



# Strengthening Accountability to Ensure Latino Success: An Analysis of NCLB Title I Regulations

By Josef Lukan\*

## INTRODUCTION

On October 28, 2008, the U.S. Department of Education finalized Title I regulations of the No Child Left Behind Act (NCLB) of 2001—the most recent iteration of the Elementary and Secondary Education Act (ESEA) of 1965. These regulations under Title I—Improving the Academic Achievement of the Disadvantaged—address accountability and transparency, uniform and disaggregated graduation rates, and improved parental notification for supplemental educational services (SES) and public school choice (PSC), among other issues. The purpose of the Department’s regulatory activity is to ensure proper implementation of the law so that it achieves its intent to close the achievement gap, particularly for Latino† and English language learner (ELL)‡ students, who have typically occupied the lower end of the gap.

Prior to finalizing the regulations, the Department published a Notice of Proposed Rulemaking (NPRM) and solicited public comment. The Mexican American Legal Defense and Educational Fund (MALDEF) and the National Council of La Raza (NCLR) jointly provided the Department with comments and recommendations. While the Department incorporated a number of our recommendations in several of the final regulations, it failed to include key recommendations on disaggregating and cross-tabulating data to allow for detailed comparisons of student subgroups, refining criteria for states to use growth models in meeting adequate yearly progress (AYP), and boosting Latino participation in supplemental educational services (SES) by reducing the potential for discrimination against the neediest students.

Previous congresses and administrations had begun to prioritize Latino and ELL students in education policymaking for three main reasons: (1) their portion of the U.S. student population is large and growing, (2) their educational needs are not being met, and (3) teachers and schools are not prepared to serve them.

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† The terms “Hispanic” and “Latino” are used interchangeably by the U.S. Census Bureau and throughout this document to refer to persons of Mexican, Puerto Rican, Cuban, Central and South American, Dominican, Spanish, and other Hispanic descent; they may be of any race.

‡ The terms “English language learner” and “limited-English-proficient” are used interchangeably to identify persons whose native language is one other than English and whose difficulties in speaking, reading, writing, or understanding the English language may hinder the individual’s ability to achieve in classrooms where instruction is given in English.

The largest and fastest-growing minority group in the United States, Latinos account for more than one-half of the nation's growth since 2000<sup>1</sup> and currently represent 20% of public school enrollment, up from 11% in 1986.<sup>2</sup> While ELLs constitute more than 10% of the nation's total public school population, ELL student enrollment has increased at nearly seven times the rate of total student enrollment.<sup>3</sup> ELLs are now present in every state and virtually every public school. In fact, nontraditional Latino and immigrant states in the Midwest and Southeast have experienced the highest growth rates (more than 200% between 1995 and 2005) of ELL students in the nation.<sup>4</sup>

Public schools, however, have not adequately served ELL and Hispanic students compared to other students, despite their high and growing proportion of U.S. student enrollment. According to the National Assessment of Educational Progress, only 57% of Hispanic eighth graders scored at or above the basic achievement level for reading, compared to 83% of non-Hispanic White eighth graders.<sup>5</sup> The disparity in achievement level for reading was even greater between ELL eighth graders and non-ELL eighth graders—29% and 75%, respectively.<sup>6</sup>

An exacerbating factor is that Latino and ELL students have not had teachers who are well prepared to teach them. Students in poor and high minority schools are twice as likely as their affluent and non-Hispanic White peers to have an inexperienced teacher. The same students are 61% more likely to have an uncertified teacher.<sup>7</sup> Furthermore, Latino students are more likely to attend schools that serve largely low-income and high minority populations<sup>8</sup> and that have fewer resources available for children. A \$1,213 annual funding gap exists in revenue available per student between school districts with the highest and lowest minority populations.<sup>9</sup>

While necessary improvements to the law must still be made, NCLB is the most significant federal education and civil rights statute to

date for English learners. It calls for schools to include ELLs in the law's assessment and accountability system by disaggregating ELL academic achievement data in order to meet AYP and for reporting purposes, making all schools responsible for ELL student achievement for the first time. As a result, NCLB makes tracking the progress and achievement of all students accessible not only to policymakers but also to the general public.

MALDEF and NCLR recognize the value of NCLB in its promise to spark improvement in ELL instruction in particular and thereby improve education for Latino students overall. Public schools have begun to develop the tools necessary to raise Latino and ELL student achievement, such as appropriate assessments, as well as institute proper instructional practices. However, the law has several flaws, and delayed reauthorization has resulted in an increase in regulatory activity to remedy the shortcomings. Despite regulatory improvements, Congress and the administration must improve the law and reauthorize it without obliterating its current framework of accountability. The recommendations in this analysis serve as a guide in shaping education policy.

## BACKGROUND

The U.S. Department of Education's engagement in regulating the implementation of NCLB, while necessary, does not provide for sufficient improvements in the law's accountability system. In fact, congressional inaction to reauthorize NCLB has threatened to weaken the public will to serve ELL students. However, before NCLB reauthorization stalled in 2007, Congress took some steps to improve the law's provisions concerning ELLs. For example, the U.S. House of Representatives Committee on Education and Labor released an NCLB reauthorization discussion draft on August 27, 2007 which included substantial improvements—incorporating proposals that MALDEF and NCLR recommended.

Most notably, the discussion draft included significant targeted funding for the development and implementation of valid and reliable academic content assessments for English language learners. It required states that have not implemented appropriate assessments for ELLs to immediately target 16.5% of their state assessment funds to develop and implement systems that would appropriately include them in ESEA accountability,<sup>10</sup> providing two years from the date of enactment to develop assessment systems that generate valid and reliable results for these students.<sup>11</sup> To enforce this provision, the statute required the Secretary of Education to withhold up to 25% of states' Title I administrative funds if they had not developed appropriate assessments two years from the date of enactment.<sup>12</sup> These critical reforms sought to ensure that—15 years after they were first required to do so by the 1994 iteration of the ESEA—states would finally implement assessment systems that generate meaningful results for ELLs.

However, since the reauthorization of NCLB stalled, the improvements to the law in the House draft have not reached schools, which continue to lack the tools needed to serve ELLs effectively. Thus, schools that have struggled to serve ELL students under NCLB will continue to do so until the law is reauthorized with sufficient improvements.

Moreover, continued stalling has threatened the foundation of NCLB—that all students should be challenged to meet high academic standards and that schools should be held accountable for improving student achievement. In June 2008, Representatives Sam Graves (R–MO) and Timothy Walz (D–MN) introduced H.R. 6239, the “NCLB Recess Until Reauthorization Act” (the “Recess Act”), which sought to suspend enforcement of Section 1116 of NCLB for all

schools and districts.<sup>13</sup> Section 1116 contains provisions to raise academic standards, assess student progress, hold schools accountable for results, and turn around low-performing schools. It is designed to ensure that all students receive the academic preparation necessary to pursue higher education or to become productive members of the workforce.

Most major civil rights organizations and education coalitions opposed the “Recess Act.” MALDEF, NCLR, the Citizens’ Commission on Civil Rights, the Lawyers’ Committee for Civil Rights Under Law, and the NAACP sent a joint letter to Congress opposing the bill stating, “the civil rights community has always believed that for civil rights laws to be effective, they must have strong enforcement provisions.”<sup>14</sup> In addition, the Campaign for High School Equity\* stated that the “Recess Act” would have “[rendered] the nation’s commitment to achievement for all students meaningless by eviscerating accountability.”<sup>15</sup> A letter from the Hispanic Education Coalition in opposition to the “Recess Act” argues that it would have provided billions of dollars to schools with no accountability for results and halted efforts to improve curriculum and instruction for Hispanic and ELL children.<sup>16</sup> While the “Recess Act” failed to pass, it is one example of how the stalling reauthorization of NCLB leaves the accountability provisions of the law vulnerable.

Had the 110<sup>th</sup> Congress reauthorized NCLB, the accountability provisions of the law would have been maintained and improved upon, and educators would now have the appropriate tools to serve students more effectively. While Congress and the Bush administration developed policy proposals for improving the law, MALDEF and NCLR strongly encourage the 111<sup>th</sup> Congress and the Obama administration to continue building upon this work and reauthorize NCLB.

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\* The Campaign for High School Equity is a diverse coalition of national organizations dedicated to improving secondary education for students of color. Its members include the Leadership Conference on Civil Rights Education Fund, League of United Latin American Citizens, MALDEF, NAACP, National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund, National Indian Education Association, National Urban League, NCLR, Southeast Asia Resource Action Center, and Alliance for Excellent Education.

## RESPONSE TO DEPARTMENT OF EDUCATION REGULATIONS

In the absence of reauthorization, the Bush administration developed regulations to improve the assessment and accountability provisions of NCLB. While the regulations are a step in the right direction, MALDEF and NCLR believe that much more can be done to ensure that NCLB produces its intended results. As such, we provided recommendations to the Department, which were taken under consideration in the development of the final regulations that were released on October 28, 2008. The following section describes the issues addressed in the new regulations, the comments we provided based on review of the Notice of Proposed Rulemaking, and our position on the final regulations.

### Multiple Measures of Achievement

Current law requires schools to be accountable for improving student achievement in reading and mathematics. Multiple measures of achievement under NCLB would allow for a more diverse set of skills to be tested while providing schools with flexibility to meet AYP. Sections 200.2(b)(7)(i) and (ii) of the NPRM state that “measures of student academic achievement may include multiple types of questions that range in complexity and reflect the cognitive concepts and processes in the state content standards within a single assessment, as well as multiple assessments within a subject area.”<sup>17</sup> The regulation clarifies the NCLB policy that allows for assessments to measure higher-order thinking, as well as cognitive concepts and processes.

*MALDEF and NCLR support the regulation because it would provide important standards for states and local educational agencies (LEAs) in assessing students. More importantly, it would clarify for the public that assessments under NCLB should measure more than simple test-taking ability and that related instructional practices and curricula should prepare students for college and beyond.*

### N-Size and Disaggregation of Data

By disaggregating data for racial and ethnic minorities, language minorities, low-income students, and students with disabilities, NCLB ensures that schools can no longer prioritize the education of certain student communities at the expense of others. NCLB should go one step further by ensuring that all subgroups be included by setting a minimum N-size. In Section 200.7 of the NPRM, the Department sought to clarify policy on the use of minimum N-sizes for determining AYP at the LEA and school levels and on the reporting of disaggregated results by states and LEAs. In particular, Section 200.7(a)(2)(i) (B) requires states to ensure that their N-sizes include all subgroups “to the maximum extent practicable.” Next, Section 200.7(a)(2)(ii) requires states to amend their accountability workbooks to describe how they will meet the above-mentioned requirement, explain how other areas of their AYP definition affect the statistical reliability of the data used to determine AYP, and provide information on the number and percentage of students and subgroups not included in AYP determinations at the school level. Finally, Section 200.7(a)(2)(iii) requires states to submit their amended accountability workbooks for peer review on their minimum N-size.<sup>18</sup>

The proposed regulations were intended to increase the inclusion of all subgroups in AYP determinations and reporting of data. As the NPRM describes, states are currently setting minimum N-sizes at various levels, and it is clear that millions of students are being excluded from AYP determinations. In fact, minority students are more likely than other students to have their scores excluded from AYP determinations.<sup>19</sup> Consequently, regulation in this area is necessary for proper implementation of the law.

*The final regulations did not provide a strong enough assurance that all subgroups, including minority students, students with disabilities, and ELLs, would be included in AYP determinations. This can be achieved by adopting a smaller*

*N-size requirement, which would capture these smaller subgroups of students. In the final regulations, the Department argued against setting a minimum N-size requirement due to the need to “ensure statistical reliability and to protect student privacy.”<sup>20</sup> However, Maryland, for example, has had a minimum N-size of five for many years and has been presumed to be statistically and educationally sound for both public reporting and school accountability purposes. Furthermore, simply requiring states to report the number of students excluded from accountability in their workbooks denies the public important information about whether or not schools are addressing the needs of all students. MALDEF and NCLR recommend requiring public reporting of the number of students excluded from AYP determinations by subgroups.*

#### **Participation in the National Assessment of Educational Progress (NAEP)**

It is essential that parents are provided information on how their state and local school districts are performing against rigorous standards. Section 200.11(c) of the NPRM requires states and LEAs to include NAEP reading and mathematics assessment results in their report cards, as required under NCLB.<sup>21</sup>

*NCLB works toward raising standards for all students, particularly minorities and ELLs. However, parents are not able to hold schools accountable unless they fully understand how well their children’s schools are faring compared to other schools, how they compare to schools in other districts, and how they measure up to schools in other states. While NAEP is not aligned with state standards, it will help demonstrate to parents whether or not a discrepancy exists between a state’s standards and the more rigorous NAEP standards. Thus, MALDEF and NCLR support this regulation.*

#### **Graduation Rate Accountability Universal Definition and Disaggregation of Data**

ELLs drop out of school at very high rates compared to other groups—for example, Latino ELLs ages 16 to 19 have a 59% dropout

rate—more than twice as high as the rate for non-Hispanic Whites.<sup>22</sup> In order to develop and optimize the skills of a future workforce, public schools clearly must do a better job in meeting the needs of a large and growing ELL student population. Schools should be held accountable not only for graduating students, but also for preparing them for postsecondary education. The NPRM sought to make several changes to graduation rate accountability. Specifically, Section 200.19(a)(1) requires all states to adopt the National Governors Association (NGA) definition of graduation rate, a standard formula to be applied across the board leading to more accurate measurements of student success. Furthermore, Section 200.19(e)(1) requires each state to disaggregate graduation rates for accountability and reporting purposes by the 2012–2013 school year.<sup>23</sup>

NCLB is based on several core principles: (1) Each child should be challenged to meet the same rigorous standards; (2) Assessments will be used to measure whether or not all students have met the standards; and (3) Test results and other academic indicators will be used to hold schools accountable. As such, graduation rate accountability is critical to NCLB’s effectiveness. If schools are not held accountable for graduating every child but rather simply increasing their average graduation rate, schools are incentivized to push out those students who are less likely to graduate—the very students NCLB intends to help. Thus, the NPRM proposed a good first step toward a common definition of graduation rate and closing a major accountability loophole.

*MALDEF and NCLR were deeply troubled when the Department failed in previous regulations to require states to disaggregate graduation rates for determining AYP and reporting to the public. As the Department now recognizes, this has resulted in lack of accountability for graduating all students. Thus, we support the Department’s new effort to strengthen the definition of graduation rate and its role in NCLB accountability.*

### **Timeline for Implementation**

Proposed Sections 200.19(e)(2)(i) and (ii) of the NPRM would have allowed all states to delay implementation of Section 200.19(a)(1) until the 2012–2013 school year. Furthermore, proposed Section 200.19(e)(1) “would require each State, no later than the 2012–2013 school year, to calculate the graduation rate at the school, LEA, and State levels in the aggregate and disaggregated by the subgroups in Section 200.13(b)(7)(ii) for reporting under Section 1111(h) of ESEA and for determining AYP.”<sup>24</sup>

*MALDEF and NCLR submitted several recommendations regarding the proposed regulations. First, we urged the Department to require states to adopt the NGA graduation rate definition by the 2010–2011 school year at the latest. Second, we noted that most states are in a position to immediately report disaggregated graduation rates under their current system of calculation. Thus, we asserted that states should be required to do so immediately for reporting purposes and that they disaggregate for AYP no later than the 2010–2011 school year.*

*In the final regulation Section 200.19(b)(4)(ii)(A), the Department incorporated our recommendation to require reporting of disaggregated graduation rates by the 2010–2011 school year. Furthermore, the Department compromised on our recommendation to require the new graduation rate calculation for determining AYP by 2011–2012.<sup>25</sup>*

### **Extended Graduation Cohort**

In addition, the final regulation Section 200.19(b)(1)(v), allowing states to place students into a cohort with a longer graduation rate timeframe, is worrisome. Specifically, states may decide to place students who are at the lower end of the achievement gap in a five- or six-year graduation cohort. This means that minority students, ELLs, and students with disabilities—the students NCLB intends to help—would be placed in a slower academic track than their peers and would be at a disadvantage when competing to get into postsecondary institutions.

*MALDEF and NCLR do not support allowing states to place students in a five- or six-year graduation cohort.*

### **Graduation Rate Benchmarks**

Section 200.19(d)(1)(ii) defines “continuous and substantial” improvement of graduation rate benchmarks. Clarification of this policy is essential as many states not only are setting low graduation rate standards but are also setting minimal goals for improving their graduation rates. States are also allowing LEAs to make AYP even if they fail to make continuous progress after they meet their graduation rate goals. For example, if an LEA meets a graduation rate goal of 22% but does not progress closer to 100%, that LEA can still make AYP. This undercuts NCLB’s goal of closing achievement gaps and MALDEF’s and NCLR’s mission of closing opportunity gaps. We believe the regulation was a step in the right direction, but that it may not result in increased graduation rate goals. Specifically, the regulation does not set a floor or benchmark for states to adopt. Thus, states have every incentive to set low graduation rate goals.

*MALDEF and NCLR recommended requiring states to report their graduation rate goals and continuous growth targets to the public. We further recommended that the Department require states to hold public forums describing how they developed their benchmarks and goals, how they will lead to a 100% graduation rate, and the number of years LEAs will take to meet a 100% graduation rate goal. We commend the Department for adopting a portion of our recommendation by adding Section 200.19(b)(6)(i)(D), which would require a state to include in its accountability workbook an explanation of how the state’s graduation rate goal represents the state’s expectations of all high schools, and how the state’s targets demonstrate continuous and substantial improvement from the prior year toward meeting or exceeding the goal.<sup>26</sup>*

### Cross-tabulation of Data

In addition, the new regulations should require that disaggregated data be maintained in a format that can and should be cross-tabulated for state assessment systems, state reporting requirements, AYP, and graduation rate requirements. Having the most accessible, accurate, and detailed information will encourage action specifically tailored to improve outcomes for those students who are falling behind. Currently, race/ethnicity, disability, and LEP status are disaggregated for determining AYP. Gender, migratory status, and economically disadvantaged status are disaggregated only for state reporting requirements. While this is helpful, data also need to be cross-tabulated, which would allow for detailed and accurate comparisons between various subgroups of children, resulting in a greater understanding of their performance compared to one another.

*Although the Department agreed with NCLR and MALDEF on the informative benefits of cross-tabulating data, the Department ultimately considered it overly burdensome and costly to states.<sup>27</sup> However, school districts, educators, and policymakers cannot create effective solutions if they do not have appropriate and relevant data that reveal what segments of the population need assistance. We believe that with cross-tabulated data, schools can tailor solutions accordingly to improve educational achievement. The availability of detailed and standardized data would provide an even clearer picture of educational effectiveness and progress in the United States, and would prompt more specific pedagogical and policy solutions aimed at closing the achievement gap.*

### Making AYP Through a Growth Model

If schools were permitted to make AYP through a growth model, they could account for varying academic progression and language proficiency among ELLs. Proposed Section 200.20(h) establishes criteria for states to incorporate growth in their AYP calculations, allowing them to make AYP by meeting benchmarks and growth targets, or through “safe harbor.” The

state plan to incorporate growth targets would be subject to peer review.<sup>28</sup>

Many states, LEAs, and schools are helping students make progress toward proficiency. Thus, MALDEF and NCLR support providing states with additional flexibility to recognize those schools making such progress. However, the proposed regulation raises two major concerns. First, many Latino and ELL students are already far behind their peers in reading, mathematics, and other subjects. Therefore, if they progress at the same rate as their peers, the achievement gap will never close and they will be at a severe disadvantage when competing for seats at top colleges and universities. Second, states do not have the technical knowledge necessary to set appropriate growth targets for ELLs. MALDEF and NCLR recommended that the peer review process related to implementation of this proposed rule require more robust growth trajectories for students at the low end of the achievement gap and that experts in ELL learning be included in the peer review process.

*The Department stated its intent in the final regulations that peers with expertise in assessing students with diverse needs will be included throughout the peer review of state growth model proposals. However, in response to our comment suggesting that states do not have the technical expertise to set appropriate targets for ELL students, the Department disagreed with our underlying premise, stating that, “setting growth targets does not require expertise in the achievement of particular groups of students...rather, states must have the technical understanding of how to establish appropriate student academic growth targets that result in all students reaching grade-level proficiency.”<sup>29</sup> NCLR and MALDEF disagree with the argument that setting growth targets does not require expertise in the achievement of particular groups of students as English language proficiency assessments are not ultimately comparable measures of content knowledge in reading/language arts. Because of their limited English proficiency, many ELLs*

may make significant leaps in learning at some stages, while they may make lesser gains at others.

### **National Technical Advisory Council**

A new regulation would establish the National Technical Advisory Council (National TAC) “to advise the Secretary on key technical issues related to State standards, assessments, and accountability systems that are part of State plans.”<sup>30</sup> Given that ELL issues have been at the forefront of the debate on the No Child Left Behind Act, MALDEF and NCLR recommended that the National TAC include experts on matters related to ELLs.

*Based on NCLR’s and MALDEF’s recommendations, the Department added Section 200.22(b)(1) in the final regulations to clarify that the National TAC must include members who have “knowledge of and expertise in designing and implementing standards, assessments, and accountability systems for all students, including students with disabilities and LEP students.”<sup>31</sup>*

### **Identification of Schools and LEAs for Improvement**

Identifying schools that are not meeting AYP is the first step in ensuring that all students have the opportunity to make progress in all subject areas. Proposed Sections 200.32 and 200.50(d)(1) clarify that schools and LEAs can be identified for improvement if they did not make AYP in the same subject for two consecutive years, but they cannot be identified for improvement solely because they did not make AYP in the same subject with the same subgroup for two consecutive years.

If schools are identified as needing improvement based only on failure to make AYP in the same subject for the same subgroup for two consecutive years, an LEA would have a smaller number of schools to identify for improvement. The need to clarify this is rooted in a loophole that has allowed schools that fail to make AYP for subgroups in one year (while making AYP for all other students that same

year) can avoid being identified if, in the second year, the school makes AYP for subgroups (while failing to make AYP for all other students). For example, a school may make AYP if—in the first year—African American students do not make AYP in mathematics, but do so in reading. This is quite problematic as the students are not making steady progress in each subject area. If all students except for the Hispanic subgroup makes AYP in both reading and mathematics both years, but Hispanics make AYP for reading in the first year, but not in the second, that school should not make AYP under the law. Every subgroup must pass the tests in every subject every year in order for the school to be successful.

*MALDEF and NCLR expressed support of this regulation, which the Department finalized. The ESEA is clear on when and how schools must be identified for improvement. The proposed regulations would ensure that schools are making progress for all children in all subject areas.*

### **Notice of Identification for Improvement and Parent Options**

According to the 2007 National Assessment of Title I, Latinos (11.6% of eligible Latinos) are less likely than all other groups except for Whites to participate in supplemental educational services (SES).<sup>32</sup> Latinos (0.4% of eligible Latinos) and ELLs (0.3% of eligible ELLs) are the least likely subgroups to participate in public school choice (PSC).<sup>33</sup> Proposed Section 200.37(b)(4)(iv) requires LEAs to provide parents with information on SES and PSC no later than 14 days before the start of the school year. Proposed Section 200.37(b)(5)(ii)(C) requires that information provided on SES include a description of the benefits of tutoring and the qualifications and effectiveness of providers. Proposed Section 200.37(b)(5)(iii) requires notices to be clear, concise, and distinguishable from other information sent to parents.

*The SES and PSC options authorized in NCLB have had limited impact among Latinos and ELLs. Thus, we welcomed regulations intended*



to bolster their participation in both SES and PSC. The Department incorporated our comments in the final regulations by adding Section 200.37(b)(5)(ii)(B), requiring an LEA to indicate, in its notice to parents, SES providers that are able to serve limited-English-proficient students or students with disabilities. However, the regulations did not go far enough in ensuring greater participation among these groups. MALDEF and NCLR recommended that, in addition to adopting the proposed regulations, the Department require LEAs to explain how their choice of when to provide parents with information on SES and PSC is consistent with their ability to provide PSC and parents' ability to find SES providers in a timely fashion. Furthermore, in conducting their outreach to parents, LEAs should ensure that notices are in a language and format that parents can understand. The Department believes that Section 1116(b)(6) of the ESEA and Section 200.36(b)(2) of the NPRM already require that, to the extent practicable, LEAs provide such notices to parents in a language they can understand.<sup>34</sup> MALDEF and NCLR believe that including language such as "to the extent practicable" creates a major loophole and allows LEAs to bypass ensuring language access.

Finally, MALDEF and NCLR express concern regarding a previous Department regulation which fails to define SES providers as federal funds recipients. If a service is identified as a federal funds recipient, it must abide by the protections set forth in the Civil Rights Act of 1964 which forbids discrimination based on race, color, or national origin. The Department or Congress must reverse the regulation, which essentially opens the door for SES providers to discriminate against the neediest students, thereby possibly hampering ELL and Latino participation in SES.

#### **Responsibilities Resulting from Identification for School Improvement**

Identifying schools in need of improvement is only the first step in making services available for those students who need them the most.

Proposed Section 200.39(c) requires LEAs to report publicly on the number of students eligible for and participating in PSC and SES, to list and provide the location of approved SES providers, and to list the schools available for PSC.<sup>35</sup>

While we support this regulation, we urged the Department to require LEAs and state education agencies (SEAs) to indicate on their list of approved SES providers those that are able to serve students with disabilities or ELL students to ensure that parents are in a better position to make the right choices for their children. The Department adopted our recommendation by adding Section 200.47(a)(3)(ii) in the final regulations. In addition, we recommended that the Department require LEAs to disaggregate data on student eligibility and participation in PSC and SES to encourage increased participation of Latinos and ELLs. The Department believes that by requiring LEAs to disaggregate these data, nearly all LEAs and SEAs would have to change their data collection processes, causing burden and high cost to states. Consequently, the Department declined to require LEAs to disaggregate their public school choice and supplemental educational services data.<sup>36</sup>

#### **Public School Choice**

Providing parents with notification that their school is in need of improvement is not enough to ensure that they exercise their rights under NCLB. Section 200.44(a)(2)(ii) of the NPRM requires LEAs to notify parents at least 14 days before the school year begins of their children's option to transfer to another school and the schools for which they are eligible.<sup>37</sup>

As noted above, MALDEF and NCLR recommended that, in addition to adopting the proposed regulations, the Department require LEAs to explain how their choice of when to provide parents with information on PSC is consistent with their ability to provide PSC. Specifically, if LEAs are not able to fulfill parents' requests to transfer children within a 14- or 21-day period, then notification should be

*provided to parents with sufficient time for LEAs to accommodate parents' requests for transfers.*

### **State Responsibilities for Supplemental Educational Services**

SES is critical to ensuring that students who need additional support receive it. The Department proposed three new regulations to bolster state monitoring of SES providers.<sup>38</sup> Seeking to ensure that SES providers are adequately prepared to serve ELLs, MALDEF and NCLR recommended adding at the end of proposed regulation 200.47(b)(3) the requirement that states consider the ability of SES providers to provide quality services to ELLs. In addition, we recommended adding at the end of proposed regulation 200.47(c) a requirement that states consider the effectiveness of SES providers in serving ELLs.

*The Department agreed with our reasoning behind the recommendations, but argued that the law already requires SEAs to ensure that "eligible LEP students receive appropriate [SES] and language assistance in the provision of these services."<sup>39</sup> The Department stated that this existing language requires SEAs to ensure that an adequate number of providers in the state have the capability to provide services to these students. The Department went on to explain that requiring all providers to serve students with the full range of second-language needs would result in the disqualification of otherwise effective providers from the program. As a result, the Department failed to adopt our recommendation. Nonetheless, ELLs live in every state, attend virtually every public school, and represent the group most eligible to receive these services, yet are participating at extremely low rates. Clearly, these students do not receive adequate information and/or services under current law. Therefore, NCLR and MALDEF maintain our belief that the existing language the Department cites as sufficient protection for these students is in fact insufficient, and further legislation and/or regulation is needed to ensure that supplemental educational services effectively serve ELLs.*

## **CONCLUSION**

The reauthorization of the Elementary and Secondary Education Act is the latest opportunity to fulfill the promise of the law. Prior to enactment of the No Child Left Behind Act of 2001, Hispanic and ELL students had received little attention from policymakers or the education community. The education system has denied ELLs access to quality teachers who are able to serve them well and has not provided parents of Latino and ELL students the tools or information they need to make important decisions affecting their children's education. As a result, these students have not received sufficient opportunities to meet high academic standards. NCLR and MALDEF believe that including Latinos and ELLs in NCLB's assessment and accountability system can reverse the negative conditions that affect student achievement and will ensure that they graduate from high school prepared for college and the workplace.

While the 110<sup>th</sup> Congress and the Bush administration took steps to improve NCLB, the law has not sufficiently benefited all students and educators. The 111<sup>th</sup> Congress and the Obama administration now have the opportunity to shape the lives of millions of Latino and ELL students by reauthorizing ESEA and maintaining NCLB's core elements of standards, assessments, and accountability, while remedying the law's shortcomings.

## ENDNOTES

<sup>1</sup> Richard Fry, *Latino Settlement in the New Century* (Washington, DC: Pew Hispanic Center, 2008).

<sup>2</sup> National Center for Education Statistics, *The Condition of Education 2008*. U.S. Department of Education. Washington, DC, 2008.

<sup>3</sup> Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students, *The Growing Numbers of Limited English Proficient Students: 1995/96-2005/06*. U.S. Department of Education. Washington, DC, 2007.

<sup>4</sup> *Education Week*, "Quality Counts 2009: Portrait of a Population" (Bethesda, MD: *Education Week*, 2009), 10.

<sup>5</sup> *The Nation's Report Card: Reading 2007* (Washington, DC: National Center for Education Statistics, U.S. Department of Education, 2007), <http://nces.ed.gov/nationsreportcard/pdf/main2007/2007496.pdf> (accessed October 2008), Table A-16.

<sup>6</sup> *Ibid.*, A-20.

<sup>7</sup> Kevin Carey, "The Real Value of Teachers," *Thinking K-16*, vol. 8, no. 1 (Washington, DC: The Education Trust, 2004).

<sup>8</sup> National Center for Education Statistics, *Condition of Education*.

<sup>9</sup> Ross Wiener and Eli Pristoop, "How States Shortchange the Districts that Need the Most Help," in *Funding Gaps 2006* (Washington, DC: The Education Trust, 2006): 5-9.

<sup>10</sup> United States House of Representatives Committee on Education and Labor, Subcommittee on Early Childhood, Elementary and Secondary Education, *Miller/McKeon Discussion Draft of ESEA Reauthorization*, 110<sup>th</sup> Cong., 2<sup>nd</sup> sess., 2007.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *NCLB Recess Until Reauthorization Act*, H.R. 6239, 110<sup>th</sup> Cong., 2<sup>nd</sup> sess., *Congressional Record* (June 11, 2008): H. 5327.

<sup>14</sup> Letter from Citizens' Commission on Civil Rights, Lawyers' Committee for Civil Rights Under Law, Mexican American Legal Defense and Educational Fund, NAACP, and National Council of La Raza, to Members of the 110<sup>th</sup> United States Congress, June 13, 2008.

<sup>15</sup> Michael Wotorson, letter to the editor, *The New York Times*, August 10, 2008.

<sup>16</sup> Letter from the Hispanic Education Coalition to The Honorable Joe Baca, Chairman, Congressional Hispanic Caucus, and The Honorable Rubén Hinojosa, Chairman, Congressional Hispanic Caucus Education Task Force, June 13, 2008.

<sup>17</sup> "Title I—Improving the Academic Achievement of the Disadvantaged; Proposed Rule," *Federal Register* 73, no. 79 (April 2008): 22,021.

<sup>18</sup> *Ibid.*, 22,022.

<sup>19</sup> *Ibid.*

<sup>20</sup> "Title I—Improving the Academic Achievement of the Disadvantaged; Final Rule," *Federal Register* 73, no. 210 (October 2008): 64,441.

<sup>21</sup> "Proposed Rule," 22,023.

<sup>22</sup> Richard Fry, *Hispanic Youth Dropping Out of U.S. Schools: Measuring the Challenge* (Washington, DC: Pew Hispanic Center, 2003), 8.

<sup>23</sup> "Proposed Rule," 22,024.

<sup>24</sup> *Ibid.*, 22,023.

<sup>25</sup> "Final Rule," 64,455.

<sup>26</sup> *Ibid.*, 64,457.

<sup>27</sup> *Ibid.*, 64,462.

<sup>28</sup> "Proposed Rule," 22,026.

<sup>29</sup> "Final Rule," 64,464.

<sup>30</sup> "Proposed Rule," 22,027.

<sup>31</sup> "Final Rule," 64,437.

<sup>32</sup> Institute of Education Sciences, *Final Report on the National Assessment of Title I: Summary of Key Findings*. U.S. Department of Education. Washington, DC, 2007, 92.

<sup>33</sup> *Ibid.*

<sup>34</sup> "Final Rule," 64,476.

<sup>35</sup> "Proposed Rule," 22,029.

<sup>36</sup> "Final Rule," 64,479.

<sup>37</sup> "Proposed Rule," 22,031.

<sup>38</sup> *Ibid.*, 22,031.

<sup>39</sup> "Final Rule," 64,488.

