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Every English Learner Succeeds: The Need for Uniform Entry and Exit Requirements

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Every English Learner Succeeds

THE NEED FOR UNIFORM ENTRY AND EXIT REQUIREMENTS

INTRODUCTION

English Learners are at risk for “school failure, delayed graduation, and negative academic self-concepts.”¹ This is alarming, especially when the English Learners’ (ELs) student population is growing rapidly in the United States.² In the last decade the EL population grew by 60 percent, compared with the 7 percent growth of the general student population.³ Estimates show that by 2020, nearly “half of all public school students will have non-English speaking backgrounds.”⁴ Thus, it is imperative that educational policies provide high quality education for ELs and integrative programs to ensure that ELs can fully participate in our educational system.

The federal government addressed the needs of students with limited English language abilities for the first time in the Bilingual Education Act of 1968,⁵ which was incorporated in the Elementary and Secondary Education Act.⁶ The Bilingual

¹ English Learner Tool Kit for State and Local Education Agencies: Chapter 5 Tools and Resources for Creating an Inclusive Environment for and Avoiding the Unnecessary Segregation of English Learners, U.S. DEPT. OF EDUC. ch. 5, 2 (2007).

² It should be noted that the term used to refer to English Language Learners has been continuously changing. For example, in 1968 they were referred to as “students with limited English speaking ability,” then the term broadened to “limited English proficient” in order to be more inclusive. Gloria Stewner-Manzanares, *The Bilingual Education Act: Twenty Years Later*, 6 NEW FOCUS, OCCASIONAL PAPERS IN BILINGUAL EDUC. 1 (1988). Other terms that have been used are “non-native English speakers” and “English learners.” The sources cited in this note do not use the same term, but all the sources refer to the same population of students. To avoid confusion, this note will address these students as “English Learners” or “ELs.” *See id.*; *see also* GRANTMAKERS FOR EDUC., EDUCATING ENGLISH LANGUAGE LEARNERS: GRANTMAKING STRATEGIES FOR CLOSING AMERICA’S OTHER ACHIEVEMENT GAP 4 (2013), https://edfund.org/sites/default/files/Educating%20English%20Language%20Learners_April%202013.pdf [<https://perma.cc/CRS9-QRDE>]; *English-Language Learner*, GLOSSARY OF EDUC.

³ GRANTMAKERS FOR EDUC., *supra* note 2, at 4.

⁴ *Id.*

⁵ Elementary and Secondary Education Amendments of 1967, Pub. L. No. 90-247, 81 Stat. 783 (codified with some difference in language at 20 U.S.C. § 6301 (2011)).

⁶ Elementary and Secondary Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified at 20 U.S.C. § 6301 (2011)); Stewner-Manzanares, *supra* note 2, at 1.

Education Act provided grants directly to school districts for educational programs, educator training, development of materials, and parental involvement.⁷ The act sought to ameliorate the underachievement of non-English speaking students and improve their English proficiency.⁸ State participation under the act, however, was voluntary and the act did not provide states with specific guidelines to implement these programs.⁹

The enactment of the No Child Left Behind Act (the NCLB) in 2001 served as the most significant shift in the role of federal government in education since 1965, and was a major revision to the Elementary and Secondary Education Act.¹⁰ The NCLB expanded testing requirements and aimed to hold schools responsible for students' academic progress.¹¹ ELs were particularly affected by the funding's contingency on academic achievement.¹² Many states inaccurately reported ELs' progress to appear as if the schools were achieving the proficiency required for federal funding.¹³ Ultimately, critics and educational experts criticized the NCLB for its rigidity, narrow curriculum focused on test preparation, and unrealistic proficiency expectations.¹⁴ By the end of 2006, the NCLB had lost the support of the former Assistant Secretary of Education, Diana Ravitch, who was an initial advocate for its enactment.¹⁵

⁷ Stewner-Manzanares, *supra* note 2, at 2.

⁸ Ester de Jong, *Return to Bilingual Education: Bilingual Education Act, ¡COLORÍN COLORADO!*, <http://www.colorincolorado.org/article/return-bilingual-education> [https://perma.cc/L4ZJ-SD9Q].

⁹ Stewner-Manzanares, *supra* note 2, at 1.

¹⁰ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. § 6301 (2002)). The NCLB created strict timetables and mandatory accountability from the states. Patrick McGuinn, *The National Schoolmarm: No Child Left Behind and the New Educational Federalism*, 35 PUBLIUS, 41, 43, 45 (2005).

¹¹ Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WK. (Apr. 10, 2015), <http://www.edweek.org/ew/section/multimedia/no-child-left-behind-overview-definition-summary.html> [https://perma.cc/2KKK-HKUD].

¹² DIANA RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 157 (2010).

¹³ *Id.* For example, school officials increased the number of students in need of accommodations. *Id.*

¹⁴ See Betheny Gross & Paul T. Hill, *The State Role in K-12 Education: From Issuing Mandates to Experimentation*, 10 HARV. L. & POL'Y REV. 299, 310 (2016); Evan Stephenson, *Evading The No Child Left Behind Act: State Strategies and Federal Complicity*, 2006 BYU EDUC. & L.J. 157, 176 (2006).

¹⁵ RAVITCH, *supra* note 12, at 99. In 2005, Ravitch thanked President Bush for the enactment of the NCLB. However, after reviewing the evidence, she changed her position and opposed the NCLB. See Steve Inskeep, *Former 'No Child Left Behind' Advocate Turns Critic*, NPR (Mar. 2, 2010, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=124209100> [https://perma.cc/V74F-3KFR]; see also Adrienne Anderson, *Education Reform Policies: How The Canadian Government's Role In Education Can Influence The United States' Education System*, 24 MICH. ST. J. INT'L L. REV. 546, 554 (2016).

In December 2015, President Obama signed the Every Student Succeeds Act (the ESSA) into law, and replaced the NCLB to address the growing need for education reform,¹⁶ shifting power back to the states. Under the act, states are able to design their own measurements for student performance and develop uniform accountability systems.¹⁷ Most importantly, the ESSA requires states to implement “standardized statewide entrance and exit procedures” to identify ELs, and to include them in the general student population reports.¹⁸ While the ESSA provides states the ability to address the specific needs of ELs, states may also take advantage of the act’s delegation of power to create accountability systems reflecting their school systems’ strengths, instead of their struggles, ignoring academic gaps.¹⁹ A balance of power between the states and the federal government will provide practical educational policies and accountability procedures for ELs.²⁰

While this shift in power back to the states is welcomed, federal involvement is still necessary to properly address the needs of ELs. In particular, it is vital that the federal government set uniform entry and exit requirements for ELs to aid schools in determining when a student reaches proficiency and can attend mainstream classes.²¹ Further, federal involvement is required because, by the very nature of ELs’ language skills, they are segregated and thus prevented from “gain[ing] access to higher level college preparation or

¹⁶ Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (codified as amended at 20 U.S.C. § 6301 (2015)); *Every Student Succeeds Act (ESSA)*, U.S. DEPT OF EDUC., <http://www.ed.gov/essa> [<https://perma.cc/WR8V-3PDN>]; see Madison Schoffner, *Education Reform from the Two-Sided Congressional Coin*, 45 J. OF L. & EDUC. 269 (2016). The ESSA will be implemented during the 2017–2018 school year. *ESSA Implementation Timeline*, EVERY STUDENT SUCCEEDS ACT (ESSA): ESSA IMPLEMENTATION RESOURCES FOR EDUCATORS (n.d.), http://www.ascd.org/ASCD/pdf/siteASCD/policy/ESSA_Resources_Timeline.pdf [<https://perma.cc/3EB6-TLER>].

¹⁷ *Every Student Succeeds Act (ESSA)*, *supra* note 16.

¹⁸ COUNCIL OF CHIEF ST. SCH. OFFICERS, MAJOR PROVISION OF EVERY STUDENT SUCCEEDS ACT (ESSA) RELATED TO THE EDUCATION OF ENGLISH LEARNERS (2016), <https://www.ccsso.org/sites/default/files/2017-11/ccsso%20resource%20on%20els%20and%20essa.pdf> [<https://perma.cc/P3EJ-A5FF>].

¹⁹ For example, states may “dumb[] down” test standards and scoring to bluff their academic achievements. See Inskeep, *supra* note 15.

²⁰ See Megan Hopkins et al., *Implementing Responsive Federal Policy for Bi/Multilingual Students*, 3 EDUC. L. & POL’Y REV. 31, 31 (2016); see also GRANTMAKERS FOR EDUC., *supra* note 2, at 4.

²¹ See, e.g., *English Language Learners (ELLs) Screening, Identification, Placement, Review, and Exit Criteria*, COMMISSIONER’S REGULATION PART 154, 15 (July 1, 2015), <http://www.nysed.gov/common/nysed/files/bilingual/ellidchartguidance7.1.15.pdf> [<https://perma.cc/MH8B-NGMT>] (New York uses the NYSESLAT to determine English proficiency status).

advanced placement courses in math or science.”²² Federal involvement and uniform entry and exit requirements will provide states the necessary framework to create educational programs and assess the academic achievements of ELs while integrating them into the educational system.

This note proposes that the federal government work with higher education institutions as well as the states, to create educational benchmarks for states. This would allow states to retain their freedom, while holding them accountable for their individualized learning problems and creating national uniformity for academic standards in relation to ELs. Part I examines in greater detail the goals, problems, and criticisms of the No Child Left Behind Act. Part II examines the Every Student Succeeds Act and its criticisms regarding the instruction of ELs. Part II also highlights the importance of integration of ELs into regular classrooms. Lastly, Part III provides a solution: the federal government and the states should collaborate to create uniform entry and exit requirements for ELs.

I. ENGLISH LEARNERS LEFT BEHIND

To close the achievement gap of all students in public schools, the NCLB aimed to provide “accountability, flexibility, and choice, so that no child [would be] left behind.”²³ Under the act, state funding depended on meeting academic and achievement standards;²⁴ as a result, public school curricula focused on “teaching to the test.”²⁵ Criticism arose because states were able to create their own measuring standards, grade their progress, and claim proficiency where none existed.²⁶ There were dire consequences for failure to meet the

²² Christian Faltis & Beatriz Arias, *Coming Out of the ESL Ghetto: Promising Practices for Latino Immigrant Students and English Learners in Hypersegregated Secondary Schools*, 6 J. OF BORDER EDUC. 19, 21 (2007).

²³ No Child Left Behind Act of 2001, Pub. L. No., 115 Stat. at 1425 (codified as amended 26 U.S.C. § 6301 (2002)).

²⁴ No Child Left Behind Act § 1111, 115 Stat. at 1457 (codified as amended 26 U.S.C. § 6311 (2002)). Another goal of the NCLB was “that all students in every school must be proficient in reading and mathematics by 2014.” RAVITCH, *supra* note 12, at 102. However, neither a region nor a state reached the goal and, in 2008, 35.6 percent of public schools did not meet the Annual Yearly Progress. *Id.* at 102–04.

²⁵ “[T]eaching to the test” eventually became one of the biggest drawbacks of the NCLB. Anderson, *supra* note 15, at 554 (quoting Lisa Guisbond, Monty Neill & Bob Shaeffer, *NCLB’s Lost Decade for Educational Progress: What Can We Learn from this Policy Failure?* FAIR TEST, 1, 6, 16 (Jan. 2012)); *see also* RAVITCH, *supra* note 12, at 107–08 (“Test scores became an obsession. Many school districts invested heavily in test-preparation materials and activities.”).

²⁶ RAVITCH, *supra* note 12, at 101; There were wide discrepancies in regard to academic achievement between federal and state findings. Sam Dillon, *Students Ace State Tests, but Earn D’s From U.S.*, N.Y. TIMES (Nov. 26, 2005), <http://>

high standards imposed by the act, which had the practical effect of the states ignoring the existing gaps in educational progress. While the NCLB brought attention to the educational needs of ELs, its requirements and policies neither improved the education ELs received, nor closed academic gaps.

A. NCLB: Background and Implementation

The role of the federal government in education expanded significantly during the time of the NCLB.²⁷ While the act provided a framework for states to achieve proficiency goals, it gave limited flexibility to the states to set their own educational goals.²⁸ The federal government mandated that states administer tests annually in math, science, and English in order to receive federal funding.²⁹ The NCLB Title III section, “English Language Acquisition, Language Enhancement, and Academic Achievement Act,” particularly addressed ELs.³⁰ Title III’s goals were to ensure that students with limited English proficiency attained English proficiency, achieved high levels in core academic subjects, and met the same academic content and achievement standards that all students were expected to meet.³¹

The NCLB’s definition of “Limited English Proficient” student failed to provide clear guidance to states on how to identify students that should or should not be classified as such.³² The act

www.nytimes.com/2005/11/26/education/students-ace-state-tests-but-earn-ds-from-us.html [<https://perma.cc/ZP2H-7B43>].

²⁷ Elizabeth DeBray & Ann Elizabeth Blankenship, *Foreword: The Aftermath of ESSA’s Devolution of Power to States: A Federal Role in Incentivizing Equity and Building State and Local Capacity*, 3 EDUC. L. & POL’Y REV. ix, x (2016); see also Allie Bidwell, *From Testing to Big Brother: ‘No Child’ Debate Moves to Federal Oversight*, U.S. NEWS & WORLD REPORT (Feb. 3, 2015), <http://www.usnews.com/news/articles/2015/02/03/no-child-left-behind-debate-moves-from-testing-to-federal-oversight> [<https://perma.cc/WWB3-CNX6>].

²⁸ Understood Team, *The Difference Between the Every Student Succeeds Act and No Child Left Behind*, UNDERSTOOD, <https://www.understood.org/en/school-learning/your-childs-rights/basics-about-childs-rights/the-difference-between-the-every-student-succeeds-act-and-no-child-left-behind> [<https://perma.cc/3NY2-FPG2>].

²⁹ Anderson, *supra* note 15, at 552.

³⁰ No Child Left Behind Act § 3101, 115 Stat. at 1690 (codified as amended 26 U.S.C. § 6811 (2002)).

³¹ Other goals include: “to develop high-quality language instruction educational programs designed to assist . . . teaching limited English proficient children,” to assist local and state agencies “to prepare limited English proficient children,” to assist state and local agencies and schools “to build their capacity to establish, implement, and sustain language instruction educational programs,” “to promote parental and community participation in language instruction,” and to hold State and local agencies, and schools “accountable for increases in English proficiency and core academic content knowledge.” *Id.* § 3102; see also Wayne E. Wright, *The Impact of No Child Left Behind Act on ELL Education*, ¡COLORÍN COLORADO!, <http://www.colorincolorado.org/article/no-child-left-behind-and-ells> [<https://perma.cc/V8LA-ZF5Y>].

³² *Id.*

defined a “Limited English Proficient” student as an individual between ages three and twenty-one enrolled in elementary or secondary school, not born in the United States or whose native language is not English, or has difficulty speaking, reading, and writing in the English language.³³ The identification procedures varied across states, even varying between school districts within a state.³⁴ For example, some states used specific test scores to set exit criteria for students, while others used “soft factors,” such as teacher recommendations and parental consultation.³⁵

The NCLB’s accountability standards for Limited English Proficient students was unsuccessful. States delayed the application of accountability standards and failed to fully implement them, rendering them ineffective.³⁶ Additionally, the NCLB required states to report the progress of Limited English Proficient students separately from those of the general student population.³⁷ This separate reporting permitted the general student population’s performance to remain unaffected by the performance of Limited English Proficient students: even if there was low academic performance by ELs, states could attribute it to the students’ language skills and not the quality of academic instruction.³⁸

³³ No Child Left Behind Act § 9101(25), 115 Stat. at 1961 (codified as amended 26 U.S.C. § 7801 (2002)).

³⁴ For example, Montana “left both identification and redesignation determinations of ELs to districts, guided by state-developed criteria.” DEPT OF EDUC., TITLE III POLICY: STATE OF THE STATES, ESEA EVALUATION BRIEF: THE ENGLISH LANGUAGE ACQUISITION, LANGUAGE ENHANCEMENT, AND ACADEMIC ACHIEVEMENT ACT 7 (2010), <https://www2.ed.gov/rschstat/eval/title-iii/state-of-states.pdf> [<https://perma.cc/89WT-6LFP>].

³⁵ Some states required a specific score or proficiency level on their English Proficiency assessment, and other states took into account “teacher evaluation and recommendation, parental consultation, and student grades.” *Id.*

³⁶ Accountability for English Learners was based on the progress of learning English relative to the state’s annual measurable achievement objective. The progress report included an annual increase in the number or percentage of students in “making progress in learning English,” “attaining English proficiency,” and “making adequate yearly progress.” If school districts failed to improve and not meet the annual measurable achievement objectives, the state was required to develop a district improvement plan or to modify its instruction program. *Id.* at 12.

³⁷ No Child Left Behind Act, § 1111, 115 Stat. at 1446–47 (codified as amended 26 U.S.C. § 6311 (2002)); see also Klein, *supra* note 11.

³⁸ See Guidelines for the Assessment of English Language Learners, ETS 2–3 (2009); see Scott Sargrad, *Hope for English-Language Learners*, U.S. NEWS & WORLD REPORT (Jan. 13, 2016, 4:30 PM), <http://www.usnews.com/opinion/knowledge-bank/articles/2016-01-13/every-student-succeeds-act-brings-new-hope-for-english-language-learners> [<https://perma.cc/N52N-TEH5>] (The NCLB created separate accountability systems for English Language Learners which sent “the message that helping these students learn English was a secondary concern.”).

B. *Criticisms of the No Child Left Behind Act*

States had difficulty achieving the uniform standards set by the NCLB.³⁹ The NCLB required states to align English language proficiency standards with the standards of core academic areas to ensure that ELs were equipped with language skills to progress in those academic areas.⁴⁰ States were unable to meet this requirement, since they lacked experience in creating English language proficiency standards and only fourteen states had some form of standards in place at the time.⁴¹ To alleviate these difficulties, the Department of Education extended the deadline and prolonged the states implementation of English language proficiency standards.⁴²

The NCLB failed to provide accurate accountability reports in regard to the Limited English Proficiency subgroup.⁴³ The NCLB's strict testing requirements and accountability standards were incapable of measuring the performance of ELs in the same manner they could measure the performance in areas like math or science.⁴⁴ Under the NCLB, Limited English Proficient students were measured based on their level of English proficiency, and were accounted and reported as a separate subgroup from the rest of the students.⁴⁵ Over time, depending on the state, their progress was accounted for along with the general student body and no longer as part of the subgroup.⁴⁶ This reporting process was described as a "revolving door:" while proficient students left the subgroup, students with low English skills entered the group.⁴⁷ This process prevented states from accurately representing the performance of Limited English Proficient students, and measuring the success of their educational programs.⁴⁸

The NCLB was ineffective and impractical,⁴⁹ and by 2012 there was a general consensus that the NCLB had failed.⁵⁰

³⁹ See DEP'T OF EDUC., *supra* note 34, at 8.

⁴⁰ Core academic areas are reading, science, and math. *Id.*

⁴¹ *Id.*

⁴² *Id.* By 2006–2007 all the states implemented the standards. *Id.*

⁴³ See *id.* at 6.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 7.

⁴⁸ The subgroup progress was "systematically underestimated because the more advanced students [were] no longer included in the determinations." *Id.*

⁴⁹ In fact, states used numerous tools to get around the strict requirements of the NCLB and meet its goals. For example, some states obtained waivers to create their own academic standards and interventions for low-performing schools. See Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 990 (2016); States were also permitted to use devices "to avoid the Act's chief aim of

Data gathered since the act's enactment showed that it severely damaged educational quality and equity, affecting mostly the poor.⁵¹ Further evidence demonstrated that the NCLB failed to increase academic performance or narrow achievement gaps.⁵² Scholars attributed the problems of the NCLB to its impractical goal of achieving 100 percent academic proficiency in an unrealistic time frame.⁵³ Limited English Proficient students were significantly affected by the high-stakes testing, and many were not able to pass high school tests to graduate, despite completing all other graduation requirements.⁵⁴ The NCLB period became known as the "lost decade for U.S. schools,"⁵⁵ and at the end, education reform was imminent.

Despite criticism, Title III of the NCLB brought the education and academic achievement of Limited English Proficient students to the forefront, and attempted to hold states accountable for improving the academic achievement of Limited English Proficient students.⁵⁶ The mere inclusion of Limited English Proficient students in the states' reports created awareness of the struggles the population faced, and identified areas which necessitated further work.⁵⁷ Still, the NCLB strategies failed to narrow the academic achievement gap between Limited English Proficient and English Proficient students.⁵⁸

II. EVERY ENGLISH LEARNER SUCCEEDS

In 2015, despite political polarization in Congress, the House and the Senate collaborated to create a new federal

100 percent proficiency" by calculating their proficiency goals using confidence intervals, which allowed states to be compliant with the act "when they reach state proficiency goals *minus the margin of error*." Stephenson, *supra* note 14, at 159.

⁵⁰ See generally Guisbond, Neill & Shaeffer, *supra* note 25, at 1.

⁵¹ FairTest, an active organization that analyzes educational practices and advocates for school improvement, created a report that examined evidence of the failures of NCLB and proposed several fundamental characteristics for a future reform. *Id.* at 1, 17; FairTest, About (Nov. 24, 2017), <https://www.fairtest.org/about> [<https://perma.cc/UGL6-7BCS>].

⁵² Guisbond, Neill & Shaeffer, *supra* note 25, at 1; Sharon L. Nichols & David C. Berliner, *Testing the Joy Out of Learning*, EDUCATIONAL LEADERSHIP, Vol. 65 N.6, 14 (Mar. 2008), <http://www.ascd.org/publications/educational-leadership/mar08/vol65/num06/Testing-the-Joy-Out-of-Learning.aspx> [<https://perma.cc/LCT3-BUJJ>].

⁵³ Stephenson, *supra* note 14, at 176.

⁵⁴ English Language learners faced chronic failure which cause many "otherwise highly engaged students to give up, drop out, or become increasingly cynical about schooling." Nichols & Berliner, *supra* note 52.

⁵⁵ Guisbond, Neill & Shaeffer, *supra* note 25, at 1.

⁵⁶ Gross & Hill, *supra* note 14, at 313; see also DEPT OF EDUC., *supra* note 34, at 15; Sargrad, *supra* note 38.

⁵⁷ These identifications were not detailed enough to guide states to take specific steps but were enough to guide states to a general area in need.

⁵⁸ DeBray & Blankenship, *supra* note 27, at x-xi.

education plan that satisfied both conservatives and liberals.⁵⁹ The Every Student Succeeds Act⁶⁰ was Congress's response to the growing diverse student population, the lack of performance by ELs, and the academic gaps left by the NCLB.⁶¹ In comparison to the NCLB, the ESSA provides states with more autonomy in their education policies and permits states to address the diverse needs of ELs.⁶² The ESSA also holds the states accountable for the progress of ELs along with the rest of the student population.⁶³ While it is valuable that the states have more flexibility, there is further need for the involvement of the federal government to set uniform standards for ELs to successfully integrate them in the educational system.

A. *ESSA: Comparison to NCLB*

Generally, the ESSA tries to rectify the failures of the NCLB, recognizes the importance of education reform,⁶⁴ and responds to the needs of English language learners. The ESSA refers to English language learners as “English Learners” as opposed to the “Limited English Proficient” moniker used in the NCLB.⁶⁵ While the definition of the term is almost identical, the new term focuses on the potential of the students, as opposed to their weakness.⁶⁶ The ESSA narrows its goals to ensure that ELs attain English proficiency as well as adequate English instruction.⁶⁷ It also encompasses a wider range of ELs by

⁵⁹ *Id.* at xi–xiii.

⁶⁰ Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (codified as amended at 20 U.S.C. § 6301 (2015)).

⁶¹ Sargrad, *supra* note 38.

⁶² Schoffner, *supra* note 16, at 273; Alyson Klein, *The Every Student Succeeds Act: An ESSA Overview*, EDUC. WK. (Mar. 31, 2016), <http://www.edweek.org/ew/issues/every-student-succeeds-act/> [<https://perma.cc/T25W-ARNM>] [hereinafter *ESSA Overview*]; DEP'T OF EDUC., NON-REGULATORY GUIDANCE: ENGLISH LEARNERS AND TITLE III OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (ESEA), AS AMENDED BY THE EVERY STUDENT SUCCEEDS ACT (ESSA) 64, (2016) [hereinafter *NON-REGULATORY GUIDANCE*].

⁶³ Sargrad, *supra* note 38.

⁶⁴ Schoffner, *supra* note 16, at 272–74.

⁶⁵ *Compare* Every Student Succeeds Act of 2015, § 3004, 129 Stat. at 1965, with No Child Left Behind Act of 2001, § 9101, 115 Stat. at 1961.

⁶⁶ No Child Left Behind Act of 2001, § 9101, 115 Stat. at 1961. An “English Learner” is defined as an “individual who, among other things, has difficulties in speaking, reading, writing, or understanding the English language that may be sufficient to deny the individual the ability to *meet challenging state academic standards*.” COUNCIL OF CHIEF ST. SCH. OFFICERS, *supra* note 18, at 13; *see also* ESSA's impact on English Language Learners: What we know so far, ELLEVATION (Oct. 11, 2016), <https://ellevationeducation.com/blog/essas-impact-english-language-learners-what-we-know-so-far> [<https://perma.cc/CZ8U-Q2SB>].

⁶⁷ Some of its goals are to assist English Learners meet the same academic challenges that all students are expected to meet, assist teachers and school leaders in implementing effective language instruction, and assist teachers with providing effective instructional programs to prepare students to enter all-English classrooms, to

including preschool and post-high school education in its legislation.⁶⁸ These changes reflect the long overdue responsiveness to the education of ELs.

Under the ESSA, the role of the federal government in education diminishes while the states gain power and flexibility over curriculum framework, assessments, and standards.⁶⁹ For example, the Department of Education “cannot impose on states teacher evaluation systems, academic standards, or remedies for poorly performing schools.”⁷⁰ In addition, the ESSA establishes broader categories for funding and fewer restrictions to allocate funds.⁷¹ The ESSA requires agencies that receive funding to report “the number and percentage of English learners who have not attained English language proficiency within [five] years of initial classification as an English learner and first enrollment in the local educational agency.”⁷² Overall, the ESSA provides states more flexibility for innovation, while curtailing federal oversight of standards for students and teachers previously present in the NCLB.⁷³

The new accountability requirements aim to encompass the academic achievements of ELs. First, states are mandated to include at least four indicators in their accountability systems: three of these indicators must be academic and at

promote parental and community participation. Every Student Succeeds Act, § 3003, 129 Stat. at 1954.

⁶⁸ For example, in the section of “Authorized Subgrantee Activities,” the ESSA permits funds to be used for “early college high school or dual or concurrent enrollment programs or courses designed to help English learners achieve success in postsecondary education.” Every Student Succeeds Act § 3115(d), 129 Stat. at 1959–60. There is also funding to develop and implement effective preschool language instruction programs and there are grants to “support strategies that promote school readiness of English learners and their transition from early childhood education programs . . . to elementary school programs.” *Id.* § 3131(6) at 1964–65.

⁶⁹ Gerard Robinson, *A Remarkable Feat in Education: The Every Student Succeeds Act Puts a Stop to the Department of Education’s Decades-Long Stranglehold on Education Policy*, U.S. NEWS (Jan. 4, 2016, 4:30 PM), <http://www.usnews.com/opinion/knowledge-bank/articles/2016-01-04/the-every-student-succeeds-act-loosens-the-federal-grip-on-education> [<https://perma.cc/MTF3-RPCC>]; see also Schoffner, *supra* note 16, at 269.

⁷⁰ Jack Jennings, *Fifty Years of Federal Aid to School: Back into the Future?*, 3 EDUC. L. & POL’Y REV. 1, 14 (2016).

⁷¹ The “Required Subgrantee Activities” section indicates that states are allowed to use their funding “to provide and implement other effective activities and strategies that enhance or supplement language instruction educational programs for English learners, which—(B) may include strategies that serve to coordinate and align related programs.” Every Student Succeeds Act § 3115(c), 129 Stat. at 1959.

⁷² *Id.* § 3121 Stat. at 1963.

⁷³ Robinson, *supra* note 69 (“[T]he Every Student Succeeds Act radically reduces the U.S. Department of Education’s authority over state curriculum frameworks, standards and testing decisions.”); The “U.S Secretary of Education is expressly prohibited from forcing or even encouraging states to pick a particular set of [academic] standards.” see also *ESSA Overview*, *supra* note 62.

least one must be a soft indicator; this gives the states autonomy to determine the weight given to each indicator.⁷⁴ Second, the accountability provisions for ELs are now included in Title I, along with the rest of the student population.⁷⁵ Third, the ESSA recognizes the need for “standardized statewide entrance and exit procedures” for ELs.⁷⁶ While the ESSA does not provide specific or strict guidelines for the education of ELs, it emphasizes areas that are important to their education, and opens the door for the involvement of the states.

B. *Criticisms of the ESSA*

The ESSA’s shift of power in education from the federal government to the states leaves ELs vulnerable to the hands of the states.⁷⁷ The ESSA significantly shrinks the power of the federal government in education, and creates problems regarding enforcement, accountability, uniformity, and the capability of states to take control of the education of ELs.⁷⁸ The federal government’s involvement is necessary to establish uniform exit requirements for ELs, and to further make sure they participate fully in the educational system.

Under the ESSA, states have freedom and flexibility to create their own accountability systems, but these may not adequately represent the actual academic progress of ELs.⁷⁹ The ESSA eliminates federal performance goals and permits states to create individual long and short-term goals for academic growth.⁸⁰ In addition, states have greater flexibility in

⁷⁴ *ESSA Overview*, *supra* note 62 (Examples of academic indicators are proficiency on state exams and English language proficiency. Some soft indicators are student engagement, school climate/safety, educator engagement, access to and completion of advanced coursework.).

⁷⁵ No Child Left Behind Act § 3001, 115 Stat. at 1689. Accountability provisions for English Learners were in Title III of the NCLB. *Id.*

⁷⁶ Every Student Succeeds Act of 2015 § 3102(b)(1)(A), 129 Stat. at 1954.

⁷⁷ See DeBray & Blankenship, *supra* note 27, at xvi; see also Delia Pompa, *New Education Legislation Includes Important Policies for English Learners, Potential Pitfalls for their Advocates*, MIGRATION POLY INST. (Dec. 2015), <https://www.migrationpolicy.org/news/new-education-legislation-includes-important-policies-english-learners-potential-pitfalls-their> [<https://perma.cc/RNX2-FDYT>].

⁷⁸ For example, the ESSA limits the power of the federal government as it directly states “[t]he Secretary shall not have the authority to mandate, direct, control, coerce, or exercise any direction or supervision over any of the challenging State academic standards adopted or implemented by a state.” Every Student Succeeds Act § 8546(c), 129 Stat. at 2120; see also Bulman-Pozen, *supra* note 49, at 990.

⁷⁹ U.S. DEPT OF EDUC., EVERY STUDENT SUCCEEDS ACT: ACCOUNTABILITY, STATE PLANS, AND DATA REPORTING: SUMMARY OF FINAL REGULATIONS (n.d.), <https://www2.ed.gov/policy/elsec/leg/essa/essafactsheet1127.pdf> [<https://perma.cc/JL4V-H2CS>].

⁸⁰ DeBray & Blankenship, *supra* note 27, at xiv. For example, States are required to “adopt English language proficiency standards that correspond with state

defining academic achievement and are free to select their own “achievement indicators.”⁸¹ These changes create opportunity for states to return to the same practices of the NCLB era: lowering the state’s academic standards in order “to look good rather than actually be good.”⁸² To balance the shift in power and avoid these problems, the federal government needs to be involved in ensuring uniform education standards to aid states in the creation of appropriate accountability systems.⁸³

There is also unclear guidance and information on the enforceability of the new provisions of the ESSA.⁸⁴ The shift of power hinders the federal government’s ability to supervise and promote the goals of the ESSA. For example, the ESSA requires states to identify and intervene in schools when there is low academic performance, low graduation rates, or when a particular subgroup of students struggle academically over a period of time.⁸⁵ While states are directed to act, it is unclear what action is adequate, what would happen if states fail to intervene, or if states’ interventions are unsuccessful.⁸⁶ The lack of guidance by the federal government negatively impacts the education of ELs, since ineffective education programs will not be properly corrected and students may run out of time to learn adequate language skills.

Additionally, the ESSA does not prepare states to address the growing number of ELs and their diversified needs.⁸⁷ ELs come from different backgrounds and have different educational needs “pertinent to [their status as] undocumented children, children from mixed-status homes, long-term ELs . . . , refugee children and youth recent arrivals, and students with interrupted formal education.”⁸⁸ While states have more

content standards in language arts, mathematics, and science.” Hopkins et al., *supra* note 20, at 33.

⁸¹ DeBray & Blankenship, *supra* note 27, at xiv.

⁸² Jay P. Greene, *Do We Need National Standards to Prevent a Race to the Bottom?*, EDUCATIONNEXT (July 17, 2012), <http://educationnext.org/do-we-need-national-standards-to-prevent-a-race-to-the-bottom/#> [<https://perma.cc/396T-MGBU>]; see also Inskeep, *supra* note 15; *supra* Part I.

⁸³ Hopkins et al., *supra* note 20, at 34. The states should respond or adapt to a set of national standards because otherwise the “race to the bottom” problem could present itself again. States could end up creating programs that are not challenging enough for English learners. Greene, *supra* note 82.

⁸⁴ DeBray & Blankenship, *supra* note 27, at xiv.

⁸⁵ *Id.* (States are supposed to identify and intervene “if a school is in the bottom 5% based on performance indicators; if a school has a graduation rate of 67% or less; or if a school has a subgroup of students who have particularly low performance over a period of time.”).

⁸⁶ *Id.*

⁸⁷ Hopkins et al., *supra* note 20, at 34.

⁸⁸ *Id.* at 40.

freedom to create education programs that work for their specific student needs, states may not have the adequate resources and expertise to properly address the diverse needs of ELs.⁸⁹ Thus, modern legislation fails to properly address the varied needs of ELs and the ESSA merely provides a “one size fits all” solution similar to previous education policies.⁹⁰

Lastly, the federal government’s lack of involvement in education may inadequately prepare ELs to integrate into the workforce and higher education. The ESSA finally requires states to create consistent entry and exit criteria to identify ELs, but it fails to provide federal guidance or factors to establish such entry and exit requirements.⁹¹ Each state has the freedom to establish different goals and/or may define proficiency differently.⁹² Consistency in entry and exit requirements is necessary because ELs tend to change school districts frequently; this lack of uniformity can prolong their stay in English-based programs longer than necessary or cause ELs to be removed from such programs when they are not ready.⁹³

C. *A Move Towards Integration Welcomed Through the ESSA*

Overall, the ESSA is a move towards the integration of ELs into mainstream classrooms along with the rest of the students in schools.⁹⁴ The notion of integration was first addressed under Title VI of the Civil Rights Act of 1964, which ensured that “ELs [could] participate meaningfully and equally in educational programs and services.”⁹⁵ This was further reinforced in the Supreme Court’s 1974 decision, *Lau v. Nichols* where the Court “directed school districts to take steps to help ELL students overcome language barriers and [] ensure that they can participate meaningfully in the districts’ educational

⁸⁹ Gross & Hill, *supra* note 14, at 299.

⁹⁰ Hopkins et al., *supra* note 20, at 34.

⁹¹ DeBray & Blankenship, *supra* note 27, at xxii.

⁹² *See id.* at xiv.

⁹³ *See* Jeremy E. Fiel, Anna R. Haskins & Ruth N. López Turley, *Reducing School Mobility: A Randomized Trial of a Relationship-Building Intervention* 50 AM. EDUC. RES. J. 1188, 1193 (2013); *See* Sarah D. Sparks, *Student Mobility: How It Affects Learning*, EDUC. WK. (Aug. 11, 2016), <https://www.edweek.org/ew/issues/student-mobility/> [<https://perma.cc/ZM4E-87MJ>].

⁹⁴ The provisions in the ESSA will permit states to promote integration in schools. Emily Hodge et al., *Lessons from the Past, Model for the Future: A Return to Promoting Integration through a Reauthorized ESEA*, 3 EDUC. L. & POL’Y REV. 58, 61 (2016).

⁹⁵ NON-REGULATORY GUIDANCE, *supra* note 62, at 64; *see also* *Education and Title VI*, U.S. DEPT OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> [<https://perma.cc/W6GG-CCXE>].

programs.”⁹⁶ Now, the ESSA lays the foundation for ELs to meaningfully participate in their education and to integrate in their schools.

By recognizing their needs and prioritizing the education of ELs, the ESSA opens the door for their integration.⁹⁷ First, English language proficiency is now an indicator of the states’ accountability system and overall academic performance, which will bring focus to the educational needs of ELs.⁹⁸ Second, the ESSA recognizes the diversity and the different needs within ELs.⁹⁹ These changes incentivize states and school districts to equally and appropriately address the education of ELs and integrate them in the system.¹⁰⁰

A move towards integration is long overdue, especially since Latino school segregation has increased tremendously over the past years.¹⁰¹ This move is welcomed; ELs, who are predominantly Latino, face segregation along racial and socioeconomic lines.¹⁰² For example, in some states like New York, ELs attend bilingual classes throughout the entire school day, which results in little or no interaction with their English speaking peers.¹⁰³ School segregation is problematic because

⁹⁶ *Developing Programs for English Language Learners: Legal Background*, U.S. DEPT OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/ell/legal.html> [<https://perma.cc/6QVH-VCT8>] (internal citation omitted).

⁹⁷ See Sargrad, *supra* note 38.

⁹⁸ Accountability for performance of English Learners is now included in Title I with the rest of the student population. *ESSA Overview*, *supra* note 62. Previously the consequences for failing to meet annual English proficiency objectives varied depending on whether the funding for English instruction came from Title I or III. Now, consequences for failing to meet English proficiency objectives will not be dependent on the source of the funding. PETE GOLDSCHMIDT & HAKUTA KENJI, INCORPORATING ENGLISH LEARNER PROGRESS INTO STATE ACCOUNTABILITY SYSTEMS 3 (2017), <http://www.ccsso.org/sites/default/files/2017-10/IncorpELProgStateAcctGoldschmidtHakuta092316.pdf> [<https://perma.cc/ZCR5-CXDJ>]; Sargrad, *supra* note 38.

⁹⁹ Every Student Succeeds Act of 2015 § 3121(a), 129 Stat. at 1962–63; Every Student Succeeds Act of 2015 § 1111(b) 129 Stat. at 1833–34. It acknowledges English Learners with disabilities, new arrivals, and long-term English Learners with additional language support. NON-REGULATORY GUIDANCE, *supra* note 62, at 4.

¹⁰⁰ See Sargrad, *supra* note 38.

¹⁰¹ Janie T. Carnock & April Ege, *The “Triple Segregation” of Latinos, ELLs: What Can We Do?*, NEW AM. (Nov. 17, 2015), <https://www.newamerica.org/education-policy/edcentral/latinos-segregation> [<https://perma.cc/AUV6-V6KM>]; See also Rebecca Klein, *Latino Schools Segregation: The Big Education Problem That No One is Talking About*, HUFFINGTON POST (Oct. 26, 2015), http://www.huffingtonpost.com/entry/latino-school-segregation_us_561d70a5e4b050c6c4a34118 [<https://perma.cc/GS8V-A9SS>]; see also Hodge et al. *supra* note 94, at 58–60.

¹⁰² Seventy percent of all English language learners are native Spanish speakers. Carnock & Ege, *supra* note 101.

¹⁰³ Christina Antonakos-Wallace & Fairouz Hadji, *The Politics & Efficacy of Bilingual & ESL Education in New York City: Exploring the Challenges of English Language Learners*, HUMANITY IN ACTION, <http://www.humanityinaction.org/knowledgebase/170-the-politics-efficacy-of-bilingual-esl-education-in-new-york-city-exploring-the-challenges-of-english-language-learners> [<http://perma.cc/VR6V-NL4V>].

ELs are not interrelating with native English speakers and are further unable to integrate into American culture and norms.¹⁰⁴ Even the Department of Education and Department of Justice recognize the need for “inclusive environments” for ELs.¹⁰⁵ Favorably, the changes reflected in the ESSA have the potential to promote integration and discourage segregation of ELs in public schools.¹⁰⁶

Scholars suggest that education policies should focus on the root of the problem, namely segregation, in order to improve academic performance and decrease the education gap across the nation.¹⁰⁷ Integration of ELs into mainstream English is associated with higher academic performance, higher graduation rates, and even an increased likelihood of taking Advance Placement courses.¹⁰⁸ The changes and flexibility of the ESSA provide states and schools with the opportunity to implement programs and policies that advance the integration and participation of ELs in the educational system.¹⁰⁹

III. PROPOSED SOLUTIONS

While the NCLB gave too much power to the federal government, the ESSA gives too little power to the federal government, which hinders the education of ELs. This note proposes increasing collaboration between the federal government and the states by permitting the federal government to have the authority to set entry and exit requirements for ELs, while permitting the states to determine methods of compliance.¹¹⁰

The shift in power should not be taken lightly because it gives the states the power to set their own educational goals and

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*; see also Emma Brown, *New Federal Guidelines Highlight Civil Rights of English Language Learners*, WASH. POST (Jan. 7, 2015), https://www.washingtonpost.com/local/education/new-federal-guidelines-highlight-civil-rights-of-english-language-learners/2015/01/07/870f952e-961f-11e4-8005-1924ede3e54a_story.html [http://perma.cc/2YRX-9MR5].

¹⁰⁶ See Hopkins et al., *supra* note 20, at 31; see also GRANTMAKERS FOR EDUCATION, *supra* note 2, at 4.

¹⁰⁷ Jennifer Jellison Holme & Kara S. Finnigan, *Changing the Narrative: Leveraging Education Policy to Address Segregation*, ALBERT SHANKER INST. (Apr. 19, 2016), <http://www.shankerinstitute.org/blog/holmefinnigan> [https://perma.cc/C7QJ-87KT]; see also Hopkins et al., *supra* note 20, at 31.

¹⁰⁸ Edward Flores, Gary Painter, Zackary Harlow-Nash & Harry Pachon, *¿Qué Pasa?: Are English Language Learning Students Remaining in English Learning Classes Too Long?*, TOMÁS RIVERA POL'Y INST. (Oct. 2009); see also Ana Núñez *Building Bridges Between Cultures in East Hampton Schools*, COLUM. C. TODAY 104 (Fall 2013).

¹⁰⁹ See Holme & Finnigan, *supra* note 107; see also Hopkins et al., *supra* note 20, at 31-32; see also GRANTMAKERS FOR EDUCATION, *supra* note 2, at 4.

¹¹⁰ See Hopkins et al., *supra* note 20, at 31.

to leave subgroups, like ELs, vulnerable.¹¹¹ States can use their autonomy to focus on the strengths of the group and not tackle challenges unique to ELs. Federal involvement is necessary to set expectations and hold the states accountable for their education programs. While scholars recognize that collaboration between the federal government and states is needed, they propose unrealistic solutions. Conversely, the proposed solution in this note, increasing collaboration in setting entry and exit requirements for ELs is practical, because the federal government is in a better position to set uniform standards, while leaving states autonomy to address their own needs.

A. *Flawed Solutions Offered by Scholars*

Scholars unrealistically propose “democratic experimentalism,” in which the federal government would provide incentives to encourage states to collaborate with each other.¹¹² This proposal requires national and state leaders to agree and to continuously revise educational laws, programs, and funding allocations based on a “continuous pooling of experiences.”¹¹³ While the rationale behind the proposal is welcomed because educational laws should reflect the current and evolving needs of students, especially of ELs, it is not practical because it takes time for states to successfully implement new legislation, and rigid standards would not address the varied needs of ELs.¹¹⁴

This proposal rightfully recognizes the value of cooperation and the balance of power between the federal government and states regarding education.¹¹⁵ For example, the pooling of state experiences can benefit the instruction of ELs because some states have more expertise with different groups of ELs, such as students with interrupted education, and/or long-term English Learners.¹¹⁶ Yet, this proposal is impractical

¹¹¹ Schoffner, *supra* note 16, at 274; *see also* DeBray & Blankenship, *supra* note 27, at xvi.

¹¹² Gross & Hill, *supra* note 14, *passim*.

¹¹³ *Id.*

¹¹⁴ For example, states took a couple of years to implement the English language proficiency standards because states’ experience with such standards varied. DEP’T OF EDUC., *supra* note 34, at 8.

¹¹⁵ Gross & Hill, *supra* note 14, at 325; For example, the NCLB was followed for many years “[d]ue to the inability of Congress to form a consensus on reform and their continued funding.” Schoffner, *supra* note 16, at 273.

¹¹⁶ Hopkins et al., *supra* note 20, at 34. An example of students with interrupted education are those with “two or more years of education interrupted in their native country.” Kristina Robertson & Susan Lafond, *How to Support ELL Students with Interrupted Formal Education (SIFEs)*, ¡COLORÍN COLORADO!, <http://www.colorincolorado.org/article/how-support-ell-students-interrupted-formal-education-sifes> [https://perma.cc/W293-PYLN]. SIFE students lack English skills and may lack an

because it fails to address incentives for states to pool experiences or agree to collaborate.¹¹⁷ Instead, a feasible approach is for the federal government to create academic benchmarks to guide states and repair academic discrepancies across the nation, without infringing on the states' freedom gained through the ESSA.¹¹⁸

B. State and Federal Collaboration: A Step Towards Uniformity and Integration

There is a need for uniformity in the education of ELs, which can be achieved by establishing uniform entry and exit requirements across the nation.¹¹⁹ This means that states should have similar procedures to identify students that need English language instruction and to adequately determine when they no longer need that instruction. Uniformity across entry and exit requirements would encourage integration and aid in the success of ELs across the nation.

The first step toward achieving uniform entry and exit requirement is to properly identify ELs.¹²⁰ All districts and states should collect data to learn about the EL student population and identify their current academic standing.¹²¹ This creates realistic expectations for education goals for unique students and also helps states and districts to collaborate with each other, especially if they share similar EL populations.¹²² In addition, uniform entry requirements and identification standards will allow states to properly track the academic progress of ELs. The current lack of uniformity combined with the diversity of ELs infringes on

understanding of the basic concepts that their peers in their grade level. *Id.* Long-term English Learners are students that “have been enrolled in U.S. schools for six or more years, but who have stalled in their progress toward English proficiency, and are struggling academically due to their limited English skills.” Hopkins et al., *supra* note 20, at 37.

¹¹⁷ Gross & Hill, *supra* note 14, at 299. Financial incentives should be given cautiously to address the level of need and not the level of experience, otherwise states with more experience and successful program may end up with more money. See DEP'T OF EDUC., *supra* note 34, at 19; *see also* Hopkins et al., *supra* note 20, at 31.

¹¹⁸ *See* Sargrad, *supra* note 38.

¹¹⁹ Pompa, *supra* note 77.

¹²⁰ *See* Robert Linquanti & H. Gary Cook, *Toward a Common Definition of English Language Learner, A Brief Defining Policy and Technical Issues and Opportunities for State Assessment Consortia*, COUNCIL OF CHIEF ST. SCH. OFFICERS 2 (2013).

¹²¹ *See id.* at 5.

¹²² This data collection would also aid in identifying the resources and the infrastructure the states have. *See* Hopkins et al., *supra* note 20, at 41.

accountability efforts, especially because states determine English proficiency differently.¹²³

English proficiency assessments along with exit requirements for English language programs vary across states,¹²⁴ thus federal participation is valuable and should be welcomed. The federal government, along with higher education officials, can create English language acquisition benchmarks, or proficiency standards, to aid the states. These benchmarks can inform and guide states on what is expected in English language instruction, and with those benchmarks in mind, states can implement their own academic programs. Furthermore, federal benchmarks would prevent the problems present in the NCLB era, where “wide discrepancies between the state and federal findings were commonplace.”¹²⁵ Uniform exit requirements would inhibit states from falsely demonstrating proficiency or academic achievement when there is none.¹²⁶

The federal proficiency standards or exit requirements should be challenging, but not unrealistic. Exit requirements need to reflect language skills that will enable ELs to attend English content classes with the rest of the student population.¹²⁷ The requirements need to be challenging because ELs may reach oral fluency in English sufficient for informal and social communication, but insufficient for academic courses.¹²⁸ At the same time, the exit requirements should not be unrealistic, since that will discourage ELs and hinder them in graduating high school.¹²⁹ Overall, consistent exit

¹²³ The English language learner population varies in education background, economic capabilities, immigrant status, and ethnic background. DEP’T OF EDUC., *supra* note 34, at 19.

¹²⁴ John Fensterwald, *New Federal Law Puts Spotlight on English Learners*, EDSource (Feb. 1, 2016), <https://edsources.org/2016/new-federal-law-puts-spotlight-on-english-learners/94222> [<https://perma.cc/CZ56-3UAT>] (“[T]he reclassification process has been subjective and inconsistent, with some students reclassified perhaps too soon and others retained too long as English Learners.”).

¹²⁵ Dillon, *supra* note 26.

¹²⁶ For example, “[t]he state education department in New York quietly changed the scoring of the state tests in mathematics and English language arts, which produced dramatic gains in the proportion who met state standards each year.” RAVITCH, *supra* note 12, at 157.

¹²⁷ See Laurie Olsen, *Meeting the Unique Needs of Long Term English Language Learners: A Guide for Educators*, NAT. EDUC. ASS. 1, 14 (Mar. 2014), https://www.nea.org/assets/docs/15420_LongTermEngLangLearner_final_web_3-24-14.pdf [<https://perma.cc/B5MZ-YNJ4>]; Exit requirement should assess English Learners’ “grasp of academic English conventions, discourse formats, language functions, grammar, and vocabulary.” *Id.*

¹²⁸ Alyson Klein, *For Stalled ELL Students, Graduation is Often an Elusive Goal*, EDUC. WK. (May 11, 2016), <https://www.edweek.org/ew/articles/2016/05/11/for-stalled-ell-students-graduation-is-often.html> [<https://perma.cc/29VZ-N6RN>]; see Olsen, *infra* note 127, at 14.

¹²⁹ See Klein, *supra* note 128.

requirements across states will permit ELs to receive better education and participate fully in the educational system.¹³⁰

Collaboration among states and the federal government will increase the likelihood that assessments truly reflect the English language skills of ELs. In particular, the entry and exit requirements will be practical and effective because they will be designed to serve a specific purpose and population, unlike general assessments for which data is gathered for a variety of purposes.¹³¹ These assessments will also prevent the “race to the bottom” problem that was present during the NCLB era, where “states competed to have the lowest standards in order to attain the highest rates of test score improvement.”¹³² Further, data gathered from these assessments should be shared across schools and states to help develop better educational practices.¹³³

The ESSA’s focus on the accountability standards for ELs¹³⁴ and on existing collaborative systems makes uniform entry and exit requirements for ELs a realistic and attainable target. For example, in 2003, the Department of Education awarded grants to states for the creation of English Language Proficiency standards and for the improvement of the quality of state assessments of English language learners.¹³⁵ The recipients of the grants included a thirty-eight state consortium, out of which nineteen states used a common set of English Language Proficiency standards by 2009.¹³⁶ Further, during the NCLB era there were general consortia that permitted states to actively participate and create guidelines to aid other states that were new to English language standards.¹³⁷ In addition, funding is available through the ESSA that encourages states to come together and work to establish common expectations.¹³⁸ Collaboration is key to set uniform entry and exit requirement

¹³⁰ See Pompa, *supra* note 77.

¹³¹ Anderson, *supra* note 15, at 592 (citing *Large Scale Assessments and High Stake Decisions: Facts, Cautions, and Guidelines*, NASP CENTER (2001), http://www.naspcenter.org/factsheets/highstakes_fs.html [<https://perma.cc/CK7K-T36P>]).

¹³² Jeremy Bachrach Siegfried, *It’s Common Sense: Why the Common Core is Not Coercive*, 25 CORNELL J. L. & PUB. POL’Y 723, 730 (2016) (citing Opinion, *Ending the ‘Race to the Bottom,’* N.Y. TIMES (Mar. 11, 2009), <http://www.nytimes.com/2009/03/12/opinion/12thu1.html> [<https://perma.cc/39PT-YXHN>]); Greene, *supra* note 82.

¹³³ Anderson, *supra* note 15, at 593 (citing *Large Scale Assessments and High Stake Decisions: Facts, Cautions, and Guidelines*, NASP CENTER (2001), http://www.naspcenter.org/factsheets/highstakes_fs.html [<https://perma.cc/CK7K-T36P>]).

¹³⁴ See Pompa, *supra* note 77; see also Fensterwald, *supra* note 124

¹³⁵ DEP’T OF EDUC., *supra* note 34, at 9.

¹³⁶ *Id.*

¹³⁷ “The use of shared ELP standards across such a large number of states demonstrates that states can agree on common standards and assessments.” *Id.* at 19.

¹³⁸ Every Student Succeeds Act § 3115, 129 Stat. at 1959–60.

for ELs because many states do not have enough experience to address and support the needs of these students.¹³⁹

The ESSA sets the grounds for this proposal because it provides a framework to uniformly record the progress of ELs. The reporting requirements of the ESSA expect states to report the number of ELs that exit language instruction,¹⁴⁰ and this creates a baseline to establish an accountability system for language programs. In fact, with uniform entry and exit requirements, the federal government and states could take a step further and create an accountability system that would reflect the progress of ELs. They could create a subgroup of former ELs to track their progress,¹⁴¹ in order to compare them with mainstream students. This will reflect whether the language programs actually prepared the students for proficiency in core content areas.¹⁴² Implementation of this recommendation will avoid the “revolving door” problem present during the NCLB.¹⁴³

Overall, collaboration and the balance of power between the federal government and the states will provide practical educational policies and accountability procedures for ELs.¹⁴⁴ This proposed solution encourages federal supervision but also state autonomy.¹⁴⁵ It permits the federal government to provide states with valid information and real expectations while giving the states flexibility with how they seek to achieve those expectations.¹⁴⁶ Diana Ravitch recommended that schools should operate like families, and that educators should talk and share what has been successful.¹⁴⁷ Arguing that “[s]chools should be ‘data-informed,’ not ‘data driven’” she proposed that, “[t]he proper role of the federal government is to supply valid information and leave the remedies and sanctions to those who are closest to the unique problems of individual schools.”¹⁴⁸ Thus, collaboration to

¹³⁹ Hopkins et al., *supra* note 20, at 41.

¹⁴⁰ Every Student Succeeds Act § 3121, 129 Stat. at 1962–63.

¹⁴¹ It has also been recommended to count EL students in their original subgroup indefinitely. DEP’T OF EDUC., *supra* note 34, at 17.

¹⁴² *Id.* at 7.

¹⁴³ *See id.*

¹⁴⁴ *See* Hopkins et al., *supra* note 20, at 31; *see also* GRANTMAKERS FOR EDUC., *supra* note 2, at 4.

¹⁴⁵ Unlike the NCLB where the role of the federal government was “to promote policies on the national level, and not necessarily [encourage] collaborat[ion] with the states.” Anderson, *supra* note 15, at 550.

¹⁴⁶ *Id.* at 571.

¹⁴⁷ Inskeep, *supra* note 15.

¹⁴⁸ *Id.*; *see also* RAVITCH, *supra* note 12, at 228 (quoting Deborah Meier, *Data Informed, Not Data Driven*, EDUC. WK.: BLOGS (Mar. 5, 2009, 11:17 AM), http://blogs.edweek.org/edweek/Bridging-Differences/2009/03/dear_diane_sometime_i_image_1.html [<https://perma.cc/5C4V-VYVC>]).

achieve uniform entry and exit requirements is attainable through the ESSA since it encourages the federal government to facilitate discussion among the states.¹⁴⁹

CONCLUSION

By 2025, one of every four public school students will be an EL.¹⁵⁰ This, along with growing achievement gaps and increasing student diversity, provides an illustration of the many obstacles faced by ELs in the American education system.¹⁵¹ The basis of this note's proposed solution requires the federal government to collaborate with states in order to elevate the education of ELs to the forefront of educational policy decisions. Specifically, this proposed solution advances the theory that uniform entry and exit requirements will permit schools and states to adequately assess the skills of ELs. With uniform and adequate assessments, educators will be able to provide struggling students with additional support or integrate on-target students with the general student body. Both pathways focus educators on the needs of the ELs and gives EL students an opportunity to succeed. The ESSA provides the foundation of EL integration within schools, a welcome solution for EL students who will one day join integrated workforces and communities. As world economics intertwine with new technologies, new and emerging educational demands further stress the need for education uniformity.¹⁵² If the United States wishes to remain an educational leader and grow to meet the demands of a changing world market, there is not only an urgency to act but an urgency to act together.

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¹⁴⁹ See Anderson, *supra* note 15, at 547.

¹⁵⁰ Hopkins et al., *supra* note 20, at 31; see also GRANTMAKERS FOR EDUCATION, *supra* note 2, at 4.

¹⁵¹ GRANTMAKERS FOR EDUC., *supra* note 2, at 4; see also Gerard Robinson, *A Federal Role in Education: Encouragement as a Guiding Philosophy for the Advancement of Learning in America*, 50 U. RICH. L. REV. 919, 923 (2016).

¹⁵² Jennings, *supra* note 70, at 7.

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