



President-elect Joe Biden Education Transition Team

January 11, 2021

Re: Urgent Request to Issue Guidance on English Learner Proficiency Assessments During COVID-19

Dear Education Transition Team:

The League of United Latin American Citizens (LULAC), National Association for Bilingual Education (NABE), TESOL International Association, National Association of English Learner Program Administrators (NAELPA), Lawyers' Committee for Civil Rights Under Law, the Multicultural Education Training and Advocacy, Inc. (META) and the undersigned civil rights and education organizations bring to your immediate attention concerns about the testing of English learner (EL) students during the pandemic. **Over thirty states (see list, page 5) have set windows for testing EL students' English proficiency that begin as early as January 4, 2021.** This particular test, the WIDA ACCESS test, does not have a remote option.

Many grassroots organizations, advocates and EL students and families have begun voicing their concerns with their state education commissioners and boards overseeing EL testing in Florida, Massachusetts, Pennsylvania and Colorado, among other places. Some, like Coloradans, have been successful, while others have not. WIDA, a recipient of federal funds and operated out of the University of Wisconsin, noted in a recent letter to advocates that it is willing to accommodate states seeking to postpone their testing. Nevertheless, many states are unwilling to budge and have cited the Department of Education's testing requirements for 2020-21. Advocates should not be forced to address the imminent concerns identified below piecemeal.

If the sitting Department of Education has not effectively acted on this matter before January 20, 2021, the incoming Department's leadership and guidance will need to act immediately to help protect EL students, their families and educators. **Accordingly, we ask that the incoming Department of Education immediately issue lawful guidance to state and local education agencies (SEAs/LEAs) informing them that the Department:**

- 1) will not seek sanctions or otherwise enforce federal testing requirements against any SEA or LEA for failing to administer English language proficiency tests to EL students who cannot otherwise take the test safely and appropriately or those students whose parents are concerned that they cannot take the test safely during the 2020-21 school year and that SEAs and LEAs may postpone the testing until the beginning of the 2021-22 school year;**
- 2) strongly encourages SEAs and LEAs to provide clear guidance describing an opt-out protocol to the in-person assessment for EL students who are in remote learning and ensure those students are informed of the options in their parents' first language and that their children will still be assessed and will not suffer any consequences for opting out; and**
- 3) still requires SEAs and LEAs to measure an EL student's English proficiency for placement and exiting students using other appropriate and reliable information in a student's portfolio.**

This requested guidance is consistent with the Department's instructions to SEAs and LEAs last year during the pandemic¹ when COVID-19 infection rates paled in comparison to today's rates.

¹ U.S. Dep't of Education Fact Sheet: Providing Services to English Learners During the COVID-19 Pandemic (May 18, 2020) <https://www2.ed.gov/documents/coronavirus/covid-19-el-factsheet.pdf>.

While measuring EL students' proficiency of English remains important, EL students and their families should not be forced into schools and expose themselves to unnecessary risks during these unprecedented times. As described below, beyond the imminent health risks, there are serious testing reliability and validity issues and civil rights concerns. The Department's guidance can help SEAs and LEAs avoid these risks while ensuring an equitable education for English learners.

Problem No. 1: EL students and, in turn their families, face greater risks by testing in-person.

EL students comprise over 5 million, or one in ten, public school students.² Approximately 94 percent are students of color.³ According to the Centers for Disease Control (CDC), Latinx persons are almost three times more likely to die from COVID-19 than white, non-Hispanics, 1.7 times more likely to become infected, and 4.1 times more likely to be hospitalized. Black persons are also almost three times more likely to die from COVID-19, 1.4 times more likely to become infected, and 3.7 times more likely to be hospitalized. Asians are 1.1 times more likely to die from COVID-19 and 1.2 times more likely to be hospitalized.⁴ Perhaps even more alarming, Latinx children are approximately eight times, and Black children five times, more likely to be hospitalized with COVID-19 than white children.⁵

Similarly, immigrants are at a disproportionately higher risk of becoming infected and developing severe or fatal COVID-19 symptoms because of the confluence of vulnerabilities such as high rates of poverty, limited access to healthcare, multigenerational households, employment in essential jobs, and fear of legal repercussions.⁶ For example, a research study determined that being a recent Latinx immigrant to the United States was the biggest predictor of being infected by COVID-19. This predictor was followed by living in a large household and working in the food service industry – common factors for homes of English learners.⁷

Given these disproportionate impacts on communities of color and immigrant communities, SEAs and LEAs should not insist upon in-person administration for its WIDA ACCESS test, or similar test, at this time. The Department should clarify that federal requirements for English language proficiency testing do not mandate SEAs and LEAs placing vulnerable students and families at this time and that postponement of testing and opt-out options for students should be pursued.

Problem No. 2: Using norm-referenced Tests like WIDA ACCESS for EL students otherwise receiving remote learning will likely yield invalid and unreliable results.

Beyond the imminent health risks imposed on EL students and their families and teachers during in-person assessment, the pandemic's compounding stressors also adversely impact their learning, which may impact their assessment results. Many states and school districts have shifted to full

² Nat'l Center for Education Statistics. "English Language Learners in Public Schools," The Condition of Education (Last Updated May 2020) https://nces.ed.gov/programs/coe/indicator_cgf.asp.

³ National Center for Education Statistics. "Indicator 8: English Language Learners in Public Schools," Status and Trends in the Education of Racial and Ethnic Groups (updated Feb. 2019) <https://rb.gy/blvs1q>.

⁴ Centers for Disease Control and Prevention, "COVID-19 Hospitalization and Death by Race/Ethnicity," (Last updated Nov. 30, 2020) available at <https://rb.gy/oxhofa>.

⁵ Lindsay Kim, et al., "Hospitalization Rates and Characteristics of Children Aged <18 Years Hospitalized with Laboratory-Confirmed COVID-19-NET, 14 States, March 1-July 25, 2020," MMWR Morbidity and Mortality Weekly Report (August 14, 2020) <https://www.cdc.gov/mmwr/volumes/69/wr/mm6932e3.htm>.

⁶ See, e.g., Eva Clark, Karla Fredericks, Laila Woc-Colburn, Maria Elena Bottazzi, and Jill Weatherhead., "Disproportionate impact of the COVID-19 pandemic on immigrant communities in the United States," PLoS Neglected Tropical Diseases, 14(7), e0008484, (July 13, 2020) at <https://doi.org/10.1371/journal.pntd.0008484>.

⁷ See, e.g., Elizabeth Cooney, "Immigration status, housing, and food-service work explain COVID-19's burden on Latinos," STAT News (Aug. 27, 2020) <https://www.statnews.com/2020/08/27/three-factors-explain-covid19-burden-on-latinos/>.

remote learning. With the increasing surge in COVID-19 cases, schools that operated in-person or hybrid learning models have also reverted back to virtual learning. Many districts that planned to reopen for in-person instruction in January 2021 have put those plans on hold.⁸ Many students and families are also struggling with economic and food insecurities, sick family members, and lack of social supports. Experts predict the pandemic to reach its highest levels through spring—the same time that WIDA ACCESS testing windows begin for several states.

Forcing students to attend schools that have been closed due to health risks solely for testing will likely only raise stress levels for students, impacting the validity and reliability of their assessment results. A federal district court monitor appointed in the EL student rights case, *Congress of Hispanic Educators and US v. Denver Public Schools*, recently sent a letter to Denver Public Schools advising the district to either cancel or postpone the WIDA ACCESS assessment this year, noting in part:

“ACCESS is a norm-referenced standardized test. A primary assumption of standardized testing is that the test is given to students under the same conditions which were in place when the norm group took the test, otherwise the comparison of a student’s score to the norm group could reflect on only the attribute measures (in this case English language proficiency) but might also reflect “measurement error” due to differences in the testing conditions between the norm group and those of the students later taking the test. *Clearly, the testing conditions in Spring 2021, during a pandemic that will have lasted a year and included lockdowns, different and varying learning modes, family and education stressors, limited opportunities to learn, and the surely surreal effect for a remote learning students of only going to school to take a test, clearly those conditions are not the same as those under which the norm group took the test.*”⁹

While some test developers have adapted to provide for remote administration, like Data Recognition Corporation which administers the LAS,¹⁰ WIDA and its consortium of states have not. The Department should advise states using WIDA ACCESS and other tests without remote options of these validity and reliability concerns and their obligations to provide valid assessments under federal law.

Problem No. 3: Civil rights legal concerns abound in light of SEAs and LEAs forcing EL students to test in-person without options to opt-out.

Finally, there are several civil rights legal concerns. Forcing students into schools that may be unsafe during the heightened pandemic places students’ rights to bodily integrity at grave risk and raises serious due process concerns. The fact that the EL students placed in harm’s way are virtually all students of color also raises issues of possible race and national origin discrimination under Title VI of the Civil Rights Act of 1964.¹¹ There are also serious implications for EL students receiving services or accommodations under Section 504 of the Rehabilitation Act of 1973, the Individuals with Disabilities Education Act and Title II of the Americans with Disabilities Act of 1990. And the reliability and validity of testing for EL students during this pandemic noted above may run afoul of

⁸ See, e.g., Valerie Strauss, “Schools start closing — or delay reopening — as covid-19 cases jump across the country,” Washington Post (Nov. 14, 2020) <https://rb.gy/43ekoj>; Samantha Smylie, “Rising COVID-19 rates statewide prompt reopening delays, setbacks among Illinois’ largest school districts” Chalkbeat Chicago (Nov. 12, 2020) <https://rb.gy/y5ivm7>.

⁹ See Attached Letter from Chris Nelson, Ph.D. to Superintendent Cordova, Deputy Superintendent Jones, and the DPS Board (December 16, 2020).

¹⁰ LAS Links, <https://laslinks.com/> (last visited Dec. 10, 2020).

¹¹ *Royal v. Detroit Pub. Sch. Consol.*, No. 2:20-cv-11947, Stipulated Temporary Restraining Order, Doc. 13 (July 22, 2020); see also *id.*, Original Compl. at <https://rb.gy/cvyjxi>.

SEAs and LEA obligations owed under Section 1703(f) of the Equal Educational Opportunities Act of 1974.

Indeed, the Department is keenly aware of these legal concerns, having stated in its own “Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students” (March 16, 2020):¹²

School officials have discretion to make educational decisions based on local health needs and concerns, and OCR recognizes this decision-making authority. As school leaders respond to evolving conditions related to coronavirus, they should be mindful of the requirements of Section 504, Title II, and Title VI, to ensure that all students are able to study and learn in an environment that is safe and free from discrimination.

Accordingly, if the current administration has not issued guidance by January 20, 2021, we respectfully urge the Biden Administration to immediately issue guidance to SEAs and LEAs consistent with the aforementioned to ensure EL students access equal and equitable educational opportunities without placing themselves and their families in imminent harm.

We also respectfully ask that you confirm you have shared these concerns with the incoming Department’s permanent staff and who that person(s) is by name and title and the date such was communicated. We trust the Biden Administration has the safety and health concerns of English learner students, parents and educators and will do its best to protect them. Should you have questions, please contact Roger Rice with META at (617) 312-3996/ rlr24@comcast.net, or Natasha Quiroga (Senior Counsel) at nquiroa@lawyerscommittee.org or David Hinojosa (Director of the Educational Opportunities Project) at the Lawyers’ Committee for Civil Rights Under Law at (210) 439-5880/ dhinojosa@lawyerscommittee.org.

Respectfully submitted,

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¹² Available at <https://rb.gy/qqaoi0>.

List of States Administering WIDA ACCESS per WIDA website (Jan. 6, 2021)

States	Testing Window
Alabama	01/19/21 - 03/19/21
Alaska	02/01/21 - 03/31/21
Bureau of Indian Education	01/25/21 - 02/26/21
Colorado	01/11/21 - 03/12/21
Delaware	02/01/21 - 05/7/21
District of Columbia	02/15/21 - 04/09/21
Florida	01/25/21 - 03/19/21
Georgia	01/13/21 - 03/26/21
Hawaii	01/12/21 - 02/24/21
Idaho	01/25/21 - 03/19/21
Illinois	03/15/21 - 05/25/21
Indiana	01/11/21 - 03/12/21
Kentucky	03/01/21 - 04/23/21
Maine	01/11/21 - 04/16/21
Maryland	02/01/21 - 05/28/21
Massachusetts	01/07/21 - 05/20/21
Michigan	1/27/21 - 04/9/21
Minnesota	01/25/21 - 03/19/21
Missouri	01/11/21 - 04/02/21
Montana	12/02/20 - 02/26/21
Nevada	01/04/21 - 04/2/21
New Hampshire	01/19/21 - 06/11/21
New Jersey	02/16/21 - 05/21/21
New Mexico	02/15/21 - 05/31/21
North Carolina	02/22/21 - 04/23/21
North Dakota	01/11/21 - 02/19/21
Oklahoma	01/11/21 - 04/09/21
Pennsylvania	01/04/21 - 03/19/21
Rhode Island	01/04/21 - 03/12/21
South Carolina	01/25/21 - 04/30/21
South Dakota	01/25/21 - 03/12/21
Tennessee	02/02/21 - 03/26/21
Utah	01/06/21 - 03/19/21
Vermont	01/04/21 - 04/30/21
Virginia	01/04/21 - 06/25/21
Wisconsin	02/22/21 - 04/30/21
Wyoming	01/19/21 - 02/26/21