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August 9, 2004

Ms. Jacquelyn C. Jackson
Acting Director
Student Achievement and School Accountability Programs
Office of Elementary and Secondary Education
U.S. Department of Education
400 Maryland Avenue, SW, Room 3W230, FB-6
Washington, DC 20202-6132

RE: Comments on Proposed Rulemaking for Title I of the ESEA Concerning Limited-English-Proficient Students (Federal Register: June 24, 2004, Volume 69, Number 121)

Dear Ms. Jackson:

On behalf of the National Council of La Raza (NCLR), the nation's largest constituency-based Latino organization, I am pleased to submit comments on proposed regulations implementing statutory provisions regarding state, local educational agency, and school accountability for the academic achievement of limited-English-proficient (LEP) students.

NCLR is encouraged that the U.S. Department of Education is willing to revisit the No Child Left Behind Act (NCLB) and seek changes to make it an effective tool for improving English language learner (ELL) student outcomes. Given the complexity of the ELL population, one-size-fits-all approaches are not appropriate or meaningful for helping this diverse class of students meet the ambitious goals of NCLB. The proposed regulations, thus, reflect an important first step in distinguishing the distinct educational challenges of recently arrived ELLs, former ELLs, and the broader LEP student population. We are hopeful that this is the beginning of a serious, substantive dialogue on policies needed to increase the achievement of the nation's 5.5 million ELL students.

NCLB's accountability system is based on two key principles. First, the law is guided by the fundamental belief that all children can learn. Second, NCLB is premised on the sound notion that holding both educators and students accountable for results is likely to create incentives for all stakeholders to improve student achievement. Maintaining these two fundamental tenets of the law is especially important for increasing achievement of ELL students, given the considerable achievement gaps between these children and their English-proficient peers.

Although, as noted below, we believe that some modest adjustments proposed by the Department make sense, other provisions that threaten the fundamental integrity of NCLB's accountability system concern us. In particular, we fear that the proposed rules virtually invite further erosion



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of the high standards and tough accountability systems, by granting the Department's imprimatur to schools and states that choose, in effect, to "leave ELL students behind."

### **Section 200.6 Inclusion of All Students**

Under the proposed regulations, schools would be allowed to exempt recently arrived LEP students – those who have attended schools in the U.S. for less than ten months – from one administration of the state's reading/language arts assessment. These proposed regulations accurately reflect the challenge in assessing ELLs and demonstrate an understanding that ELL students who are assessed with an English language instrument may not yield meaningful and valid results, even with accommodations. However, we are deeply concerned that the proposed regulations, in a well-intentioned effort to provide states with more flexibility in their assessment of ELLs, fail to address the larger and more substantive issue of accurately assessing LEP students and ensuring their inclusion in a valid accountability system. While we recognize the challenge that states face in appropriately assessing this unique population, NCLR strongly urges the Department to refrain from further easing NCLB's provisions that seek to ensure the inclusion of all students in state accountability systems.

The exclusion of any group of students – especially one as large as the ELL population – from NCLB's accountability system contradicts the law's operating principles. It promotes the inaccurate and dangerous notion that some children cannot learn – the "soft bigotry of low expectations" – which NCLB was designed to counteract. Furthermore, it removes rather than creates incentives for policy-makers and educators to take the steps necessary to increase achievement of all students.

### Native-Language Tests

NCLB law allows states to assess the reading/language arts and mathematics proficiency of ELLs who have attended U.S. schools for less than three consecutive years, as well as other ELL students on a case-by-case basis, using native-language tests "when practicable." Although "some states report that as many as 120 languages are represented in their schools," as noted in the *Federal Register's* invitation for comments, the fact remains that approximately 80% of ELLs are native Spanish speakers. Therefore, NCLR believes that native-language tests are particularly "practicable" for Spanish-speaking LEP students. To conclude otherwise would render the term "practicable" operationally meaningless.

Unfortunately, few states have made efforts to develop such assessments, nor has the Department exercised leadership in promoting the dissemination of existing instruments or the development of new ones. In lieu of offering states additional flexibility in including LEP students in the reading/language arts assessment, NCLR urges the Department to assist in the research, development, and dissemination of valid and appropriate native-language assessment instruments. With additional research and support from the Department, states and schools will be better able to ensure that their accountability systems appropriately serve their ELL student population, rather than exclude them altogether.

### Intensified English-Language and Academic Instruction

In its invitation for comments, the Department suggests that the proposed regulations will allow local educational agencies (LEAs) to provide "intensified language instruction programs well

aligned with the State’s English language proficiency (ELP) standards and linked with State academic content and student academic achievement standards.” To ensure that recently arrived LEP students receive the necessary preparation that they need to both yield valid and reliable test scores and demonstrate improvement in their proficiency of the English language and core academic content, NCLR strongly encourages the Department to include language in the final regulations recommending “intensified” instruction in both English-language development *and* academic content.

### **Section 200.20 Making Adequate Yearly Progress**

The proposed regulations also change the manner in which states can include recently arrived LEP students and former LEP students in their determinations of adequate yearly progress (AYP) for the broader LEP subgroup.

#### Recently Arrived LEP Students

The proposed regulations would allow states to exclude results from the reading/language arts assessment for recently arrived LEP students who are assessed in this academic content area. As noted previously, NCLR encourages the Department and states to invest in the research and development of valid native-language assessments and accommodations. However, given that the proposed regulations will allow states to exclude recently arrived LEP students from one administration of the reading/language arts assessment, NCLR agrees that the inclusion of the reading/language arts results for AYP determination is no longer valid.

In addition to permitting the exclusion of reading/language arts scores for recently arrived LEP students, the proposed regulations also allow states to exclude scores from the mathematics assessment for recently arrived ELLs, while concurrently requiring schools to assess this cohort of students in mathematics. Although this is consistent with the Department’s acknowledgment that states should not be held accountable for assessment scores that may be deemed invalid due to students’ limited proficiency in English, the Department’s proposed regulations do nothing else to ensure that states are assessing recently arrived students with valid and appropriate mathematics instruments. Again, the proposed regulations fail to address the fundamental challenge of appropriately testing ELLs and ensuring their proper inclusion in state accountability systems.

Also, while the proposed regulations allow states to exclude the reading/language arts and mathematics results of recently arrived LEP students for AYP determinations, they continue to allow states to count recently arrived LEP students who take the reading/language arts or ELP assessment as well as the mathematics assessment toward meeting the 95% participation requirement for determining AYP. NCLR is concerned, again, that in an effort to provide increased flexibility to states and schools, the Department’s proposed regulations undermine a key tenet of NCLB – holding schools accountable for educating *all* students. Specifically, the proposed regulations will create a disincentive for schools to adequately prepare recently arrived LEP students to improve their proficiency in reading/language arts as well as mathematics. We, therefore, oppose this provision, which would have the perverse effect of continuing to hold ELL students accountable for learning without maintaining a similar requirement for schools. Should the final regulations allow states to exclude assessment results of recently arrived LEP students, NCLR urges the Department to ensure that states do not count these students toward the 95%

participation requirement for AYP determinations. To do otherwise would endanger the integrity of the AYP principle and NCLB, since, in effect, schools would be credited for including students whose scores are irrelevant and doing little to ensure that their testing instruments are appropriate and inclusive of this population.

#### Former LEP Students

The proposed regulations also allow states to include the assessment scores from the reading/language arts and mathematics assessments for former LEP students – those who have exited the LEP category in the previous two years. NCLR believes that this is an important change in the right direction. Many schools that are successful in helping ELLs become English proficient may be unfairly punished under NCLB since these children may continue to lag behind in other academic areas, lowering overall test scores for some schools. We commend the Department for addressing this important issue.

NCLR, however, is concerned that the proposed regulations concurrently restrict states from counting these former LEP students for the purposes of Title III funding. Research indicates that ELLs who become fully proficient in English continue to lag behind their native English-language peers in academic achievement.<sup>1</sup> AYP scores for Latino and low-wealth subgroups, as a result, may be negatively affected. To ensure that former LEP students do not fall behind their native English-language peers, it is critical that schools and states continue to provide supportive services as they exit from the LEP category and into the “mainstream.” Therefore, we recommend that the Department’s final regulations allow states to count former LEP students for the purposes of determining Title III funding.

Finally, the proposed regulations would not allow results of former LEP students to be included as part of the LEP subgroup in the reporting of achievement results on state and LEA report cards, as required under Section 1111 (h) (1) (C) “because there is a difference between data used for system accountability and data used for providing information to parents.” Such a provision conflicts with NCLB’s principle of including parents and other community stakeholders in a school’s accountability system. While allowing schools to include former LEP students in the broader LEP subgroup for AYP determinations is important, it is equally critical that states and LEAs report achievement results to parents in the same manner in which they are included for AYP purposes. As key players in school accountability systems, parents and the community should be equally informed of the progress that their school is making in helping LEP students learn English. Therefore, NCLR strongly encourages the Department to ensure that the achievement results of all ELLs, including former LEP students, are reported to parents and the community in state and local report cards in the same manner in which they are calculated for AYP determinations.

Once again, NCLR hopes that the Department’s proposed regulations with respect to ELLs mark the beginning of a serious effort to improve the educational achievement of our nation’s ELL students. While we believe that some of the changes will soundly rectify some of the challenges that states and schools are currently facing in their efforts to include ELLs in their accountability

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<sup>1</sup> Hakuta, K., Y. Goto Butler, and D. Witt. (2000). *How Long Does It Take English Learners to Attain Proficiency?* University of California: Linguistic Minority Research Institute.

systems, further adjustments and considerations are necessary to ensure that *both* ELL students and the educators who serve them are effectively assisted by the Department's regulations. We hope the Department will carefully consider our suggestions when drafting the final regulations. Finally, we look forward to working with the Department and the Administration as our nation's schools continue to implement NCLB and strive to meet the rigorous goals set by the law.

If you have questions regarding these comments, please feel free to contact Raul Gonzalez or Melissa Lazarín at (202) 785-1670.

Sincerely,

A handwritten signature in black ink, appearing to read "Raul Yzaguirre", with a long horizontal flourish extending to the right.

Raul Yzaguirre  
President & CEO