

State Bilingual Program Eligibility

**2018 Supplemental Budget
Decision Package**

Agency: 350 Office of Superintendent of Public Instruction

Decision Package Code/Title: SC/State Bilingual Program Eligibility

Budget Period: 2018 Supplemental

Budget Level: PL

Agency Recommendation Summary Text:

Washington State uses both state and federal definitions to determine which students may be eligible for an English language development program. The state definition excludes certain groups of potential English Learners and is therefore not compliant with federal civil rights law. The Superintendent is proposing alignment of state definitions with federal definitions. This would expand program eligibility to groups that the federal definition encompasses, namely: academically at-risk Native Americans and students whose families use a language other than English, regardless of the student's primary language. These changes will result in an increased appropriation of approximately \$7.2 million for FY 19.

Fiscal Summary:

Operating Expenditures	FY 2018	FY 2019	FY 2020	FY 2021
Fund 001-1 (Program 060)	\$0	\$7,221,765	\$9,027,206	\$9,027,206
Total Cost	\$0	\$7,221,765	\$9,027,206	\$9,027,206
Object of Expenditure	FY 2018	FY 2019	FY 2020	FY 2021
Obj. N	\$0	\$7,221,765	\$9,027,206	\$9,027,206

Package Description:

Background:

Under Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974 (EEOA), all states and Local Education Agencies (LEAs) must ensure that English Learners (ELs) can participate meaningfully and equally in educational programs and services.

Federal law defines "English Learner" and "Native" or "Primary" language differently than Washington State. In the Every Student Succeeds Act (ESSA), the term "English Learner", when used with respect to an individual, means an individual:

- A. who is aged 3 through 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) (I) who is a Native American or Alaska Native, or a native resident of the outlying areas; and (II) who comes from an environment where a language other than English has had a significant impact on the individual's level of English language proficiency; or
(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 the language of instruction is English; or
 - (iii) the opportunity to participate fully in society.

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Under the federal definitions, Federal Title III dollars may also be used to address the unique needs of eligible students, who come from linguistically and culturally diverse backgrounds. All services provided to ELs using Title III funds must supplement, and not supplant, the services that must be provided to ELs by States under Title VI of the Civil Rights Act of 1964 (Title VI) and the Equal Educational Opportunities Act (EEOA) of 1974.

ESSA defines “Native Language” as (a) The language normally used by such individual; or (b) In the case of a child or youth, the language normally used by the parents of the child or youth. Washington State defines English learners (ELs) as students whose primary language is other than English and whose English language skills are sufficiently deficient or absent to impair learning (28A.180.030). In the state definition, “primary language” means the language most often used by the student for communication in his/her home.

All students who register with a school in Washington State must be asked to identify their primary language. This is done through a Home Language Survey (HLS). Students whose primary language is a language *other than* English must be assessed by the tenth day of attendance with the state-approved language proficiency placement test. For students who are identified as ELs, in addition to basic education funding provided for all students, districts receive state funds to provide supplemental instruction to support language development. In Washington State, the Transitional Bilingual Instructional Program (TBIP) provides supports to help those students identified as ELs become proficient in English.

During the 2015-16 school year, 130,308 students were identified as English learners (ELs), an 8.7 percent increase from 2014-15.

According to guidance issued by the U.S. Department of Justice and the U.S. Department of Education in January, 2015, one of the most critical “affirmative steps” and “appropriate action[s]” that school districts must take to open instructional programs to EL students and to address their limited English proficiency is to first identify EL students in need of language assistance services in a timely manner.¹

Current Situation:

Washington State uses two definitions to determine which students may be eligible for an English language development program. One definition is the federal definition—which is inclusive of all potential English Learners (Students who come from an environment where a language other than English has had an impact on the individual’s level of English language proficiency)—and the other definition is the state definition, which is more narrow and is based on language spoken most often by the student. The state definition excludes certain groups of potential English Learners and is therefore not compliant with federal civil rights law.

Proposed Solution:

The Superintendent is requesting that the Legislature adopt the federal definition of an English Learner as the state definition in order to capture qualifying students to receive services provided through the State Transitional Bilingual Instructional Program (TBIP). The Superintendent is recommending replacing the definition of an “English Learner” and “Primary Language” in RCW 28A.180.030 with the federal definition.

Potential English Learners who the federal definition encompasses, and who are not captured by the state definition include: 1) academically at-risk Native Americans who comes from an environment where a language other than English has had a significant impact on the individual's level of English language

¹ US Department of Education. (2015). Dear Colleague Letter about EL students and LEP parents. <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>

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proficiency and 2) students whose families use a language other than English, regardless of the student's primary language. The adoption would ensure state funding for language acquisition services be provided to these students for an educational entitlement, the English language development program. The funds will be used to close achievement gaps for English Learners and academically at-risk Native Americans—two groups that LEAs must address to effectively implement the state's ESSA Consolidated State Plan.

The increased caseload of roughly 7,762 English Learners would increase the budget by \$7,221,765 in FY18 and the subsequent year costs would be \$9,027,206 annually. These English Learners would be eligible for the reading, writing, listening, speaking, and native language supports that TBIP-eligible English Learners receive.

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Base Budget: If the proposal is an expansion or alteration of a current program or service, provide information on the resources now devoted to the program or service.

In the 2016-17 school year, the Transitional Bilingual Instructional Program received \$132,062,186.33 in funding, and districts paid for 757.448 FTE of staff time. In the 2015-16 school year, the Transitional Bilingual Instructional Program received \$123,630,945.01 in funding, and districts paid for 697.125 FTE of staff time.

Decision Package expenditure, FTE and revenue assumptions, calculations and details:

The state fiscal year 2019 TBIP per-pupil allocation is \$1,163. The impact of adding 7,762 students would be \$7,221,765 for FY19, and \$9,027,206 annually in subsequent years. This assumes no change in the per-pupil rate.

The requested definition change represents an increase in Transitional Bilingual Instructional Program funding of 12.12%. The rate of increase between the 2016 SY and the 2017 SY in TBIP was 6.81%. The rate of increase for staffing between the 2016 SY and the 2017 SY was 8.65%. Over the past four years, the English Learner population has grown at a rate of roughly four times that of the total student population.

Decision Package Justification and Impacts

What specific performance outcomes does the agency expect?

English Learners have the highest annual targets for ELA and Math improvement of any group, according to Washington's ESSA Consolidated State Plan. Native Americans have the highest annual target for ELA improvement among any racial subgroup. Please see the tables below, which were also included in Washington's ESSA Consolidated State Plan.

ELA Proficiency Rate Baseline and Targets			
Subgroup	Projected 2017 ELA Proficiency Rates (%)	Annual Target for Improvement (%)	Projected 2027 ELA Proficiency Rates (%)
All	61.9	2.8	90
American Indian/Alaskan Native	31.6	5.8	90
Asian	76.6	1.3	90
Black/African American	44.6	4.5	90
English Learners	19.2	7.1	90
Hispanic/Latino	44.9	4.5	90
Low Income	47.3	4.3	90
Native Hawaiian/Pacific Islander	41.3	4.9	90
Special Education	24.1	6.6	90
Two or More Races	64.7	2.5	90
White	68.2	2.2	90

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Math Proficiency Baseline and Targets			
Subgroup	Projected 2017 ELA Proficiency Rates (%)	Annual Target for Improvement (%)	Projected 2027 ELA Proficiency Rates (%)
All	53.1	3.7	90
American Indian/Alaskan Native	23.5	6.6	90
Asian	72.8	1.7	90
Black/African American	33.9	5.6	90
English Learners	20.7	6.9	90
Hispanic/Latino	36.4	5.4	90
Low Income	38.8	5.1	90
Native Hawaiian/Pacific Islander	32.9	5.7	90
Special Education	20.7	6.9	90
Two or More Races	55.5	3.5	90
White	58.8	3.1	90

The Transitional Bilingual Instructional Program is successful in supporting exited English Learners in meeting state standards. English Learners who exit from the Transitional Bilingual Instructional Program met standard in English Language Arts and Math at higher rates than the All student groups two years after their transition in school years 2015 and 2016. Because more students will qualify for the Transitional Bilingual Instructional Program—including, for the first time, academically at-risk Native Americans—local education agencies will decrease the achievement gaps between transitioned English Learners and All students with thousands more students.

Performance Measure detail:

Local education agencies will be measured by:

- the number and percent of English Learners who have made progress in English language acquisition.
- the number and percent of English Learners who transitioned from program.

Washington has established a timeline of six years as the expectation for English Learners to achieve language proficiency and exit the program. The table below is taken from Washington’s Consolidated State Plan and it demonstrates the performance measures that English Learners are expected to meet.

Progress in Achieving English Language Proficiency				
Measurement of Interim Progress	2017 Actual (preliminary)	2018	2019	2020
Annual Transition Rate	14.0%	15.0%	16.0%	17.0%

Fully describe and quantify expected impacts on state residents and specific populations served.

The adoption of the federal definition as the state’s definition will impact English Learners and academically at-risk Native American students. The adoption will provide LEAs with funding to close achievement gaps for these sub-groups.

The adoption will allow the state to become compliant with federal civil rights law. Currently, Washington State is under-identifying thousands of English Learners because the state definition excludes potential English Learners whose families speak a language other than English (regardless of the language that the student speaks).

Distinction between one-time and ongoing costs:

The adoption of the federal definition as the state’s definition will add English Learners to the state’s Transitional Bilingual Instructional Program. When these students transition out of the program, they will be eligible for two years of funding as Exited English Learners. In 2015–16, each Exited English Learner generated \$585, and, in 2014–15, each Exited English Learner generated \$580 dollars. Washington has established a timeline of six years as the expectation for English Learners to achieve language proficiency and exit the program.

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What are other important connections or impacts related to this proposal?

Impact(s) To:		Identify / Explanation
Regional/County impacts?	No	Identify:
Other local gov't impacts?	No	Identify:
Tribal gov't impacts?	Yes	Identify: Academically at-risk Native American students who attend Tribal Compact Schools will be eligible for TBIP funding. These students are currently not eligible for TBIP funding. The Tribal Compact Schools' at-risk Native Americans are currently not receiving Title III funding either, because Title III regulations stipulate that an LEA must generate at least \$10,000 in Title III funding in order to be able to individually apply. No Tribal Compact School has yet been able to reach the \$10,000 floor.
Other state agency impacts?	No	Identify:
Responds to specific task force, report, mandate, or exec order?	Yes	<p>Identify:</p> <p>TBIP Task Force: In the 2014 Supplemental Budget, \$117,000 of the 2015 general fund was directed to OSPI to convene a task force to design a performance-based assistance and accountability system for the Transitional Bilingual Instruction Program (ESSB 6002 Section 501 (y)). In January 2016, the TBIP Task Force recommended that the state adopt the federal definition of an English Learner. See page 23 of the task force's report to the Legislature.</p> <p>The Equal Opportunities Act and Title VI of the Every Student Succeeds Act: The Office of Civil Rights and the Department of Justice require that states appropriately identify English Learners for service.</p>
Does request contain a compensation change?	Yes	Identify: The adoption of the federal definition of an English Learner will precipitate the state's compensation of the Transitional Bilingual Instructional Program to change. The amount of funding per English Learner will remain the same. The number of English Learners will increase, because the federal definition is more inclusive than the state's definition.
Does request require a change to a collective bargaining agreement?	No	Identify:
Facility/workplace needs or impacts?	Yes	Identify: Local education agencies will hire or train more staff due to an increase in the English Learner population.
Capital Budget Impacts?	Select Y/N	Identify:

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Impact(s) To:		Identify / Explanation
Is change required to existing statutes, rules or contracts?	Yes	Identify: The RCW 28A.180.030 will be amended to align its definition of an English Learner with the federal definition.
Is the request related to or a result of litigation?	No	Identify lawsuit (please consult with Attorney General's Office):
Is the request related to Puget Sound recovery?	No	If yes, see budget instructions Section 14.4 for additional instructions
Identify other important connections	Yes	See below.

Please provide a detailed discussion of connections/impacts identified above.

- The Bilingual Education Advisory Committee (BEAC) is the advisory committee to the State Superintendent of Education on matters related to English Learners. The BEAC recommended to adopt the federal definition of an English Learner.
- The Western Washington Native American Education Consortium (WWNAEC) is comprised of educators who work to decrease achievement gaps for Native American students in western Washington. The WWNAEC supports the adoption of the federal definition of an English Learner.
- In the 2017 legislative session, HB 1686—which concerned the state's adoption of the federal definition—passed the House Committee on Education. The bill did not pass the House Appropriations Committee.
- In the 2017 legislative session, SB 5489—which concerned the state's adoption of the federal definition—passed the Senate Committee on Early Learning and K-12 Education. The bill did not pass the Senate Committee on Ways and Means.

What alternatives were explored by the agency and why was this option chosen?

House Bill 1686 and Senate Bill 5489 were introduced to the state Legislature last year, and those bills concerned the state's adoption of the federal definition of an English Learner. The Legislature did not fund either bill. The adoption of the federal definition is influenced by compliance concerns and the drive to make the Transitional Bilingual Instructional Program available to each eligible English Learner. As an alternative to legislation, the Agency is proposing to include the adoption of the federal definition in the Superintendent's decision package. The financial increase to the Transitional Bilingual Instructional Program's budget is based upon the increase in caseload in the number of qualifying English Learners. The annual per pupil expenditure on English Learners was set by the Legislature and is codified in law. Please see Senate Bill 5883, Section 516.

What are the consequences of not funding this request?

There are two major consequences of not funding this request.

The first major consequence is that the state will be precluded from screening thousands of potentially eligible English Learners, therefore, the state will remain open to the risk of federal litigation. There is precedent—as recently as 2016—for the Department of Education's Office of Civil Rights and Department of Justice to make determinations against state education agencies on the grounds of under-identifying English Learners. These determinations are based upon Title VI and the Equal Educational Opportunities Act.

The second major consequence is that thousands of academically at-risk students will not have access to the educational programming that they need to succeed. The two groups of students spoken of here are academically at-risk Native Americans—who are in districts that are either providing only Title III funding supports at a tenth of the amount as TBIP support, or who are receiving neither Title III nor TBIP because their local education agency cannot meet the \$10,000 fiscal threshold needed to apply individually for Title III—and students whose families speak a

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language other than English at home (regardless of the language spoken by the child). This latter group of students is receiving neither TBIP nor Title III support.

There is precedent for the U.S. Department of Education’s Office of Civil Rights to find against state and local education agencies for inadequately identifying and serving English Learners. Grounds for the determinations made against other SEAs and LEAs by the Office of Civil Rights and the Department of Justice were that “The District violated Title VI and the Equal Educational Opportunities Act enforced by the DOJ.” For examples, please see:

- The 2010 [“Settlement Agreement Between The United States of America and The Boston Public Schools”](#),
- The [“Settlement Agreement between the United States of America and Adams 12 Five Star Schools”](#), and
- The [“Arizona Department of Education English Language Proficiency Testing Matters – Resolution Agreement, Grades 3 to 12 – May 2, 2016”](#).

For a general idea of the scope and the basis for these settlement agreements, please be advised that the settlement against Boston Public Schools required the LEA to “spend \$10 million on improving services to ELLs, beginning in the 2009–10 school year and continuing through the 2010–11 school year”. The Arizona Department of Education was found out of compliance, in part, for the “under-identification of thousands of ELL students across Arizona.” A list of these cases, and many more, may be found on the United States Department of Justice’s website, under their [Educational Opportunities case roster](#).

How has or can the agency address the issue or need in its current appropriation level?

The state is providing services to eligible English Learners through its Transitional Bilingual Instructional Program. But the state cannot identify all potential English Learners so long as the state does not align its definition with the federal definition.


Other supporting materials: Please attach or reference any other supporting materials or information that will help analysts and policymakers understand and prioritize your request.

- [TBIP Accountability Task Force Report to the Legislature](#)
- [House Bill 1686 – 2017-18](#)
- [Senate Bill 5489 – 2017-18](#)
- [Senate Bill 5883 – 2017-18](#)
- [The United States Department of Justice – Educational Opportunities Cases](#)

Activity Inventory:

Activity Inventory Item	Prog	Staffing			Operating Expenditures		
		FY 2018	FY 2019	Avg	FY 2018	FY 2019	Total
A005	060	0	0	0	\$0	\$7,221,765	\$7,221,765
Total Activities					\$0	\$7,221,765	\$7,221,765

Information technology: Does this Decision Package include funding for any IT-related costs, including hardware, software, services (including cloud-based services), contracts or IT staff?

- No 
- Yes Continue to IT Addendum below and follow the directions on the bottom of the addendum to meet requirements for OCIO review.)