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Analysis of Flexibility Waivers, Process and Impact on English Language Learners

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Abstract

This paper will focus on the measures of the flexibility waivers, the peer review process and determine whether there are implications that specifically affect minority communities, such as English Language Learners (ELL's). In recent years the rate of students who are learning a second language has increased and they are predominantly Spanish speakers. Schools were not prepared for the influx of ELL's in the last ten years and the support system lacked knowledge and appropriate resources to assist this population. The No Child Left Behind Act (NCLB), attempted to close the achievement gap and provide schools with the flexibility to establish their own programs and academic standards. However, in the last ten years, most states have not been able to reach the 100 percent goal of achievement. The reauthorization of the NCLB is overdue and the federal government stepped in to assist states with the staggering drop out rates. The flexibility waiver process is complex, but it is essential to investigate how a fragile population, like ELL's fare from the entire process. This paper provides recommendations of establishing a system of accountability so that students truly receive an equal opportunity to education in the United States. Valid and reliable assessments are a crucial part of assisting ELL's to be successful in the classroom. Although the flexibility waivers are intended to protect students, set a high

educational bar and provide flexibility to States from the requirements of NCLB, the flexibility waiver application is an in-depth document that needs to be fully evaluated. Making sure that states follow through with their proposals will be the most difficult task for the Department of Education.

Introduction

The condition of the education system in the United States is a serious conversation at the local, state and federal level. As this country advances in its diversity and globalization, it is clear that the U.S. education system must create the next generation workforce in order to compete in a global economy. Educational achievement, as shown by standardized test scores and graduation rates, is the lowest it has ever been, specifically for students of color. Hispanics¹ have the highest high school drop out rate in the country and according to the National Center for Education Statistics, 33 percent of Hispanics dropped out in 2009. Although current legislation like The No Child Left Behind Act (NCLB)² intends to address issues of disparity between groups of students and dissuade emphasis on standardized testing as the primary representative indicator of success, more must be done. Due to the economic crisis, schools across the country are experiencing more budget cuts and have been forced to let go of many of their teachers and other support staff. In

the process, programs designed for students learning a second language have lost vital resources such as textbooks that assist this population. Unfortunately, the schools and communities that are most affected are areas with high poverty rates. In 2010, according to the Pew Research Center, 6.1 million Hispanic children were living in poverty.³ The reality is that many of these students also attend districts that lack the funds to provide students with well-prepared teachers and resources that they need in order to be successful. A group that is regularly ignored is English Language Learners,⁴ a population of students made up of about 5.3 million students across the country.⁵ In order to move towards a more equitable education system, policies must be developed to help disadvantaged students rise and have an equal chance to success. There is a strong desperation to bring about effective change in schools to reduce the academic achievement gap that persists in Hispanic communities and across the country. The following paper addresses whether the flexibility waivers are indeed the best option to tackle this problem. Furthermore, it will explore the measures of the flexibility waivers, the peer review process and determine whether there are implications that specifically affect minority communities, such as English Language Learners.

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Background

*H.R. 1: No Child Left Behind Act of 2001 (NCLB)*⁶, is the new title that was given to the Elementary Secondary Education Act of 1965. The NCLB was enacted as a way to close the achievement gaps, specifically with disadvantaged children. However, ten years later, the bill is no longer applicable for the changing demographics of students across the nation. The provisions of the NCLB are no longer providing accountability that ensures that states are indeed assisting students of color. Since the introduction of the NCLB, opponents and supporters do not agree with the fundamental provisions that aim to accomplish a 100 percent proficiency goal in public schools across the nation. The bill was signed into law by President Bush in 2002 and requires all students in a school improve scores in standardized exams in reading and math, as demonstrated by an Adequate Yearly Progress (AYP). Failure to meet AYP requires the school to develop a two-year improvement plan and may result in the closure of the school if failure continues for 6 consecutive years. Supporters of NCLB believe that accountability and high standards are reinforced through the provisions of this act and that public education can improve as a whole, by rewarding schools completing high AYP goals. Endorsers also approve of the annual reports parents and the community receives in regard to the progress of each school. Major emphasis is also given to recognizing public school systems based on the achievement outcomes of their students, especially those from disadvantaged backgrounds. NCLB states that it will not discriminate based on wealth, disability, language spoken or ethnicity. However, opposition groups believe that NCLB does not increase accountability, but instead diverges into a singular approach. Instead of developing a holistic approach, most States develop inclusive

strategies that do not address the needs of all students. Furthermore, due to the strong emphasis on standardized testing in the NCLB, teachers are constrained from developing creative and stimulating lesson plans for their students. Opponents also believe there is the challenge of attempting to meet the requirements of NCLB with little funds and placing the blame in schools and districts for failure of student achievement.

As a result, on September 23, 2011, Secretary of Education Arne Duncan announced Flexibility Waiver packages.⁷ The flexibility waivers are intended to protect students, set a high educational bar and provide flexibility to states from the unrealistic requirements of NCLB. After months of relentless effort to re-authorize the ESEA, Congress was unable to come to some sort of agreement. According to a recent article in the *New York Times* "about 38,000 of the nation's 100,000 public schools have fallen short under the federal law in 2010."⁸ Since most states are not on track to meet the reading and math achievement goals established in NCLB, the only alternate approach at this moment are the flexibility waivers.

The flexibility waivers encourage states to concentrate on the lowest 5% underperforming schools in each district, thus obliging each State to be accountable for schools that serve predominantly minority students. For organizations like the Mexican American Legal Defense and Educational Fund (MALDEF), English Language Learners are the students who fall through the cracks due to the policies in place by NCLB and because States lack a strong implementation system. According to findings on behalf of the National Education Association, approximately 5.3 million students identified as English Language Learners are enrolled in public schools across the country. Although, ELL's make up 460 different languages, 73%

percent are Spanish-speakers⁹. An article published by the *Working Group on ELL Policy*, claims that the growing population of ELL's has made it difficult for States to keep up with practices that benefit these students. About "30% of the schools held accountable for adequate yearly progress (AYP) targets for the ELL subgroup under NCLB did not make the AYP for that subgroup [and] high-poverty schools was substantially higher."¹⁰ These numbers make this paper even more relevant to the possible issues with the flexibility waivers. Analyzing what the Flexibility Waiver is and how it can potentially affect English Language Learners in schools is critical in order to begin closing achievement gaps.

This paper will focus on the measures of the flexibility waivers, the peer review process and determine whether there are implications that specifically affect minority communities, such as Latino students. In the midst of attempting to design stronger accountability systems, the following paper also conducts an analysis of state applications that delineate common approaches. Finally, important recommendations are made toward the end of the paper that offers a legitimate way of holding states accountable for their proposals.

A Brief History of Authority and Waivers

Several groups attempted to challenge the decision of the flexibility waivers by claiming that the law does not give the Secretary of Education the power to exercise such right. However, Section 9401 grants the Secretary of Education the authority to waive "any statutory or regulatory requirement of the ESEA, specifically requested by SEA's¹¹, LEA's¹² Indian tribes or schools."¹³ It is not the first time that waivers are granted under Section 9401. In 2009 " 4 waivers were granted to allow states to implement growth models, 3

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waivers were granted to states to permit the implementation of a differentiated accountability model, waivers to 28 states to allow state educational agencies to approve schools or LEA's in need of improvement to be SES providers.¹⁴ Under current law, the Secretary of Education has the authority to grant under specific instances, such as: Academic Standards and assessments as stated in Section 1111(b)(1) and (3); accountability requirements, including proficiency timeline in Section 1111(b)(2); corrective action and restructuring requirements in Section 1116(b); public school choice requirements in Section 1116(b)(1)(E). The Secretary's ability to restrict interventions to the lowest performing 5 percent of schools is authorized as long as the Education Department develops consistent statutory purposes as set forth in Section 9401.¹⁵

Under Section 9401, the waiver cannot go over 4 years. However, if the waiver has improved student achievement, the Secretary has the option of extending it. Certain restrictions apply to the Secretary's authority to waive parts of the law and it includes any statutory related to monetary funds belonging to states, programs in place involving parental involvement, funds related to religious worship and certain ESEA Title I-A requirements. Under Section 9401, waivers proposed by the Department of Education must comply and should be able to: identify federal programs that could potentially be impinged on by the waiver, have a clear description of how the waiver requirements will improve current student academic achievement, unambiguous language about the population that will be served under the waiver that is requested and finally a clear description of "specific measurable education goals" that fall in line with the ESEA.¹⁶

Creating Flexibility for States: The Application

The application, submitted and approved by eleven states so far, is an extensive packet requesting specific and detailed information from states, which shows the Department of Education that each state will monitor the progress of the proposal submitted to the review board. Besides the reports, data and other information that is always to be made public, each state is responsible for compiling assessments that are reliable and valid. Though the intention of the flexibility waiver is to "fix" the broken system of the NCLB, there are a lot of variables difficult to control. The following sections of this paper, discusses barriers that potentially make the flexibility waiver just another extension of NCLB. Identifying effective ways, which can create change for Latino students in this country, as specified by the Flexibility waiver, is a bit unclear. However, there are some advantages to recognizing the gaps that exist within the current system that can initiate movement towards a stronger system of support for students living in low-income communities. On November 14th 2011, eleven states submitted official application packets with the intention of waiving the provisions of the NCLB. On February 9, ten states were approved for flexibility and on February 15, New Mexico's application was also accepted. The states that submitted their applications are Colorado, Florida, Georgia, Indiana, Kentucky, Massachusetts, Minnesota, New Jersey, New Mexico, Oklahoma and Tennessee.¹⁷

The provisions in the NCLB have helped bring light to issues of achievement gaps, and with some respect even increased accountability for high-need students. Regardless, states have failed¹⁸ to set high standards and have not been successful in investing enough resources into the teacher workforce. According to the Department of Education, both President Obama and

Secretary of Education Duncan are "acting because Congress is four years late in rewriting the law,"¹⁹ During an interview in March 2011, Secretary of Education Duncan suggested that if an alternative approach was not taken to fix the NCLB provisions, that "the percentage of schools that are not meeting AYP could rise from 37 percent up to 82 percent."

The flexibility waivers are intended to protect students, set a high educational bar and provide flexibility to states from the requirements of the NCLB. Secretary of Education Duncan and his team strongly believe that the flexibility waivers will support state and local districts to design qualitative education and improve student achievement. In the protection of student's section, they hope to show light on the students that are most at risk, such as individuals with disabilities, low-income backgrounds and English language learners. The flexibility waivers also encourage states to raise the standards and set a high bar when it comes to the expectations of both their students and teachers. The release of the waivers will also provide states with the immediate relief they need from the requirements of the NCLB. For the last ten years, state districts and local schools have pushed vigorously to raise academic achievement, but have struggled to do so. It is important to note that transparency will continue to be upheld as states are encouraged to be open and honest with parents and students about their academic performance.

What are the key components of the Flexibility Waiver Application?

The key²⁰ components of this application packet include three principles: 1) College- and career-ready expectations for all students; 2) State-developed differentiated recognition, accountability and support;

The submission of an application packet assures the Department of Education that states will comply and meet the goals as stated in principles one through three. It further assures that States will also adopt English Language Proficiency standards (ELP), as required by their state.

3) Supporting Effective Instruction and Leadership; all of these of course with a focus on lowest 5 percent of schools. In relation to the ELL population, Principle 1 aims to encourage states to adopt English Language Proficiency (ELP) Standards. At the same time, the goal is to administer high-quality ELP standards that will “measure student growth and reflect the academic language skills necessary to access college-and-career ready standards.”²¹ Principle 2 aims at setting new targets for performance that are ambitious, but at the same time achievable. The target of this principle’s is to ensure that Title I schools²² continue to receive systematic improvements in the interventions designed to close the achievement gaps. Most importantly, the Education Department wants to ensure that the needs of ELL’s are taken into account when focus schools are being identified. Principle 3 intends to evaluate teachers and principals on a more frequent basis in order to improve the quality of teaching. This principle will allow local systems to implement techniques that enhance multiple valid measures and it includes student growth.

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information by the demonstration of subgroup statistics.

Review Board and Evaluation Process

On November 17, the Department of Education, released the list of peer reviewers in charge of assessing the first round of applications.²⁴ The list is made up of individuals who have expertise in standards, accountability systems, interventions and support, interest of teachers, representation of principals, background with special education and English language learners. The representation of experts in this group guarantees that issues in education are well represented and biases are reduced. However, it is vital that every peer reviewer is given a clear guidance with guidelines that ensure that every state application receives the same objective inspection.

Analysis of State Applications

Georgia

In 2010, the state of Georgia identified 80,890 ELL’s of which 80% are Spanish speakers. The submission of a 246-page application packet, was approved on along with ten other states. Georgia is proposing to continue to address ELL’s and “has initiated an intense professional development campaign that is blanketing the entire state with educator training related to standards-based on instruction for English Learners.”²⁵ To meet the requirements under Principle 1 of college-readiness, the state hopes to bridge career awareness with STEM programs in both middle school and high schools. At the same time, there is an attempt to increase the number of minority students who are entering the fields of math and science. This will ensure that students of color have an equal oppor-

tunity to rigorous courses and be ready to compete in the global workforce. Georgia also identified additional Title I schools that were performing poorly under ESEA. By identifying these schools, the State will be able to track their progress accordingly.

New Mexico

New Mexico identified 53,970 ELL’s of which 82% are Spanish speakers in their application.²⁶ New Mexico, is one of the eleven states that was approved to receive a waiver. One of the most significant parts of their application packet was their focus on improving teacher curriculum and instruction with specialized training to support the needs of English Language Learners. Their plan for Principle 1, reassures the department of education that for several years the state has been conducting assessments for ELL’s named ACCESS and ensures that it monitors the rate of English acquisition of students. Regardless of this, they also adopted the Common Core State Standards (CCSS)²⁷ and they are currently conducting a study to create a detailed alignment between states and the CCSS.

Major concerns with applications

The extensive applications submitted by both Georgia and New Mexico are impressive, however, quite concerning. Although both states describe their current measuring techniques, assessment strategies and programs in place, they have both failed to recognize that many of their schools are not meeting AYP. For example, New Mexico expresses having programs in place, they fail to provide exact measuring techniques as to how they are identifying ELL’s and then placing them into full-English courses. Both of these states have not been able to identify the gaps that exist. If New Mexico has an assessment program in place for ELL’s, why is it that

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the achievement rates for Hispanics are significantly low? Some argue that it lies in the make-up of validity and reliability measures used to assess how well ELL programs work. Regardless, these are simple questions that their application proposal fails to address.

For several years, organizations and advocates of English Language Learners have recommended in the re-authorization of the ESEA to hold schools and districts accountable for the achievement of this population. Organizations such as MALDEF and National Council of la Raza (NCLR), believe that the decision to access of equal education as ensured by *Brown v. Board of Education*, is still not a reality in the U.S. The major concern they have is that schools are not being held accountable for the high dropout rates of sub-groups, especially Hispanic students. Monitoring the progress of these groups requires resources and time, but the districts must be ready to close these disparities.

When the Department of Education made announcements for flexibility waivers, critics, including civil rights organizations, became alarmed. The fear was that instead of providing flexibility and encouraging innovation, it was simply temporary remedy to the issue and at the same time the re-authorization of ESEA would lose its momentum. On September 15, 2011, The Leadership Conference on Civil Rights and Human Rights submitted a letter to Secretary of Education Duncan where they expressed that “the best way to update ESEA is through a full reauthorization of the law. Providing waivers to states for selected aspects of the law runs the risk of creating confusion and exacerbating inequity among students, schools and school districts.”²⁸ Recently, some of these organizations accepted that the re-authorization of the ESEA as the only alternative to move toward fixing the bro-

ken system. However, other opponents claim that the flexibility waivers are simply a “cop-out” strategy. Additional concerns include the time that has been given to the states to compile a comprehensive application proposal is quite concerning. However, President Obama’s administration has expressed several times that the grave state of this country’s education can no longer wait and an alternative approach to the NCLB is detrimental. Necessary questions must be kept in mind when determining whether or not the flexibility waivers can potentially assist or continue to harm Latino students. Although the intention of the flexibility waiver is good, how does the Department of Education intend to hold the states accountable after they have received the breathing room they requested? The reality is that the only consequence at the moment is the withholding of funds for states that continue to fail in their AYP. Are these consequences enough as a motivating factor for States?

MALDEF believes that educational standards need to have more holistic views, so that subgroups like English Language Learners are not fully ignored. In this case, the flexibility waiver promises to address this issue, but MALDEF questions whether enough research has been done to determine the true reasons for drop out rates. There is a lack of data that serves as proof that Latino students are indeed dropping out early. After briefly being opposed to the flexibility waivers, the organization now believes that something can be learned from the waiver process, but they are unsure whether this simply means more red tape. In comparison to MALDEF, NCLR has always been a strong proponent of NCLB, arguing that all students must be held to the same standards and that creating separate standards simply reduces benchmarks. Although the organization’s view is agnostic, three

concerns have been expressed by one of its members. The major concern with the flexibility waiver is that it is too strict and once the application has been accepted, the state is obliged to follow that specific law for a couple of years. In his opinion, the federal law is experimenting with “colored kids” and there is insufficient information to support that these waivers actually help the state of education for this population. At the same time there is a concern that the focus on the lowest five percent of schools, creates division and harms the public education system of this country.

Recommendations

It is clear that there are plenty of concerns involved with the Flexibility Waivers. The states that have historically failed to meet AYP and “have made least effort to improve the quality of education and close achievement gaps,” are now the primary states asking for flexibility.²⁹ How do English Language Learners fare from the implementation of the flexibility waiver? Although the intention of these applications is to provide flexibility to States from the provisions of NCLB, there are many areas of concern.

1. Although the Department of Education believes that the waivers encourage states to create more innovative strategies to increase academic achievement, submitted state applications demonstrate a gap of accountability.
2. The peer review group must publicly state how they will approve or reject an application and what are key factors that will demonstrate a valid and reliable measurement for accountability. Somehow, the peer review group must remain transparent at all times and after each process is over, they should hold hearings about some of the most common barriers they encountered during

the review process. This will allow the public to be engaged during the process of review.

3. As more states adopt the Common Core State Standards³⁰ the States need to identify how they are going to apply these measures into their schools, especially how they will monitor the progress with schools who have high ELL populations.
4. Finally, there is not enough information to determine what are the best strategies when working with ELL's and overall Hispanic students. Resources and time need to be invested into analyzing what are some of best teaching strategies and classroom curriculum that engages these students. The federal government must be held accountable for assisting the States in the implementation of their proposals.

Accomplishing success with all four principles and emphasizing more accountability at the local level, requires increased funding and resources. It is probable that the implementation of these waivers is a long-term process for up to four years. Equally, the waivers themselves might be an additional layer to the bureaucracy and a regression from the current ESEA. However, because Congress has yet to re-authorize the ESEA, the flexibility waiver is the most hopeful way to move towards equal education for all. States are claiming to address the needs of these students and reduce the disparity in the achievement gaps. We must now hold states accountable for their proposals and trust that they truly act on the propositions they developed. The current broken system has already created enough dropout factories, most of the victims students who are learning English as their second language.

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Endnotes

- 1 Hispanic and Latino will be used interchangeably throughout the paper. For more information about these terms refer to http://www.elboricua.com/latino_hispanic.html
- 2 National Center for Education Statistics, Institute of Education Science. (2010) *The Condition of Education*. Appendix <http://www2.ed.gov/policy/elsec/leg/esea02/index.html>
- 3 <http://www.pewhispanic.org/2011/09/28/ii-poverty-patterns-among-hispanic-children/>
- 4 This paper will refer to students who are learning a second language as English Language Learners. It is important to note that the Department of Education refers to these students as English Learners.
- 5 National Education Association, <http://www.nea.org/home/13598.htm>
- 6 http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h1enr.txt.pdf
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- 9 Migration Policy Institute Analysis of the 2009 American Community Survey
- 10 Working Group on ELL Policy: <http://www.schoolsmovingup.net/cs/smu/download/rs/26041/Q&A%20ELL%20Policy%20Working%20Group%2001%2014%2011.pdf>
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- 20 U.S Department of Education. (2011). *ESEA Flexibility*. Retrieved from <http://www.edu.gov/esea/flexibility>
- 21 <http://www.ed.gov/esea/flexibility>
- 22 Title I, ensures that schools with high numbers of students from low-income backgrounds, receive additional funds to ensure that disadvantaged students have an equal opportunity to an education.
- 23 WIDA: <http://www.wida.us/standards/elp.aspx>
- 24 Peer review list: <http://www.ed.gov/esea/flexibility>
- 25 Georgia Application: <http://www2.ed.gov/policy/eseaflex/ga.pdf>
- 26 New Mexico application: <http://www2.ed.gov/policy/eseaflex/nm.pdf>
- 27 Common Core Standards: <http://www.corestandards.org/>
- 28 Letter to Secretary Duncan: <http://www.civilrights.org/monitor/winter-2012/getting-to-yes-on-esea.html>
- 29 Democrats for Education: http://www.dfer.org/2011/09/democrats_for_e_4.php
- 30 Common Core Standards: <http://www.corestandards.org/>