive language services. An LEA should not include ELs whose parents have declined language services in this report. Note, however, that under the ESEA, all ELs in kindergarten through grade twelve must be annually assessed for ELP, including those whose parents refuse their participation in language services.<sup>22</sup>

***Former English Learners***

The question and answer below updates the response originally published under question and answer J-1 of the 2016 EL Guidance. See underlined text for updated information.

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<sup>22</sup> ESEA section 1111(b)(2)(G); 34 C.F.R. §§ 200.5(a)(2), 200.6(h).

**J-1. Which ELs must be included as part of the reporting requirement regarding former ELs under ESEA section 3121(a)(5)?**

ESEA section 3121(a)(5) requires that LEAs report on the number and percentage of ELs meeting the challenging State academic standards for four years after such students are no longer receiving Title III services. To meet this requirement, an LEA must report to the State on the academic achievement of an EL for each year of the four years after such student *has achieved ELP* and no longer receives EL services. These data must include results on content assessments for reading/language arts, mathematics and science. The students included in this reporting must include *all* former ELs served by the LEA who have achieved ELP and therefore no longer receive any EL services.

These data must be disaggregated by ELs with disabilities.<sup>23</sup> For more information, please see question H-2. An LEA should also disaggregate data by year after exit (*e.g.*, 1st year, 2nd year) to ensure that any academic deficits incurred due to participation in a language assistance program are recouped.

In reporting these data, an LEA must include students who have met the standardized, statewide exit procedures required under section 3113(b)(2) of the ESEA and no longer receive language services. Thus, if a particular SEA has standardized statewide exit procedures that include measures in addition to a score of proficient on the statewide ELP assessment, the SEA would not report all ELs who attained a score of proficient on the ELP assessment, but rather only those ELs who met the standardized statewide exit procedures and therefore no longer receive EL services.

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<sup>23</sup> ESEA section 3121(a)(5).