



# **MALDEF**

**Mexican American Legal Defense and Educational Fund**

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**“Miller/McKeon Discussion Draft of ESEA Reauthorization”**

**Before the Committee on Education and Labor  
United States House of Representatives  
September 10, 2007**

Chairman Miller, Congressman McKeon, I am Peter Zamora, Washington D.C. Regional Counsel for the Mexican American Legal Defense and Educational Fund (MALDEF). Founded in 1968, MALDEF is a national nonprofit legal organization that employs litigation, policy advocacy, and community education programs to protect and promote the civil rights of the Latino community.

The Elementary and Secondary Education Act of 1965 (ESEA) is a key federal civil rights statute for the Latino community. Latino students, who comprise 20% of America’s K-12 student population<sup>1</sup>, have traditionally experienced extreme educational inequality in our nation’s public schools.<sup>2</sup> The 2002 reauthorization of the Act, commonly known as the No Child Left Behind Act, greatly strengthened the ESEA for Latino students by holding states, school districts, and schools accountable for the academic success of all students. By disaggregating data for racial and ethnic minorities, language minorities, low-income students, and students with disabilities, the Act ensured that schools could no longer prioritize the education of certain student communities at the expense of others. In highlighting disparities in educational outcomes that continue to characterize U.S. public education, the ESEA has required officials at every level of government to focus upon addressing inequalities that mar our national commitment to educational opportunity.

The current reauthorization of the Elementary and Secondary Education Act presents an historic opportunity to build upon the achievements of the 2002 reauthorization while remedying defects that have limited the law’s effectiveness in eliminating educational inequalities. I am pleased to offer MALDEF’s views regarding the reauthorization this critical federal civil rights law.

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<sup>1</sup> Source: U.S. Department of Education. *See* <http://nces.ed.gov/programs/coe/2007/section1/indicator05.asp>

<sup>2</sup> *See, e.g.,* Ferg-Cadima, James A., *Black, White, and Brown: Latino School Desegregation Efforts in the Pre- and Post- Brown v. Board of Education Era*, Washington, D.C.: Mexican American Legal Defense and Educational Fund (2004) (available at: <http://www.maldef.org/publications/pdf/LatinoDesegregationPaper2004.pdf>).

## **I. English Language Learners and the ESEA**

While the Elementary and Secondary Education Act has greatly affected the entire Latino student community, it has been particularly significant for English language learner (ELL) students, who often face particularly acute educational inequalities. My testimony will focus upon the particular needs of the ELL student population and the bipartisan draft bill's reforms relating to ELLs.

The nation's 5.5 million English language learner (ELL) students<sup>3</sup> significantly underperform on nearly every measure of academic performance. In the 2005 National Assessment of Educational Progress, for example, only 29% of ELLs scored at or above the basic level in reading, compared with 75% of non-ELLs.<sup>4</sup> ELLs also drop out of school at very high rates: Latino ELLs aged 16-19, for example, have a 59% dropout rate.<sup>5</sup>

The academic success of the ELL student population is critical to the success of the Latino community and the U.S. student population as a whole. Over three-quarters of ELLs are Latino, and nearly half of K-12 Latino students are ELL.<sup>6</sup> Over the past fifteen years, ELL student enrollment has nearly doubled, and experts predict that one-quarter of the total U.S. public school population will be made up of ELLs by 2025.<sup>7</sup>

Despite common assumptions to the contrary, native-born U.S. citizens predominate in the ELL K-12 student population: 76% of elementary school and 56% of secondary school ELLs are citizens, and over one-half of the ELLs in public secondary schools are second- or third-generation citizens.<sup>8</sup> The stereotype of ELLs as foreign-born immigrants is, therefore, inaccurate: the majority are, in fact, long-term ELLs whose academic and linguistic needs are not being met by our public school system.

## **II. Invalid and Unreliable Assessments Have Hindered the Effective Operation of the ESEA for ELLs**

The No Child Left Behind Act adopted a sound approach to improving ELL student achievement. ELLs face the dual challenge of learning English while

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<sup>3</sup> Source: U.S. Department of Education. See [www.ed.gov/admins/lead/account/lepfactsheet.html](http://www.ed.gov/admins/lead/account/lepfactsheet.html).

<sup>4</sup> National Center for Education Statistics, *National Assessment of Educational Progress (NAEP): Reading and Mathematics*, Washington, DC (available at [http://nces.ed.gov/nationsreportcard/nrc/reading\\_math\\_2005/](http://nces.ed.gov/nationsreportcard/nrc/reading_math_2005/)).

<sup>5</sup> See Fry, R., *Hispanic Youths Dropping Out of Schools: Measuring the Problem*, Washington, D.C.: Pew Hispanic Center (2003), p8.

<sup>6</sup> See <http://www.nclb.gwu.edu/expert/fastfaq/4.html>; see Lazarín, M., *Improving Assessment and Accountability for English Language Learners in the No Child Left Behind Act*, Washington, D.C.: National Council of La Raza (2006), p1 (noting that 45% of Latino students are ELL).

<sup>7</sup> Source: U.S. Department of Education. See <http://www.nclb.gwu.edu/expert/faq/08leps.html>; <http://www.ed.gov/nclb/methods/english/lepfactsheet.html>.

<sup>8</sup> See, e.g., Capps, R., Fix, M., Murray, J., Ost, J., Passel, J., & Herwatoro, S., *The New Demography of America's Schools: Immigration and the No Child Left Behind Act*, Washington, D.C.: The Urban Institute (2005), p18.

simultaneously gaining academic knowledge in an unfamiliar language.<sup>9</sup> NCLB addresses each aspect of this challenge: Title I requires accountability for the content knowledge of the ELL subgroup, while Title III requires accountability for English language acquisition.

Significant implementation failures by federal and state agencies have severely hindered the effectiveness of NCLB for ELLs, however. Chief among these implementation failures is that states have not yet implemented valid and reliable Title I content or language proficiency assessments for ELLs, and the U.S. Department of Education has not provided sufficient technical assistance or guidance to the states in the development of appropriate assessment policies and practices.<sup>10</sup> Consequently, schools and districts have struggled under NCLB to demonstrate academic gains for the ELL student population, and ELLs have been denied the full benefit of the law's key reforms.

### **III. Ongoing Efforts to Improve Assessments for ELLs**

In order for the ESEA to be effective in eliminating educational disparities, ELL students require assessments and/or assessment accommodations that are tailored to their specific academic and linguistic needs. This is required not only by sound educational practice and the express terms of ESEA, but by the Supreme Court's decision in *Lau v. Nichols*.<sup>11</sup> *Lau* held that Title VI of the Civil Rights Act of 1964 requires schools to deliver academic services to ELLs that are tailored to their linguistic abilities and academic needs.<sup>12</sup>

Although the statutory requirement for valid and reliable assessments for all students originated in the Improving America's Schools Act of 1994, the U.S. Department of Education (ED) has only recently begun to enforce these provisions as they relate to ELL students. ED has also recently embarked upon a long-overdue project to provide technical assistance to states in developing and implementing appropriate assessment policies and practices for ELL students.

In August of 2006, MALDEF, the National Council of La Raza, the U.S. Department of Education, and education officials from all 50 states launched the "LEP Partnership" to provide technical assistance in appropriate ELL assessment practices to the states. The LEP<sup>13</sup> Partnership unites assessment experts, federal and state officials, and advocates in an unprecedented collaborative. Our focus is to improve assessment practices for the 2006-07 testing cycle and to support improved ELL assessment practices

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<sup>9</sup> See, e.g., Short, Debra, & Fitzsimmons, Shannon, *Double the Work: Challenges and Solutions to Developing Language and Academic Literacy for Adolescent English Language Learners*, Washington, D.C.: Alliance for Excellent Education (2007).

<sup>10</sup> U.S. Government Accountability Office, *No Child Left Behind Act: Assistance from Education Could Help States Better Measure Progress of Students with Limited English Proficiency*, GAO-07-140, July 2006 (available at <http://www.gao.gov/new.items/d06815.pdf>).

<sup>11</sup> 414 U.S. 563 (1974).

<sup>12</sup> *Id.*

<sup>13</sup> "LEP" is an acronym for "Limited English Proficient," which is synonymous with "English language learner."

for future years. The next formal LEP Partnership meeting will be held in Washington, D.C. in October of 2007.

Our efforts are beginning to yield results, but Congress must provide additional support to states in the development and implementation of appropriate academic and linguistic assessments for ELLs. The technical expertise needed to develop and implement sound assessments for ELLs exists, but thus far we have not generally seen necessary efforts at the federal and state levels to appropriately include ELLs in statewide assessments. Both the federal government and the states must do much more to implement native language, simplified English, portfolio, and other assessments designed to measure ELLs' academic content knowledge.

#### **IV. The Committee on Education and Labor's Draft ESEA Reauthorization Bill**

In its bipartisan draft bill to reauthorize the Elementary and Secondary Education Act of 1965, the Committee on Education and Labor has proposed critical reforms that will greatly improve the effectiveness of the Act for ELLs. This "discussion draft" provides increased federal supports for appropriate assessment practices as well as flexibility for schools, districts, and states in the treatment of ELLs under ESEA accountability systems. Many of the Committee's proposed reforms respond to proposals offered by the Hispanic Education Coalition, which unites 26 key national and local organizations in support of improved Latino educational opportunities. These reforms will greatly assist schools, districts, and states in demonstrating academic growth for ELLs and will ensure that ELLs may benefit from education reforms prompted by the ESEA.

First, the discussion draft provides significant levels of targeted funding for the development and implementation of valid and reliable academic content assessments for ELLs. It would require states that have not implemented appropriate assessments for ELLs to immediately target 16.5% of their state assessment funds to developing and implementing assessment systems that will allow ELLs to be appropriately included in ESEA accountability.<sup>14</sup> States would be allowed two years from the date of enactment to develop assessment systems that generate valid and reliable results for ELLs.<sup>15</sup> To enforce this provision, the statute would require the Secretary to withhold up to 25 percent of states' Title I administrative funds if they have not developed appropriate assessments 2 years from the date of enactment.<sup>16</sup> These critical reforms will ensure that states will finally, fifteen years after they were first required to do so by the 1994 ESEA, implement assessment systems that generate meaningful results for ELLs.

The discussion draft would also provide key federal supports for the increased use of native language academic content assessments, which are most appropriate for newly-arrived ELLs and students who receive dual language instruction. Under current law,

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<sup>14</sup> Section 6113(c)(2).

<sup>15</sup> Section 1111(b)(10)(C).

<sup>16</sup> Section 1111(b)(10)(A).

states are required to implement such assessments when it is “practicable,” but most states have not prioritized the development and implementation of native language content assessments. To remedy this defect in NCLB implementation, the draft bill would enact a “trigger” to ensure that schools and districts are able to assess members of significant populations of ELLs in their native languages, when consistent with state law.<sup>17</sup> This reform will especially support schools and districts that offer dual language instruction, which education research has shown to be the most effective instructional method for ELLs.

The bill would also strengthen accountability systems for ELLs who are not tested in their native languages. It would require state education agencies to implement policies to provide assessment accommodations for all ELLs and present research-based evidence of the accommodations’ effectiveness in yielding valid and reliable data on ELL academic achievement.<sup>18</sup> This is also a significant improvement to the law, one that will ensure that states appropriately include all ELLs in ESEA accountability systems.

At the same time, the draft bill grants increased flexibility to states, districts, and schools in the treatment of ELLs, especially during the 2-year window in which states are developing valid and reliable content assessments. During this 2-year window, the bill would permit schools and districts to, for the first time, calculate AYP for reading/language arts using results from English language proficiency assessments for ELLs at the lowest levels of English proficiency.<sup>19</sup> Schools will therefore be relieved of pressures to demonstrate ELL academic achievement using assessments that have not been valid and reliable for ELLs. Because English language proficiency assessments are not ultimately comparable measures of content knowledge in reading/language arts, however, this 2-year window will close when states implement the appropriate content assessments described above.

The draft would also provide additional increased flexibility in the treatment of ELLs that was not in the “No Child Left Behind” statute. First, it codifies Department of Education regulations that exempt recently-arrived ELLs (those who have attended schools in the U.S. for less than 12 months) from one administration of the state’s reading/language arts academic assessment.<sup>20</sup> In addition, the draft would permit schools to count ELL students who have acquired English proficiency as members of the ELL subgroup for 3 years after they gain English proficiency<sup>21</sup>, which will benefit schools that are doing a good job helping students learn English.

Title III of the discussion draft, “Language Instruction for Limited English Proficient and Immigrant Students,” also reforms the ESEA to the benefit of ELLs. The draft Title III would require the Secretary of Education to improve data collection and

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<sup>17</sup> Section 1111(b)(6)(C).

<sup>18</sup> Section 1111 (b)(3)(D)(xi)(II); Section 1111(b)(3)(D)(xi)(IV); Section 1111(b)(3)(D)(xi).

<sup>19</sup> Section 1111(b)(10)(B).

<sup>20</sup> Section 1111(b)(1)(Q).

<sup>21</sup> Section 1111(b)(2)(C)(v)(II)(dd).

grant distribution practices with respect to ELLs.<sup>22</sup> It would require states to describe how they will ensure that ELLs and immigrant children “access the full curriculum in a manner that is understandable to and appropriately addresses the linguistic needs of such children.”<sup>23</sup> It would also specifically authorize program activities that support “instructional programs that promote academic proficiency in more than one language,” i.e., bilingual education programs of instruction.<sup>24</sup>

## **V. Conclusion**

The No Child Left Behind Act has focused increased attention upon the academic and linguistic concerns of the Latino population, especially English language learners. The poor academic achievement levels of Latinos and ELLs were generally a well-kept secret prior to NCLB; this, thankfully, is no longer the case. NCLB has increased the pressure at every level of our education system to improve results for underperforming students, and this is clearly a step in the right direction for student populations that have historically existed in the shadows of the U.S. public education system.

As ESEA is debated, approved, and implemented, officials at all levels of government must ensure that they fully consider the educational interests of Latinos and ELLs. If ESEA reforms are ineffective for these large and growing student populations that disproportionately suffer from low academic achievement, ESEA will be ineffective in reforming our public education system as a whole.

The bipartisan draft reauthorization bill recently released by the House Committee on Education and Labor includes numerous reforms that will greatly improve the law’s effectiveness for students while ensuring that it is less burdensome to our nation’s schools and teachers. Latino students, especially English language learners, stand to benefit from many ESEA reforms that would be authorized under the draft bill. MALDEF looks forward to continuing to work with this Committee and the full Congress to ensure the timely renewal of this critical civil rights legislation.

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<sup>22</sup> Section 3111(c).

<sup>23</sup> Section 3113(b)(2).

<sup>24</sup> Section 3115(d)(8).