

UNDEFINED: A CALL TO RECOGNIZE, AND ADVOCATE FOR, LONG-TERM ENGLISH LEARNERS

BY ALLYSON LYNCH*

*“To have another language is to possess a second soul.”
Charlemagne*

INTRODUCTION.....	211
I. THE ENGLISH LEARNER POPULATION AND LONG-TERM ENGLISH LEARNERS	212
II. RESEARCH SHAPING CURRENT EL POLICY: THE FIVE TO SEVEN YEAR STANDARD	215
III. THE EVOLUTION OF LEGAL RIGHTS AFFECTING ENGLISH LEARNERS	218
A. The Civil Rights and Equal Educational Opportunities Acts.	219
B. The Elementary and Secondary Education Act.....	221
i. The Bilingual Education Act.....	222
ii. The No Child Left Behind Act.....	222
iii. The Every Student Succeeds Act	225
IV. DEFINING AND INCREASING EXPECTATIONS: A PROPOSED CHANGE TO ESSA FOR LONG-TERM ENGLISH LEARNERS	228
A. Introduction of Proposed Changes	228
B. Proposed Changes	229
C. Justifications for the Proposed Change	232
i. Setting the Five-Year Standard	232

* Juris Doctor candidate, Belmont University College of Law, May 2019. I would like to extend my sincerest thanks to Professor Jeffrey Usman, who provided critical and thorough guidance throughout the process of writing this Note, as well as to Professors Amy Moore and Abigail DeBlasis for their thoughts and encouragement during the writing process. To the Belmont Law Review, thank you for this opportunity and thank you, particularly, to Sara, Sarah, Shelby and Ward for your work in preparing this piece for publication. I also would like to thank Mr. Marty Szeigis for serving as an incredible mentor as I navigated through this area of law. To my family and friends who read this work and provided their unending support and assistance, I am forever thankful. Importantly, to Dr. Kristin McGraner, thank you for serving as a compass, not only as I endeavored to immerse myself in this topic, but in my life as a mentor. This Note is dedicated to the millions of English Learner students who inspire me, and to the teachers, leaders, and communities that serve them fervently.

Graph 1: Fourth Grade Achievement Data on the 2015 Mathematics NAEP Assessment for English Learner Students and Non-English Learner Students.....	234
Graph 2: Fourth Grade Achievement Data on the 2015 Reading NAEP Assessment for English Learner Students and Non-English Learner Students.....	235
Graph 3: Eighth Grade Achievement Data on the 2015 Mathematics NAEP Assessment for English Learner Students and Non-English Learner Students.....	235
Graph 4: Eighth Grade Achievement Data on the 2015 Reading NAEP Assessment for English Learner Students and Non-English Learner Students.....	236
ii. Practical Impacts	238
Table 1: Discussion, Identification, and Description of Long-Term English Learners in ESSA State Compliance Plans.....	239
CONCLUSION.....	244

INTRODUCTION

David¹ is an eighth grade student at a public middle school in Tennessee. He smiles as he introduces himself, although he is hesitant to make eye contact. While walking down the hallway on a Friday afternoon, he shares his plans for the weekend and describes what he is learning in math class, quietly adding that he is not disappointed that he gets to take a break from class to talk with me. Sharing more about himself, David explains that he was born in Nashville, that he lives with his mom, dad, and a few siblings, and that he loves his family. He describes his mom, who was born in Mexico, and his dad, who was born in Honduras, as his biggest cheerleaders. Although he says that school is sometimes discouraging because it can be difficult for him to “get things the first time,” David explains that thinking of his family gives him encouragement to keep trying his best.

David is proud that he can speak both English and Spanish, and he smiles when we high-five and talk about the many opportunities that skill can unlock for him. In fact, he further shares that he is interested in joining the United States Army after graduating from high school, as he thinks being bilingual could serve him well in the Army. Admittedly, however, he is more comfortable speaking English than Spanish, and he shares that English is the primary language spoken at home.

David was born in the United States. He has attended public elementary and middle school without interruption. He does not have any identified disability. However, David has been receiving services as an

1. The actual name of the student has been changed to retain the student’s anonymity.

English learner² for *10 years*. Surprising to most, David is not an atypical English learner. In fact, his story represents the story of thousands of students just like him.

This Note argues that the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act, should include a definition of long-term English learner (“LTEL”), and, additionally, set a minimum expectation for states and school districts that all English learner students achieve English Language Proficiency within a maximum of five years. It proceeds in four parts: Part I provides an overview of the English Learner population and discusses the current opportunities and obstacles of this population. Part II explores prevailing research on English learners, particularly as it relates to English language acquisition rates, which has shaped policy decisions regarding expectations for this population of students. Part III details the evolution of English learner case law and legislation, highlighting critical changes that have occurred over time. Finally, Part IV proposes model changes to the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act, which aim to hold states, school districts, and schools more accountable to meeting the needs of English learner students, and provides justifications for the proposed changes.

I. THE ENGLISH LEARNER POPULATION AND LONG-TERM ENGLISH LEARNERS

English learners are a highly diverse population of students who bring valuable linguistic, cultural, and socio-emotional assets to their classrooms and communities.³ Under the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act⁴, an English learner (“EL”) is a student

who is aged 3 through 21[,] . . . who was not born in the United States or whose native language is other than English[,] . . . who comes from an environment where a language other than English has had a significant impact on

2. The terms “English language learner” (“ELL”), “English learner” (“EL”), and “Limited English Proficient” (“LEP”) are commonly used interchangeably to refer to “national-origin-minority student[s] who [are] . . . limited-English-proficient.” See *Developing Programs for English Language Learners: Glossary*, U.S. DEP’T. OF EDUC. OFFICE FOR CIVIL RIGHTS, <https://perma.cc/NT3B-6JB3> (last modified October 15, 2015). For purposes of this Note, I refer to these students as “English learners,” or “ELs,” in an effort to maintain consistency, unless quoting directly from a statute or case.

3. See NAT’L COUNCIL OF TEACHERS OF ENGLISH, *ENGLISH LANGUAGE LEARNERS 2* (2008), <https://perma.cc/XG2J-PXG4>.

4. When discussing the Elementary and Secondary Education Act, this Note, generally, refers to the version of the Act as amended by the Every Student Succeeds Act, unless otherwise stated.

the individual's level of English language proficiency[,] or . . . whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual the ability to meet the challenging State academic standards[,] . . . to successfully achieve in classrooms where the language of instruction is English[,] or the opportunity to participate fully in society.⁵

For several decades, the EL population has been one of the fastest growing student demographics across the United States.⁶ Currently, roughly one in ten K–12 students across the country, totaling over 4.8 million students in the 2014–15 school year⁷, are learning to speak English.⁸ This reflects an over 60% increase in the last ten years.⁹ The five most common native languages of these students are (1) Spanish/Castilian, (2) Chinese, (3) Arabic, (4) Vietnamese, and (5) Haitian/Haitian Creole.¹⁰ Contrary to popular belief, however, a great majority of these students are not immigrant students. Rather, over 75% of ELs are born in the United States.¹¹ Still, this rapidly growing population of students has been historically underserved by our educational systems.¹²

Traditionally, ELs “face significant opportunity and academic achievement gaps compared to their non-EL peers.”¹³ EL students, “[a]s a group[,] . . . perform at lower levels than their English-speaking counterparts on ‘virtually every measure, from achievement scores to graduation rates.’”¹⁴ For example, only 62.6% of ELs graduated from high school in 2013–14

5. Elementary and Secondary Education Act of 1965 § 8101, 20 U.S.C. § 7801(20)(A)-(D) (2015).

6. U.S. 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) 3 (2016), <https://perma.cc/J382-GAD3>.

7. OFFICE OF ENGLISH LANGUAGE ACQUISITION, U.S. DEP'T OF EDUC., *Fast Facts: Profiles of English Learners (ELs)* (Feb. 2017), <https://perma.cc/FH9U-THJX>.

8. Claudio Sanchez, *nprEd*, *English Language Learners: How Your State is Doing*, NASHVILLE PUB. RADIO (Feb. 23, 2017, 6:00 AM) <https://www.npr.org/sections/ed/2017/02/23/512451228/5-million-english-language-learners-a-vast-pool-of-talent-at-risk>.

9. LAURIE OLSEN, NAT'L EDUC. ASS'N, *MEETING THE UNIQUE NEEDS OF LONG TERM ENGLISH LANGUAGE LEARNERS: A GUIDE FOR EDUCATORS 2* (2014).

10. OFFICE OF ENGLISH LANGUAGE ACQUISITION, U.S. DEP'T OF EDUC., *Fast Facts: Languages Spoken by English Learners (ELs)* (Feb. 2017), <https://perma.cc/5XZA-Y48F>.

11. Jie Zong & Jeanne Batalova, *Migration Information Source, The Limited English Proficient Population in the United States*, MIGRATION POLICY INST. 9 (July 8, 2015), <https://perma.cc/P48R-ULN4>.

12. OLSEN, *supra* note 9.

13. U.S. DEP'T OF EDUC., *supra* note 6.

14. Maria-Daniel Asturias, Note, *Burden Shifting and Faulty Assumptions: The Impact of *Horne v. Flores* on State Obligations to Adolescent ELLs Under the EEOA*, 55 HOW. L.J. 607, 613 (2012).

across the country, while the national average was 82.3%.¹⁵ Additionally, a mere six percent of EL students scored proficient or advanced on the eighth grade mathematics National Assessment of Educational Progress (“NAEP”) compared to 35% of non-EL students on the same assessment.¹⁶ Further, only four percent of EL students scored proficient or advanced on the eighth grade NAEP reading assessment compared to 36% of their non-EL peers.¹⁷ However, when EL students are taught by excellent educators, who execute highly effective, research-based academic models, EL students meet and exceed the high expectations set for them and their non-EL peers.¹⁸

The EL student population also consists of a subcategory of “long-term English learners” (“LTEL”). Although definitions vary, LTELs are currently thought of as students “who have been enrolled in U.S. schools for six years or more” and have not yet reached English language proficiency as measured by the state in which they attend school.¹⁹ The LTEL category was created in an effort to encourage educators to recognize and formulate plans around the unique, specific needs of this student population.²⁰ Currently, because “definitions and classification criteria vary widely from place to place, there are no nationwide data on the number of LTEL students.”²¹ However, “estimates are that between one-quarter and one-half of all [ELs] . . . who enter U.S. schools in primary grades” will be classified as long-term English learners.²² In many regards, a large population of LTEL students can provide “the starkest evidence of a school system still too unaware, ill prepared, and inadequately focused on the needs of English Learners.”²³

Particular challenges face EL students who qualify as long-term ELs. Long-term English learners “may face significant barriers to attaining

15. OFFICE OF ENGLISH LANGUAGE ACQUISITION, U.S. DEP’T OF EDUC., *Fast Facts: National- and State-Level High School Graduation Rates for English Learners* (Mar. 2016), <https://perma.cc/MZ9R-P8QC>.

16. *2015 Mathematics & Reading Assessments, National Achievement Level Results*, THE NATION’S REPORT CARD, <https://perma.cc/EKF3-7ZUF> (last visited Jan. 21, 2018) (to review these statistics, scroll roughly halfway down the page; where it prompts the user to “select a student group” select “Status as English language learners” from the drop down menu; the graph below will automatically adjust to reflect the correct data.).

17. *2015 Mathematics & Reading Assessments, National Achievement Level Results*, THE NATION’S REPORT CARD, <https://perma.cc/D74M-K7X2> (last visited Jan. 21, 2018) (to review these statistics, scroll roughly halfway down the page; where it prompts the user to “select a student group” select “Status as English language learners” from the drop down menu; the graph below will automatically adjust to reflect the correct data.).

18. U.S. DEP’T OF EDUC., *supra* note 7, at 3-4.

19. OLSEN, *supra* note 9, at 4.

20. Karen D. Thompson, *Questioning the Long-Term English Learner Label: How Categorization Can Blind Us to Students’ Abilities*, 117 *Teachers College Record* 1, 2 (2015).

21. REL WEST, *Long-term English learner students: Spotlight on an overlooked population* (Nov. 2016), <https://perma.cc/44L2-R457>.

22. OLSEN, *supra* note 9, at 4.

23. *Id.* at 3.

English language proficiency and graduating college-and-career ready.”²⁴ Similar to traditional EL students, LTELs drop out of high school at a “rate estimated to be four times greater than the average.”²⁵ Further, when considering solely the practical significance of a student being enrolled in an EL program for six or more years, a child who enters kindergarten as an EL is not able to fully access the content in his or her core classes, such as science, social studies, and mathematics, until, at best, *sixth grade*, missing the ability to fully communicate questions and receive clarification during a foundational time in his or her education.

A student’s classification as a LTEL, however, does not tell the story of her capabilities.²⁶ Instead, when discussing EL students, inclusive of LTELs, it is critical not to examine this group through a deficit lens. Rather, policy and conversation aimed at providing equity and access to high-quality education for EL students should look expectantly toward these students’ futures, reflecting the high expectations we set for them, and for ourselves as their leaders, teachers and neighbors. In order to do this, it is critical to understand the research and literature that has guided our standards and understanding of EL performance to this point.

II. RESEARCH SHAPING CURRENT EL POLICY: THE FIVE TO SEVEN YEAR STANDARD

There is a widely believed theory amongst many educators, policymakers, and stakeholders: it takes EL students between five and seven years to attain English language proficiency (“ELP”).²⁷ This premise, in large part, is derived from research conducted by Dr. Kenji Hakuta from The University of California Linguistic Minority Research Institute at Stanford University.²⁸ Dr. Hakuta’s research, summarized in his report *How Long Does it Take English Learners to Attain Proficiency*,²⁹ was reviewed in 2001

24. U.S. DEP’T OF EDUC., *supra* note 7, at 38.

25. OLSEN, *supra* note 9, at 7.

26. Although it is necessary to highlight the current gaps that exist in achievement data for this population of students in order to understand the importance of the need to better serve ELs, inclusive of LTELs, I take this opportunity to address criticism that the “label” of LTEL has created a stigma for students that receive services, and that this label facilitates discussion primarily revolving around the negative outcomes these students have commonly faced. Rather, it is the opposite of my intention to discuss LTELs in a way that focuses on “obstacles.” Instead, the purpose of this Note is to encourage lawmakers and stakeholders to appreciate, and focus on, the *abilities* of ELs, including LTELs, to achieve at the highest levels, and to encourage laws, decisions, and policy discussions to reflect EL’s capabilities of achieving more than what the system currently expects of our states and schools.

27. U.S. DEP’T OF EDUC., RESOURCE GUIDE: ACCOUNTABILITY FOR ENGLISH LEARNERS UNDER THE ESEA 9 n.5 (2017), <https://perma.cc/BTL7-YZ85>.

28. *Id.*

29. KENJI HAKUTA, YUKO GOTO BUTLER & DARIA WITT, HOW LONG DOES IT TAKE ENGLISH LEARNERS TO ATTAIN PROFICIENCY (2000), <https://perma.cc/PT53-D4QF>.

by the United States House of Representatives Committee on Education and the Workforce during its hearings titled “Meeting the Needs of Students with Limited English Proficiency.”³⁰ The purpose of these hearings, in part, was to answer the pressing, complex question of how long it takes English learners to achieve English language proficiency.³¹

The purpose of Dr. Hakuta’s paper was “to pull together findings that directly address this question.”³² Dr. Hakuta analyzed data from four school districts, two in California and two located in Canada, focusing on the amount of time it took ELs to achieve ELP,³³ differentiating between “oral [English] proficiency” and “academic English proficiency.”³⁴ Oral English proficiency³⁵ refers to a student’s ability to engage in conversational English.³⁶ An individual who speaks to a student who has attained oral English proficiency, due to the student’s ability to have a comfortable conversation in English, may not recognize this student as an EL. Academic English proficiency,³⁷ alternatively, “refers to the ability to use language in academic contexts, which is particularly important for long-term success in school.”³⁸ Thus, a student may achieve oral English proficiency and be able to communicate well with peers and teachers using his English speaking skills, but may not have yet acquired academic English proficiency, making

30. KHALIL EL-SAGHIR, HOW LONG DOES IT TAKE ENGLISH LEARNERS TO ATTAIN PROFICIENCY? 2 (2003).

31. *Id.*

32. HAKUTA, *supra* note 29, at Abstract.

33. English language proficiency, or ELP, “refers to the ability to speak, read, write, and comprehend the English language in general.” EDVANTIA, CTR. FOR PUB. EDUC., RESEARCH REVIEW: WHAT RESEARCH SAYS ABOUT PREPARING ENGLISH LANGUAGE LEARNERS FOR ACADEMIC SUCCESS 4 (2007), <https://perma.cc/7YRJ-7CFN>. As discussed earlier in this Note, states use different methods for measuring when an EL student has achieved ELP and can, therefore, “exit” the EL program. State assessments must, however, test “all four language domains (listening, speaking, reading, and writing) to ensure that ELs have achieved English proficiency.” Further, “[t]he proficiency score on the ELP assessment must be set at a level that enables students to effectively participate in grade-level content instruction in English without EL services.” U.S. DEP’T OF EDUC., *English Learner Toolkit Chapter 8: Tools and Resources For Monitoring and Exiting English Learners from EL Programs and Services* 2, <https://perma.cc/FN58-QQGQ> (updated Nov. 2016).

34. HAKUTA, *supra* note 29, at Abstract.

35. *Developing Programs for English Language Learners: Glossary*, *supra* note 2 (“Oral English proficiency” is also referred to in other research as “basic interpersonal communication skills” (“BICS”). This term, like oral English proficiency, describes “the language ability required for verbal face-to-face communication”).

36. HAKUTA, *supra* note 29, at 3.

37. *Developing Programs for English Language Learners: Glossary*, *supra* note 2 (“Academic English proficiency” is also referred to in other research as “cognitive academic language proficiency” (“CALP”). This term, like academic English proficiency, describes “the language ability required for academic achievement”).

38. HAKUTA, *supra* note 29, at Abstract; *see also* EDVANTIA, *supra* note 33 (describing academic English proficiency as “the ability to speak, read, write, and comprehend academic English, which is characterized by academic and content-specific vocabulary, complex sentence structure, and the processes of academic discourse (e.g., interpretation and analysis of data or text”).

it difficult for that student to fully access and master the academic content in their core classes. David's story, illustrated in the Introduction, provides a good example of this concept—while his oral communication skills are strong and, in fact, he is more comfortable speaking English than Spanish, his native language, he has not yet acquired academic English proficiency and, therefore, remains classified as an EL and continues to receive EL services.

After reviewing the data from the four school districts, Dr. Hakuta concluded it takes a student between three and five years to develop oral English proficiency, while it can take a student four to seven years to develop academic English proficiency.³⁹ Importantly, the study also found that, while there is a steep increase in English language acquisition rates between zero and five years, results begin to taper off and normalize after the five year benchmark.⁴⁰ This pattern can create greater achievement gaps between EL and non-EL students, and, further, reflects the importance of guaranteeing that states and schools are being held to high standards, ensuring EL students attain ELP as quickly and effectively as possible.

Applying these findings to policy discussions, Dr. Hakuta cautioned against overly ambitious policies that would prevent school districts from receiving the funds necessary to continue providing supports to EL students.⁴¹ Instead, he promoted a policy that recognizes these findings and allows EL students to receive services for the full amount of time it takes them to achieve academic English proficiency.⁴² Additionally, Dr. Hakuta encouraged researchers and policymakers to conduct further longitudinal studies that track EL students for longer periods of time and in more sophisticated ways, so policymakers would have more detailed, thorough research to guide their policy decisions.⁴³

Dr. Hakuta's study is not the only research that has guided policymakers to this point, however. For example, one study suggests it takes ELs even longer than seven years to attain English language proficiency.⁴⁴ Another suggests that ELs who had no schooling in their native language attained ELP in seven to ten years, while ELs who had two to three years of schooling in their native language attained ELP in five to seven years.⁴⁵ Still another study suggests that students in third grade and below need to be exposed to English for three to five years, and students above third grade need at least five to six years of exposure, before being expected to attain ELP.⁴⁶ Finally, a recent study conducted in part by the United States Department of Education's Institute of Education Sciences found that

39. *Id.* at 13.

40. *Id.* at 9-10.

41. *Id.* at 13-14.

42. *Id.*

43. *Id.*

44. EDVANTIA, *supra* note 33, at 8.

45. *Id.* at 7-8.

46. *Id.* at 8.

“[s]tudents who entered kindergarten as English learner students took a median of 3.8 years to develop the English proficiency necessary to be reclassified as former English learner students.”⁴⁷ Even with the more recent expansion of literature in this area of study, however, several researchers continue to assert the need for more thorough and consistent studies in order for policymakers to make more informed laws.⁴⁸

Particularly, researchers highlight the difficulties associated with the varying tests used across states, and even within states across school districts, to identify and measure the growth of ELs.⁴⁹ Due to these variances, “cross-study and interstate comparisons often are not possible[,]”⁵⁰ as the choice of what test is used “can affect the reported English language proficiency levels of students.”⁵¹ Further, researchers commonly highlight the complexity of understanding the development of acquiring English, as several factors, including “initial proficiency level[,] . . . student poverty, and access to academic curriculum[,]”⁵² influence this process. Thus, due to the lack of use of a single proficiency assessment, and because of the need for more focused research on specific influencing factors, like initial English proficiency level, researchers continue to highlight the need for greater in-depth research.⁵³

In sum, this research has played a critical role in guiding policymakers as they have developed accountability provisions related to English learner success throughout the last several decades. Similar to the development of research in this area, the law surrounding English learner rights has also evolved significantly.

III. THE EVOLUTION OF LEGAL RIGHTS AFFECTING ENGLISH LEARNERS

Since the Civil Rights Era in the 1960s, federal policy surrounding the English learner population has advanced substantially. From the dawn of the Civil Rights Act of 1964, to the most recent reauthorization of the Elementary and Secondary Education Act in 2015, the unique needs of and opportunities for EL students have been gradually realized and expounded.

47. JASON GREENBERG MOTAMEDI, MALKEET SINGH & KAREN D. THOMPSON, NAT’L CTR. FOR EDUC. EVALUATION AND REG’L ASSISTANCE, INST. OF EDUC. SCIENCES, U.S. DEP’T OF EDUC. ENGLISH LEARNER STUDENT CHARACTERISTICS AND TIME TO RECLASSIFICATION: AN EXAMPLE FROM WASHINGTON STATE 1 (2016).

48. See HAKUTA, *supra* note 29, at 15; EDVANTIA, *supra* note 33, at 4 (“Catherine Snow refers to summarizing research on second-language literacy as “a Herculean task”); H. Gary Cook, Timothy Boals & Todd Lundberg, *Academic achievement for English learners: What can we reasonably expect?* 93 KAPPAN MAG. 67 (Nov. 2011) (“There isn’t enough good research . . . to give clear answers [as to how long it take[s] English learners to reach [language proficiency]”).

49. EDVANTIA, *supra* note 33, at 5.

50. EDVANTIA, *supra* note 33, at 5.

51. EDVANTIA, *supra* note 33, at 5.

52. Cook, Boals & Lundberg, *supra* note 48, at 69 (Nov. 2011).

53. EDVANTIA, *supra* note 33 at 5-6, 9-11.

A. The Civil Rights and Equal Educational Opportunities Acts

Title VI of the Civil Rights Act of 1964 provides that “[n]o person . . . shall, on the ground of race, color, or national origin . . . be denied the benefits of, or be subjected to discrimination.”⁵⁴ This piece of federal legislation has, perhaps, the greatest impact on English learners, as it not only serves as the required “floor” for ensuring EL students, even those who opt out of services, receive appropriate services,⁵⁵ but it also has set the backdrop for nearly every Act, case, and policy discussion regarding ELs that has come after it.

In fact, in a landmark case concerning EL students, *Lau v. Nichols*, the Supreme Court, granting certiorari due to the “public importance of the question presented,”⁵⁶ concluded that, under Title VI of the Civil Rights Act, “school systems must ‘take affirmative steps’ to teach English to those not yet fluent in the language[,] while also providing access to the general curriculum.”⁵⁷ In *Lau*, 1,800 students of Chinese ancestry in the San Francisco, California school system were not given supplemental courses in English.⁵⁸ The Court reasoned that providing these students the “same facilities, textbooks, teachers, and curriculum,” as their non-English learner peers did not qualify as “equality in treatment.”⁵⁹ Rather, as “students who do not understand English are effectively foreclosed from any meaningful education,” supplemental support is required.⁶⁰ Holding that “[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students,”⁶¹ the Court established precedent that has served as “the foundational case in EL[] law.”⁶²

54. 42 U.S.C.A. § 2000(d) (West 2018).

55. *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents*, CIVIL RIGHTS DIVISION, U.S. DEP’T OF JUSTICE, & U.S. DEP’T OF EDUC., OFFICE OF CIVIL RIGHTS (Jan. 7, 2015). <https://perma.cc/PX8V-GXRE>; see also *Ensuring English Learner Students can Participate Meaningfully and Equally in Educational Programs*, OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC. 3, <https://perma.cc/4HUW-Y727> (last visited July 11, 2018) (explaining that, although EL students are entitled to receive services, parents may opt their child out of receiving assistance through an EL program, or from any service provided through an EL program. If a parent makes this decision for their student, the “school district must still take steps to provide opted-out EL students with access to its educational programs . . . and offer services again if a student is struggling.”).

56. *Lau v. Nichols*, 414 U.S. 563, 565 (1974).

57. Thompson, *supra* note 20, at 3 (quoting *Lau*, 414 U.S. at 567).

58. *Lau*, 414 U.S. at 564.

59. *Id.* at 566.

60. *Id.*

61. *Id.* at 568.

62. Asturias, *supra* note 14, at 617; see also OFFICE OF CIVIL RIGHTS, *supra* note 55, at 1 (highlighting *Lau* when discussing how the importance of ensuring “school districts are

Further, “reflecting [the] concerns’ presented by the *Lau* Court,”⁶³ Congress enacted the Equal Educational Opportunities Act (“EEOA”).⁶⁴ The EEOA provides that “[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . [failing] to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”⁶⁵ The EEOA, therefore, effectively enacted the Court’s decision in *Lau*.⁶⁶ Although EL “rights revolve almost entirely around the courts’ application”⁶⁷ of the statute, the statute itself does not “provide individual students with any specific educational rights.”⁶⁸ Instead, the statute aimed to ensure a child’s access to education by assessing a school’s “overall efforts to overcome language barriers,” which allows schools to have “broad leeway in what sort of educational services they provide to” ELs.⁶⁹

This “broad leeway” is not unlimited, however. Again, the judiciary played a critical role in interpreting federal legislation regarding EL rights in *Castañeda v. Pickard*.⁷⁰ In *Castañeda*, the United States Court of Appeals for the Fifth Circuit, recognizing that Congress provided “almost no guidance, in the form of text or legislative history, to assist [the court] . . . in determining whether a school district’s language remediation efforts are ‘appropriate,’”⁷¹ outlined three standards by which an EL program is analyzed under the EEOA.⁷² Specifically, the court considers whether

- (1) [t]he educational theory underlying the language assistance program is recognized as sound by some experts in the field or is considered a legitimate experimental strategy⁷³;
- (2) [t]he program and practices used by the school system are reasonably calculated to implement effectively

equipped with the tools and recourses [needed] to meet their responsibilities to [EL] students . . . is as important today as it was then”).

63. Asturias, *supra* note 14, at 619 (citing *Horne v. Flores*, 557 U.S. 433, 476 (2009) (Breyer, J., dissenting)).

64. *Dear Colleague Letter*, *supra* note 55.

65. 20 U.S.C.A. § 1703 (West 2018).

66. *See Dear Colleague Letter*, *supra* note 55.

67. Derek W. Black, *Civil Rights, Charter Schools, and Lessons to be Learned*, 64 FLA. L. REV. 1723, 1739 (2012).

68. Eric Archerd, *An Idea for Improving English Language Learners Access to Education*, 41 FORDHAM URB. L.J. 351, 366 (2013).

69. *Id.*; *see also* Black, *supra* note 67 (“While the statutory language clearly establishes an affirmative duty to assist [EL] . . . students, exactly what schools must do is unclear”).

70. 648 F.2d 989 (5th Cir. 1981).

71. *Id.* at 1009.

72. Archerd, *supra* note 68.

73. Asturias, *supra* note 14, at 620-21 (noting that the “very existence” of LTELs and the “data for long-term English . . . learners . . . illustrate[s] the pitfalls of inconsistency” that has resulted from the lack of clarity and “great latitude” given in the first prong of the *Castañeda* test).

the educational theory adopted by the school; and (3) [t]he program succeeds, after a legitimate trial in producing results indicating that students' language barriers are actually being overcome within a reasonable period of time.⁷⁴

The “significant level of unchallenged discretion” that the three-pronged analysis has been purported to give states and school districts has been widely criticized.⁷⁵ However, the court's holding in *Castañeda* has been adopted by the Department of Justice and the Department of Education and is used when determining whether a school district is in compliance with both the Civil Rights Act and the EEOA.⁷⁶

The Civil Rights Act, EEOA, and both *Lau* and *Castañeda* played a critical role in establishing the standards that would shape the future of EL policy. The foundation set by these pieces of legislation and cases are echoed in not only the first version of the Elementary and Secondary Education Act, but in the two later reauthorizations of the Act as well.

B. The Elementary and Secondary Education Act

The Elementary and Secondary Education Act (“ESEA”) was enacted in 1965 as a civil rights law.⁷⁷ “ESEA offered new grants to districts serving low-income students, federal grants for textbooks and library books, funding for special education centers, and scholarships for low-income college students.”⁷⁸ ESEA additionally “provided federal grants to state educational agencies to improve the quality of elementary and secondary education.”⁷⁹ The ESEA has evolved in many ways over the last fifty years. Specifically, in regard to ELs, the ESEA has evolved in three primary ways: through the addition of the Bilingual Education Act; the reauthorization of ESEA by the No Child Left Behind Act in 2001; and the second reauthorization of ESEA through the Every Student Succeeds Act in 2015.

74. *Dear Colleague Letter*, *supra* note 55, at 6.

75. Asturias, *supra* note 14, at 620; *see also* Black, *supra* note 67, at 1742 (“The *Castañeda* standard affords districts so much discretion that plaintiffs are unable to establish that a district's program—even a poor one—is the cause of educational failure. Similarly, even a state's refusal to significantly support EL . . . programs will go unchecked unless a plaintiff can somehow control for numerous variables and causally connect state policy to student outcomes”).

76. *Dear Colleague Letter*, *supra* note 55.

77. *Every Student Succeeds Act (ESSA)*, U.S. DEP'T OF EDUC., <https://perma.cc/5WYY-85KZ> (last visited Jan. 23, 2018).

78. *Id.*

79. *Id.*

i. The Bilingual Education Act

Three years after the ESEA's enactment, Congress amended the ESEA in 1968 to include the Bilingual Education Act ("Title VII" or "BEA").⁸⁰ Enacted in part due to concerns expressed by policymakers and educators regarding the "low academic achievement, high dropout rates, and poor self-esteem among Latino children in general, and Mexican-Americans in particular,"⁸¹ the BEA was the "first official federal recognition of the needs of students with limited English speaking ability."⁸² It "drew national attention to the unique educational challenges that non-English-speaking students encountered."⁸³ Under Title VII, school districts could receive funds to help bolster programs that served ELs.⁸⁴ Funds received through the Bilingual Education Act could be "used by districts for: (1) resources for educational programs, (2) training for teachers and teacher aides, (3) development and dissemination of materials, and (4) parent involvement projects."⁸⁵ The Bilingual Education Act is often regarded as the foundation for legislation focused on ELs and served the incredibly important purpose of attempting to meet the needs of EL students before the enactment of No Child Left Behind, which officially repealed the Bilingual Education Act in 2002.⁸⁶

ii. The No Child Left Behind Act

No Child Left Behind ("NCLB") was enacted in 2001 to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education."⁸⁷ NCLB reauthorized the ESEA and "put in place measures that exposed achievement gaps among traditionally underserved students and their peers and spurred an important national dialogue on education improvement."⁸⁸

Generally, NCLB required states receiving federal funds to create "a set of high-quality, yearly student academic assessments that include, at a minimum, assessments in reading/language arts, mathematics, and science"

80. GLORIA STEWNER-MANZANARES, *THE BILINGUAL EDUCATION ACT: TWENTY YEARS LATER* 1 (1988).

81. Rosemary C. Salomone, *Educating English Learners: Reconciling Bilingualism and Accountability*, 6 HARV. L. & POL'YREV. 115, 118 (2012).

82. STEWNER-MANZANARES, *supra* note 80.

83. U.S. DEP'T OF EDUC., NATIONAL EVALUATION OF TITLE III IMPLEMENTATION—REPORT ON STATE AND LOCAL IMPLEMENTATION 4 (2012).

84. STEWNER-MANZANARES, *supra* note 80, at 1-2.

85. *Id.* at 2.

86. William N. Myhill, *The State of Public Education and the Needs of English Language Learners in the Era of 'No Child Left Behind*, 8 J. GENDER RACE & JUST. 393, 426 (2004).

87. *Id.* at 430 (citing 20 U.S.C.A. § 6301 (West 2003)).

88. *Every Student Succeeds Act (ESSA)*, *supra* note 77.

and to “report student progress in terms of percentage of students scoring at the ‘proficient’ level or higher.”⁸⁹ This reporting was referred to as “adequate yearly progress” and was calculated at a school, school district, and state level for all students.⁹⁰ Schools that failed to meet adequate yearly progress targets for two or more years faced sanctions, including losing students to better-performing schools in the same district, state intervention, and setting aside a percentage of a school’s Title I funds.⁹¹

Accountability provisions regarding ELs under NCLB were located in two primary sections: Title I and Title III. Under Title I, NCLB required that adequate yearly progress, for a variety of student subgroups, be disaggregated and reported separately. These subgroups included: (1) economically disadvantaged students, (2) students from major racial and ethnic groups, as defined by each state, (3) students with disabilities, and (4) students with *limited English proficiency*.⁹² NCLB defined EL students as those students who: (1) were between the age of 3 and 21, (2) were enrolled or were preparing to be enrolled in elementary or secondary school, (3) were not born in the United States, or spoke a language other than English, and (4) did not meet “the state’s proficient level of achievement” due to their “difficulty in speaking, reading, writing, or understanding English.”⁹³ This disaggregation of EL student achievement data, and NCLB’s requirement that this data be publicly disclosed,⁹⁴ was a milestone in EL education and accountability, as it provided greater transparency and understanding around EL students’ needs.

Title III, for the first time in federal law, held districts accountable “for the progress of EL students both in acquiring English and in achieving states’ challenging academic standards.”⁹⁵ Specifically, Title III provides that states must “ensure that [ELs], including immigrant children and youth, attain English proficiency and develop high levels of academic achievement in English” and “meet the same challenging State academic standards that all

89. Jamal Abedi, *The No Child Left Behind Act and English Language Learners: Assessment and Accountability Issues*, 33 EDUC. RESEARCHER 4, 4 (2004).

90. *Id.*

91. Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WEEK (Apr. 10, 2015), <https://perma.cc/EVA4-8AYC>.

92. Abedi, *supra* note 89 (emphasis added). As mentioned above, the terms used to describe students learning English have changed throughout the years. To maintain consistency, this Note refers to students classified with “limited English proficiency” under NCLB as EL students, as they refer to the same subgroup of students.

93. *Id.* at 5.

94. RICHARD FRY, PEW HISPANIC CTR., *THE ROLE OF SCHOOLS IN THE ENGLISH LANGUAGE LEARNER ACHIEVEMENT GAP 2* (2008).

95. U.S. DEP’T OF EDUC., *supra* note 83, at xiii. Through the allocation of grant funds, “Title I . . . of the Elementary and Secondary Education Act, as amended . . . provides financial assistance to . . . [school districts and] schools with high numbers or high percentages of children from low-income families to help ensure that all children meet challenging state academic standards.” U.S. DEP’T OF EDUC., *Programs: Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A), Purpose*, <https://perma.cc/C3XK-2YWP> (last modified Oct. 5, 2015).

children are expected to meet.”⁹⁶ States were, therefore, required “to develop English language proficiency (“ELP”) standards, to adopt valid and reliable assessments aligned to ELP assessments, and to measure ELs’ progress toward and attainment of English language proficiency.”⁹⁷ Further, states were responsible for establishing “accountability systems to monitor state and district performance in supporting ELs’ English language proficiency development and mastery of challenging academic content.”⁹⁸ School districts were then held accountable to three Annual Measurable Achievement Objectives (“AMAOs”), which were set under the accountability systems.⁹⁹ The three AMAOs were:

1. Annual increases in the number or percentage of students making progress in learning English (AMAO 1)
2. Annual increases in the number or percentage of students attaining English proficiency (AMAO 2)
3. Making adequate yearly progress for limited English Proficient children as described in Title I, Section 111(b)(2)(B), of ESEA (AMAO 3).¹⁰⁰

“The AMAOs represented a first attempt to gather outcomes-related data on the EL population at scale.”¹⁰¹ If a district failed to meet their AMAOs for two or four consecutive years, the district was subject to state actions.¹⁰²

The increase in accountability structures surrounding EL students under NCLB provided more information on the unique opportunities schools, districts, and states had in educating EL students. However, under NCLB, there was no guidance as to how quickly states were expected to help students achieve English language proficiency, and “neither the statute itself nor the implementing regulations provide[d] much guidance in terms of what sort of educational services should be provided to [EL students].”¹⁰³ Further, there were no accountability provisions specifically focused on the needs of long-term English learners.¹⁰⁴ Districts were only required to set AMAOs related to “the number or percentage of students making progress in learning English” and “the number or percentage of students attaining English

96. 20 U.S.C.A. § 6812 (West, 2015).

97. U.S. DEP’T OF EDUC., *supra* note 83, at xvii.

98. *Id.* at xx.

99. *Id.*

100. *Id.*

101. JANIE TANKARD CARNOCK, SEEING CLEARLY: FIVE LENSES TO BRING ENGLISH LEARNER DATA INTO FOCUS 5 (2017).

102. U.S. DEP’T OF EDUC., *supra* note 6, at xx.

103. Archerd, *supra* note 68, at 370.

104. CARNOCK, *supra* note 101, at 7.

proficiency.”¹⁰⁵ While an improvement from the Bilingual Education Act, still more was needed to bolster accountability for states, districts, and schools around EL student achievement, particularly related to English language acquisition.

Thus, although at its enactment many stakeholders believed the structures implemented by NCLB were a “step in the right direction,” and even “promising,”¹⁰⁶ over time “parents, educators, and elected officials across the country recognized that a strong, updated law was necessary to expand opportunity to all students; support schools, teachers, and principals; and strengthen our education system and economy.”¹⁰⁷

iii. The Every Student Succeeds Act

The Every Student Succeeds Act (“ESSA”) was enacted in 2015 and again reauthorized the Elementary and Secondary Education Act.¹⁰⁸ Repealing NCLB, ESSA’s purpose “is to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.”¹⁰⁹ “Compared to previous federal education law, [including the] No Child Left Behind Act . . . , ESSA mandates that states provide greater information to the public regarding English proficiency progress and academic achievement for English learners.”¹¹⁰ The ESSA does this in part by recognizing “the unique needs of ELs, including by acknowledging . . . separate groups of ELs such as English learners with disabilities, recently arrived ELs, and long-term ELs.”¹¹¹

Primary changes in the ESEA, as amended by NCLB and ESSA, can be separated into two categories: changes in Title I accountability and amendments to Title III accountability. Under Title I, states are now required to not only report on EL student academic achievement on a *district* level, but ESSA mandates that states disclose, on a *school* level, “(1) academic achievement; (2) academic progress (elementary and middle schools); (3) graduation rate (high schools); (4) *progress in achieving English language proficiency*; and (4) at least one school quality for student success indicator” for each student subgroup, including ELs.”¹¹² Shifting the requirement that states disclose data reflecting ELs’ “progress in achieving English language proficiency” to Title I on a *school* basis, rather than under Title III on a *district* basis, which was the requirement under NCLB, “proves a valuable opportunity for States to reshape their accountability systems to support

105. U.S. DEP’T OF EDUC., *supra* note 83, at xx.

106. Abedi, *supra* note 89, at 11.

107. *Every Student Succeeds Act (ESSA)*, *supra* note 77.

108. *Id.*

109. 20 U.S.C.A. § 6301 (West 2015).

110. DELIA POMPA & LESLIE VILLEGAS, ANALYZING STATE ESSA PLANS FOR ENGLISH LEARNER ACCOUNTABILITY: A FRAMEWORK FOR COMMUNITY STAKEHOLDERS 1 (2017).

111. U.S. DEP’T OF EDUC., *supra* note 6, at 4.

112. U.S. DEP’T OF EDUC., *supra* note 27, at 5.

improved outcomes for ELs.”¹¹³ Additionally, “several scholars and advocates have argued that the move [to Title I] heightens the visibility and importance of ELs by integrating their linguistic outcomes into the core accountability structure for all students under Title I, which comes with a much larger pot of funding.”¹¹⁴

In particular, ESSA requires that, when setting goals relating to ELs’ “progress in achieving English language proficiency,” “states must take into account a student’s initial [English language proficiency] . . . level,” rather than merely their time in the EL educational program, as was the case under NCLB. Additionally, states may consider one or more of several other student characteristics, including a student’s time in the EL educational program, “grade level; age; native language proficiency level; and limited or interrupted formal education.”¹¹⁵ Using the required and optional selected student characteristics, states must then create a “uniform procedure” that includes “applicable timelines, up to a state-determined maximum number of years following identification as an EL, for ELs sharing particular characteristics to achieve ELP.”¹¹⁶ These timelines should also include “annual ‘student level targets’” to ensure that students with similar characteristics are meeting goals that will help them achieve English language proficiency within the maximum amount of time determined by the state.¹¹⁷ This “State-determined maximum timeline” must be supported by a rationale, “which may be informed by historical data on ELs attaining ELP,”¹¹⁸ but the ESSA does not establish a mandatory time by which ELs are expected to have achieved English language proficiency.

Under Title III, “the law newly requires extra EL data collection and reporting metrics.”¹¹⁹ States must report on

title programs and activities, [the] number and percentage of ELs making progress toward English language proficiency, [the] number and percentage of ELs who attain proficiency and exit [EL programs] . . . , [the] number and percentage of former ELs who meet academic content standards (for 4 years), [the] *number and percentage of ELs who have not exited [the EL program] . . . after 5 years as an EL*, and any other information required by the [State Education Agency].¹²⁰

113. *Id.* at 4 (emphasis added).

114. CARNOCK, *supra* note 101.

115. U.S. DEP’T OF EDUC., *supra* note 27, at 5.

116. *Id.* at 7.

117. *Id.*

118. *Id.* at 9.

119. CARNOCK, *supra* note 101, at 5.

120. U.S. DEP’T OF EDUC., *supra* note 6, at 37 (emphasis added).

By requiring states to report more thoroughly on various aspects of EL progress, “the Title III-required data have the potential to create a more nuanced understanding of states’ EL performance and yield more granular data over a longer arc of time.”¹²¹

Particularly regarding LTELs, the Department of Education (or “the Department”) has noted that “the ESEA does not define ‘long-term English learner.’”¹²² The Department, rather, indicates that “the reporting requirement under ESEA Section 3121(a)(6) may be instructive in determining which ELs served under Title III are long-term ELs.”¹²³ Specifically highlighting the provision requiring states to report students who have not exited the EL program within “five years of initial classification as an EL,” the Department recommends that states consider students “who have not attained English language proficiency after five years” long-term English learners.¹²⁴ Highlighting that LTELs “who remain in EL status for prolonged periods of time may face significant barriers to attaining English language proficiency and graduating college-and-career-ready,” the Department emphasizes the importance of tracking ELs as they move from school to school, or school district to school district, to ensure that no student “falls through the cracks and is unable to attain English language proficiency despite receiving EL services for many years.”¹²⁵ This new reporting requirement is in part designed with the intention of helping schools, school districts, and states better understand whether EL programs need to be modified, or whether targets need to be adjusted, both to help ELs more quickly and effectively attain English language proficiency. Additionally, reporting helps to ensure LTELs are receiving services that best support their specific needs.¹²⁶

Thus, EL students under the ESEA, as amended by ESSA, are better advocated for than any other time in our education legislation history. By recognizing the diversity of the EL population, and the unique needs of different subgroups of EL students, and by requiring states to report this data, educators and policymakers will likely be able to better understand not only which states, districts, and schools are better serving EL students, but also what methods of educating ELs are working best for students, particularly for different EL subgroups. The goal of policymakers and educators alike is that this information will propel the knowledge of educating this population of students to the next generation of understanding, where these students will most assuredly not “fall through the cracks,” but, rather, will be more supported each and every year.

121. CARNOCK, *supra* note 101, at 6-7.

122. U.S. DEP’T OF EDUC., *supra* note 6, at 38.

123. *Id.*

124. *Id.*

125. *Id.* at 38-39.

126. *Id.* at 39.

However, despite the incredible legal evolution impacting ELs and the recent wins for this population of students under the ESSA, there is still much work to be done, particularly to ensure the unique needs of LTELs are being met in a way that recognizes their ability to achieve at the highest levels.

IV. DEFINING AND INCREASING EXPECTATIONS: A PROPOSED CHANGE TO ESSA FOR LONG-TERM ENGLISH LEARNERS

A. Introduction of Proposed Changes

In order to further ensure all English learners, particularly long-term English learners, are receiving access to a high-quality education that will enable them to achieve at the highest levels, two primary issues need to be addressed in the ESEA, as amended by ESSA.

First, the ESEA does not currently explicitly define the term “long-term English learner.”¹²⁷ Instead, Title III requires states to report on “the number and percentage of English Learners who have not attained English language proficiency within 5 years of initial classification as an English learner.”¹²⁸ While this new reporting requirement indicates progress toward ensuring state accountability for ELs timely acquiring the English language, the lack of a clear definition for “long-term English learner” has led to inconsistent interpretations among states, which will be discussed in Section C. Further, the way the requirement for reporting under Title III is currently written does not fully recognize the incredible diversity of the EL population and does not encourage states to set more rigorous standards for English language acquisition based on student-level characteristics, such as initial level of proficiency, age, grade, native language proficiency level, and whether the student’s education has been interrupted.¹²⁹ Amending the ESEA to require states to report on the number and percentage of long-term English learners and define LTEL would set a baseline requirement for English language acquisition at five years, as well as provide an opportunity for states

127. *Id.* at 38.

128. 20 U.S.C.A. § 6841(a)(6) (West 2015).

129. For example, in order to set rigorous standards, a state may consider setting an expectation that students who are identified as ELs at the pre-K or kindergarten level achieve English language proficiency after receiving EL services for three years, so that this student advances to 4th or 5th grade with the language skills needed to truly access the content in their core classes. Thus, a student who is identified as an EL in Kindergarten may be determined to be a LTEL if he has not exited the program after completing second grade, whereas a student who is identified as an EL in third grade may only be considered to be a LTEL after not exiting the EL program after five years, or, in other words, after the child has completed seventh grade. Encouraging states to consider these student characteristics when setting expectations for schools empowers them to set higher standards and, therefore, hopefully draw more attention to better serving EL students earlier on so they avoid being classified as LTELs. Additionally, it will allow states to more quickly identify LTELs and better serve those students.

to set more rigorous standards based on various student characteristics, which would better serve EL students and create more clarity around expectations.

Second, the lack of defining LTEL in the ESEA makes it difficult to implement consistent accountability and reporting standards between Title I and Title III. Specifically, Title I requires that states establish “long-term goals” for each applicable subgroup of students, including ELs, that consider “academic achievement,” “*progress in achieving English language proficiency . . . within a state determined timeline[,]*” and “graduation rates.”¹³⁰ Therefore, Title I does not set forth a standard that EL students achieve language proficiency within five years, as is currently implied in Title III through the requirement that states report the number and percentage of EL students who have not achieved ELP within five years.¹³¹ Instead, Title I provides states with complete discretion in determining timelines for attaining English language proficiency and does not provide guidance to states regarding a maximum timeline for achievement. By amending Title I to require that a state’s long-term goal for English language acquisition not exceed five years, the statute sets a higher expectation for states and creates greater consistency in accountability structures and provisions, while still giving states significant leeway in their goal setting processes and determinations by providing flexibility in Title III for states to create timelines based on state selected student-level characteristics.

Therefore, in an effort to provide states with more clarity, consistency, and ease of implementation when both setting long-term goals under Title I and when reporting on ELs under Title III, the ESEA should be amended to: (1) set a minimum expectation in Title I that a state must ensure EL students attain English language proficiency within five years; and (2) include a definition for the term “long-term English learner” in Title III that sets the maximum number of years an EL is expected to attain ELP at five years, but that also gives states guidance in setting more rigorous standards by determining the definition of long-term English learner based on specific, student-level characteristics at the state level.

B. Proposed Changes

In order to better serve the needs of EL students, through the use of higher expectations as well as greater clarity and accountability, Sections 1111, 3121, and 3201 of the ESEA should be amended. The following text includes relevant portions of the ESEA, as well as proposed removals, indicated by strikethroughs, and additions, indicated by bold, italic text.

SEC. 1111. [20 U.S.C. 6311] STATE PLANS.

130. 20 U.S.C.A. § 6311(c)(4)(A)(i)-(ii) (West 2015) (emphasis added).

131. *See generally* 20 U.S.C. §§ 6801-7014 (2015).

[SECTIONS (a) AND (b) REMAIN WITHOUT CHANGE. FURTHER, SECTION (c)(1)-(3) REMAIN WITHOUT CHANGE.]

(4) DESCRIPTION OF SYSTEM.—The statewide accountability system described in paragraph (1) shall be based on the challenging State academic standards for reading or language arts and mathematics described in subsection (b)(1) to improve student academic achievement and school success. In designing such system to meet the requirements of this part, the State shall carry out the following:

(A) ESTABLISHMENT OF LONG-TERM GOALS.—Establish ambitious State-designed long-term goals, which shall include measurements of interim progress toward meeting such goals—

[SUBSECTION (i) REMAINS WITHOUT CHANGE]

(ii) for English learners, for increases in the percentage of such students making progress in achieving English language proficiency, as defined by the State and measured by the assessments described in subsection (b)(2)(G), within a State-determined timeline, *not to exceed five years*.

[THE REMAINDER OF THIS PROVISION REMAINS WITHOUT CHANGE.]

SEC. 3121. [20 U.S.C. 6841] REPORTING.

(a) In General.—Each eligible entity that receives a subgrant from a State educational agency under subpart 1 shall provide such agency, at the conclusion of every second fiscal year during which the subgrant is received, with a report, in a form prescribed by the agency, on the activities conducted and children served under such subpart that includes—

(1) a description of the programs and activities conducted by the entity with funds received under subpart 1 during the 2 immediately preceding fiscal years, which shall include a description of how such programs and activities supplemented programs funded primarily with State or local funds;

(2) the number and percentage of English learners in the programs and activities who are making progress toward achieving English language proficiency, as described in section 1111(c)(4)(A)(ii), in the aggregate and disaggregated, at a minimum, by English learners with a disability;

(3) the number and percentage of English learners in the programs and activities attaining English language proficiency based on State English language proficiency standards established under section 1111(b)(1)(G) by the end of each school year, as determined by the State's English language proficiency assessment under section 1111(b)(2)(G);

(4) the number and percentage of English learners who exit the language instruction educational programs based on their attainment of English language proficiency;

(5) the number and percentage of English learners meeting challenging State academic standards for each of the 4 years after such children are no longer receiving services under this part, in the aggregate and disaggregated, at a minimum, by English learners with a disability;

(6) the number and percentage of ~~English learners who have not attained English language proficiency within 5 years of initial classification as an English learner and first enrollment in the local educational agency~~ *long-term English learners*; and

(7) any other information that the State educational agency may require.

[THE REMAINDER OF THIS PROVISION REMAINS UNCHANGED.]

SEC. 3201. [20 U.S.C. 7011] DEFINITIONS.

Except as otherwise provided, in this title:

[SECTIONS (1) – (7) REMAIN WITHOUT CHANGE]

(8) LONG-TERM ENGLISH LEARNER.—*The term “long-term English learner” means an English learner who has not achieved English language proficiency within the*

maximum number of years, not to exceed five years, as defined by the state based on one or more student-level characteristics including—

(A) initial English language proficiency level;

(B) grade;

(C) age;

(D) limited or interrupted formal education, if any; or

(E) native language proficiency level.

[THE REMAINDER OF THIS SECTION, ASIDE FROM RENUMBERING, REMAINS UNCHANGED].

C. Justifications for the Proposed Change

Setting a clear standard that provides a minimum expectation that the state ensures EL students attain English language proficiency within five years after a student is identified as an EL, while also prompting states to set higher standards based on student-level characteristics that each state chooses, is not only justified based on leading EL research and current EL policy, but is also justified by at least three practical impacts that will better serve EL students.¹³² These impacts include: (1) a more consistent baseline standard across states; (2) the possibility for more thorough and complex research on English language acquisition rates that reflects the diversity of the English learner population; and (3) greater accountability for states, school districts, and schools regarding English learner language acquisition and academic outcomes.

i. Setting the Five-Year Standard

The proposed change requires that a state ensure its EL students achieve ELP within a maximum of five years, which is not an arbitrary standard. Rather, the five-year requirement is both consistent with leading research on EL English language acquisition rates and is compatible with current policy.¹³³ Although ideally states would be expected to ensure students achieve ELP within an even shorter baseline amount of time, a clear, five-year requirement, as utilized in the proposed change, establishes a

132. See *infra* Part IV, Section (C)(i).

133. See *supra* Part II.

reasonable standard that better serves ELs than current law.¹³⁴ Additionally, prompting states to set English language acquisition standards for different subgroups of EL students based on state-selected, student-level characteristics provides states with an opportunity to set more rigorous standards for different subgroups of EL students, thereby further promoting the interests of EL students in the classroom.

First, the proposed change is consistent with current research regarding academic English language acquisition.¹³⁵ As discussed in Part II of this Note, leading research in the field of English language acquisition suggests that it takes an EL student between four and seven years to master academic English language proficiency.¹³⁶ Although the proposed change submits that states are required to ensure EL students achieve ELP on the more ambitious side of this accepted standard,¹³⁷ the proposed change is consistent with this research while setting high expectations for states, no different from the high expectations that are set for students in classrooms every day. Additionally, prompting states to set higher expectations for schools based on student-level characteristics is in keeping with research. As indicated by the Washington study also discussed in Part II,¹³⁸ several factors, such as the grade level at which a student was identified as an EL, affected the rate at which an EL student achieved ELP.¹³⁹ Other studies have further recognized the impact of initial proficiency level on ELP acquisition rates.¹⁴⁰ Because this proposed change still maintains the state's autonomy in process and implementation, the state is able to differentiate the learning goals for each student based on factors like grade level and initial proficiency level of EL students. This supports a more realistic, yet challenging and individualized, set of expectations.

Second, and most practically, “[b]y definition, English . . . Learners enter school lacking the English proficiency needed to fully access the core curriculum.”¹⁴¹ The consequences of this are well illustrated by the NAEP performance statistics first mentioned in Part I of this Note. Graphs 1 through 4 below outline this data more thoroughly. Graphs 1 and 2 illustrate the achievement scores of EL and non-EL fourth graders on the math and reading

134. See *infra* Part IV, Section D (highlighting the fact that many states do not determine EL students to qualify as LTELs until after 6 or 7 years in the EL program. By requiring states to accelerate EL's English language acquisition to five years instead of six or seven, EL students are able to transition out of EL services earlier in their academic careers, thus being able to more fully participate in their classes at earlier grade levels); see also *infra* note 186.

135. See *supra* Part II.

136. See *supra* text accompanying note 39.

137. See *supra* text accompanying note 26.

138. See *supra* text accompanying note 47 (highlighting that ELs identified in Kindergarten, generally, achieved ELP after 3.8 years).

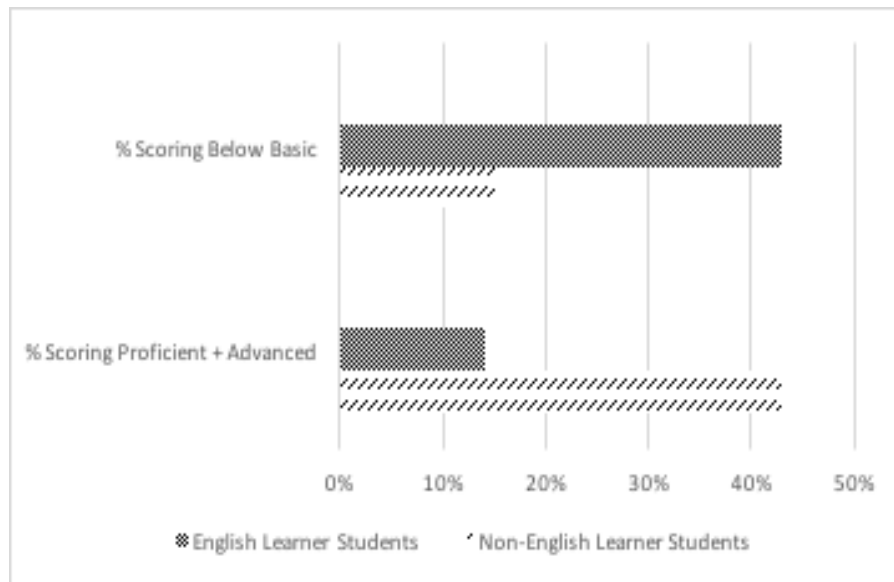
139. See MOTAMEDI, *supra* note 48, at i.

140. See COOK, *supra* note 52, at 69; GREENBERG, *supra* note 47, at 9; ERIC HAAS ET AL., THE ACHIEVEMENT PROGRESS OF ENGLISH LEARNER STUDENTS IN NEVADA i (2016).

141. OLSEN, *supra* note 9, at 8.

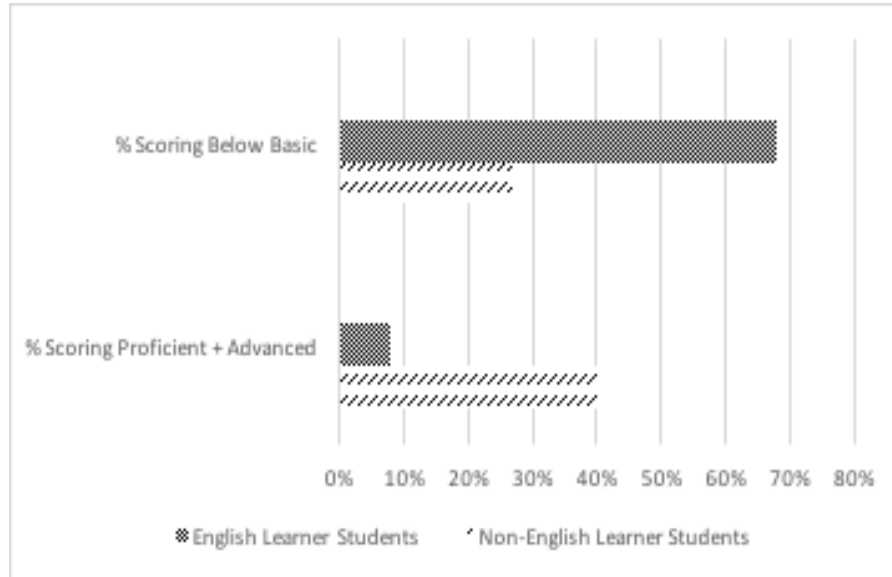
assessments, and Graphs 3 and 4 depict the same information for students in eighth grade.¹⁴²

Graph 1: Fourth Grade Achievement Data on the 2015 Mathematics NAEP Assessment for English Learner Students and Non-English Learner Students

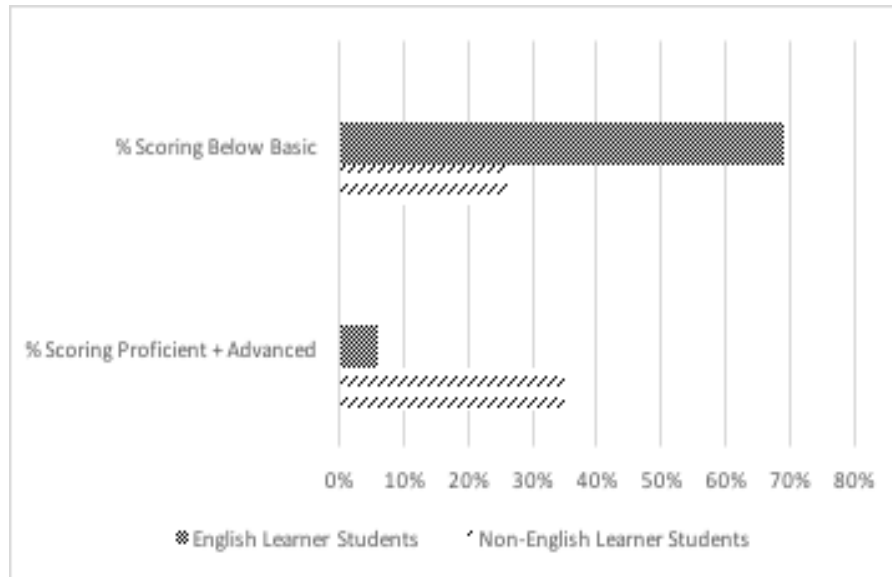


142. The achievement scores depicted in these graphs are divided between the percentage of students that scored “below basic” on the assessment, and those that scored “proficient” or “advanced.” Students performing at a below basic or basic level are performing below the standard of achievement expected students in that grade on that particular subject area. Students achieving at the proficient or advanced levels are meeting or exceeding the achievement standards set for students in that grade for that particular subject area. (Note: the percentage of students scoring at the “basic” level is excluded from this data.)

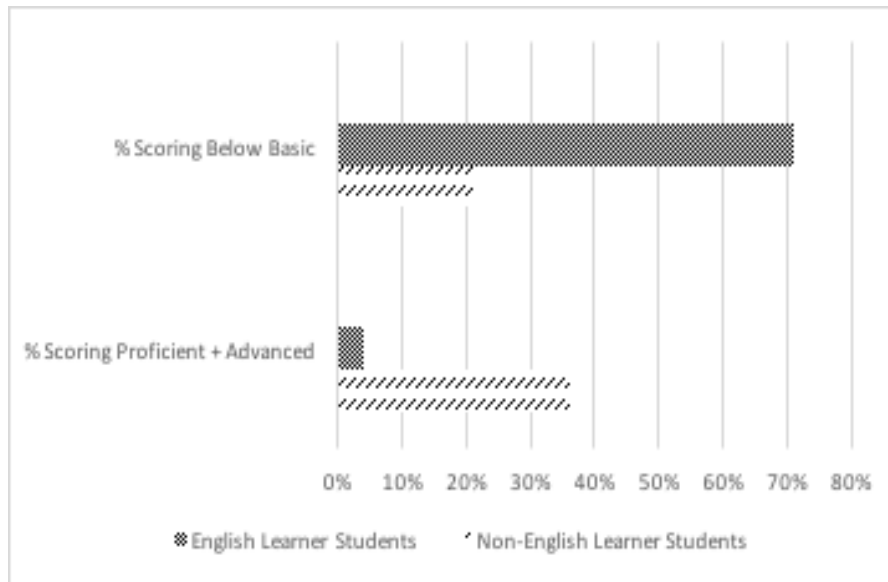
Graph 2: Fourth Grade Achievement Data on the 2015 Reading NAEP Assessment for English Learner Students and Non-English Learner Students



Graph 3: Eighth Grade Achievement Data on the 2015 Mathematics NAEP Assessment for English Learner Students and Non-English Learner Students



Graph 4: Eighth Grade Achievement Data on the 2015 Reading NAEP Assessment for English Learner Students and Non-English Learner Students



As depicted in this student performance data, it is clear that a student's inability to access the content in their core classes has a significant impact on their academic achievement outcomes, which is a principal reason for mandating a five-year standard for English language acquisition. For example, as displayed above, only six percent of EL students, compared to 35% of non-EL students, scored proficient or advanced on the eighth grade mathematics NAEP assessment.¹⁴³ Similarly, only four percent of EL students, compared to 36% of non-EL students, scored proficient or advanced on the eighth grade reading assessment.¹⁴⁴ A similar pattern is seen in the fourth grade assessment results. On the NAEP reading assessment, only eight percent of fourth grade EL students, compared to 39% of non-EL students, scored proficient or advanced.¹⁴⁵ In mathematics, 14% of EL students scored proficient or advanced, while 43% of non-EL students scored proficient or advanced.¹⁴⁶ What is even more striking, however, is the differential between

143. *2015 Mathematics & Reading Assessments*, *supra* note 16.

144. *Id.*

145. *2015 Mathematics & Reading Assessments, National Achievement Level Results*, THE NATION'S REPORT CARD, <https://perma.cc/3DT4-4S9P> (last visited Jan. 21, 2018) (to review these statistics, scroll roughly halfway down the page; where it prompts the user to "select a student group" select "Status as English language learners" from the drop down menu; the graph below will automatically adjust to reflect the correct data.).

146. *2015 Mathematics & Reading Assessments, National Achievement Level Results*, THE NATION'S REPORT CARD, <https://perma.cc/LU8F-W2BH> (last visited Jan. 21, 2018) (to

EL students and non-EL students who score at the “below basic” level. In math, **69%** of EL students in eighth grade scored *below basic*, while 26% of non-EL students scored the same.¹⁴⁷

Similarly, **43%** of fourth grade EL students scored below basic, compared to 15% of their non-EL peers.¹⁴⁸ Practically and simply speaking, the data reflects the following scenario: a fourth grade EL student who cannot fully understand the language in which he is being taught will have a much more difficult time mastering the foundations of multiplication and division. It is hardly difficult to imagine that if that same child remains classified as an EL for six years and shows up to his tenth grade geometry class expected to be able to solve for the area of a triangle, for example, he will face additional difficulties because of the inability to fully comprehend the concepts taught in earlier grades.¹⁴⁹ This may not only cause the student more frustration as he endeavors to learn this information, but also can lead to continuing lower achievement results, which may prevent the student from performing competitively when applying to college or a job. This data, and the preceding illustration, clearly depict why it is critical for states to work diligently, and with the best interests of the particular EL student in mind, when crafting timelines for language acquisition and support a baseline five-year language acquisition standard, as each year a student is unable to access the content in their core classes, the greater the consequences for their long-term academic success.

Furthermore, the proposed change keeps EL students’ best interests at the forefront, as leading research also suggests a tapering off of progress toward ELP after a student has been receiving EL services in excess of five years.¹⁵⁰ The proposed change encourages states to ensure that ELs are exiting the program within an amount of time where they generally experience the most growth and success. By setting this standard, states are encouraged to work to ensure that EL students make greater amounts of growth during the initial five years after identification as an EL and provided with a better opportunity to identify which EL students may be struggling earlier on, rather than after six or seven years of receiving services. By setting a norm that all EL students will exit the program within the five-year period, LTELs will be identified sooner, thus enabling states, and thereby school districts and schools, to provide LTELs with the additional support needed to ensure they reach ELP.

review these statistics, scroll roughly halfway down the page; where it prompts the user to “select a student group” select “Status as English language learners” from the drop down menu; the graph below will automatically adjust to reflect the correct data.).

147. *2015 Mathematics & Reading Assessments*, *supra* note 16.

148. *2015 Mathematics & Reading Assessments*, *supra* note 146.

149. See OLSEN, *supra* note 9, at 12 stating that “[d]uring the years they are learning English, ELLs only partially comprehend whatever subject matter is being taught. . . . As a result, LTELs arrive in middle school without foundational academic knowledge—contributing to the academic struggles so typical for LTELs.”

150. See *supra* text accompanying note 40.

In addition to being aligned with current research, the proposed change is also consistent with current law. The ESEA is currently drafted in a way that sets a requirement that states report the number of ELs who have not exited the program within five years under Title III.¹⁵¹ The proposed change further clarifies this expectation in Title I, by providing that a state's long-term goal for English language acquisition cannot exceed five years, and in Title III, through inclusion of the LTEL definition, while prompting states to set rigorous standards based on student-level characteristics. Further, rather than the proposed change abruptly departing from current law, making it increasingly difficult for states to effectively transition into the new requirements of the ESEA, which began taking effect in the 2017-18 school year, the proposed change is a natural extension of the current law that provides more guidance and clarity for states.

Thus, the proposed change presents an option that is not only consistent with current research, but that also creates a workable standard compatible with current law, while still providing a clearer, more student-tailored standard.

ii. Practical Impacts

Implementing a change that not only defines what students qualify as long-term English learners, but that also sets a standard that expects states to accelerate English language acquisition to ensure ELs achieve proficiency within a maximum of five years, will have at least three critical, practical impacts. First, amending the ESEA to include the proposed change will result in greater clarity as to the expectations of states and thus provides for greater consistency across state lines. This is particularly important when serving EL students due to the fact that this particular student subgroup tends to be very mobile.¹⁵² Second, data surrounding EL language acquisition rates will be more thorough and clear and, therefore, will be able to be used as a guide not only for policymakers moving forward, but will be able to provide educators with a more complete toolkit in assessing the unique needs of various subgroups of EL students. By encouraging states to set specified standards for ELs with different characteristics, the potential for research into English language acquisition rates is robust.¹⁵³ Lastly, adopting the proposed change promotes greater state, school district, and school-level accountability by

151. 20 U.S.C. § 6841(a)(6) (West 2015).

152. COOK, *supra* note 52, at 68.

153. If, for example, a state realizes that the percentage of LTELs in a subgroup of ELs who are identified in third grade who did not have any interrupted education are nearly all reaching ELP within 4 years, while the students who were also identified in third grade as ELs but did have interrupted education are primarily not achieving ELP within 4 years, this contributes to the body of research regarding English language acquisition, including factors that influence how long it takes ELs to acquire academic English.

requiring states to report on the number and percentage of ELs who qualify as LTELs, calling more attention to those students who need greater support.

First, one primary consequence of ESEA not explicitly defining LTEL is that states have addressed gathering information on this subgroup of ELs in an inconsistent manner, and, in nearly all instances, in a way that is not in compliance with the statute. Particularly when reviewing State Compliance Plans submitted to the United States Department of Education, in which a state details how it will comply with the new requirements of the ESEA, it is evident that states have considered the needs of LTELs with varying degrees of acknowledgement and curiosity—either by not discussing the population at all or by mentioning the population in a way that is often inconsistent with the way the ESEA is currently drafted.¹⁵⁴ Table 3, below, highlights these distinctions across states and includes the language each state uses to describe LTELs, or, alternatively, the number of years the state expects ELs to acquire ELP.

Table 1: Discussion, Identification, and Description of Long-Term English Learners in ESSA State Compliance Plans

	Description
States that discuss “long-term English learner” or “long-term English learner” in their State Compliance Plan	<p>Arkansas: Notes that LTELs “are students classified as English Learner for more than <i>five</i> years.”¹⁵⁵</p> <p>Illinois: “ISBE will work directly with or provide technical assistance to districts to concentrate ongoing goals that identify long-term English learners[.]”¹⁵⁶</p> <p>Indiana: “. . . appropriately track the number of English learners who achieve proficiency within <i>six years</i> of initial classification and avoid the designation of long-term English learner (federally-defined term of English learners who do not achieve proficiency within <i>six years</i>). . . .”¹⁵⁷</p> <p>Michigan: “Address the needs of long term ELs by utilizing the seven basic principles and eight</p>

154. See 20 U.S.C. § 6841(a)(6) (West 2015).

155. ARK. DEP’T OF EDUC., EVERY STUDENT SUCCEEDS ACT ARKANSAS STATE PLAN 38 (2017), <https://perma.cc/VK2Z-65FA>.

156. ILL. DEP’T OF EDUC., ILLINOIS STATE BOARD OF EDUCATION STATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT 123 (2017), <https://perma.cc/2SC4-F8BK>.

157. IND. DEP’T OF EDUC., STATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT 148 (2017) (emphasis added), <https://perma.cc/K5K9-NUZP>.

	<p>program components delineated by Laurie Olson . . . ¹⁵⁸</p> <p>Minnesota: “the SEA must provide technical assistance to districts receiving state aid for English learners . . . but with an emphasis to districts who have large number of . . . long-term English learners (LTELs). . . .”¹⁵⁹</p> <p>Nevada: “The NDE goal is that 90% of English learners will exit EL status <i>within six years of initial EL identification</i> and 90% of <i>long-term English learners</i> will exit EL status by 2022.”¹⁶⁰</p> <p>“Define <i>long-term English learner</i> as an English learner who has not achieved English language proficiency within 6 years of initial classification.”¹⁶¹</p> <p>New Mexico: “The three main topics that were selected for discussion and engagement pertained to highly prominent features in ESSA: . . . the issue of addressing potentially <i>long-term English learners</i> (EL students that do not exit status within approximately <i>five years</i>).”¹⁶²</p> <p>Rhode Island: “This year, the focus of professional learning is on <i>long-term English learners</i>.”¹⁶³</p> <p>Tennessee: “TDOE defines <i>long-term ELs</i> (LTELs) as those students <i>finishing their sixth year of ESL instruction without qualifying for exit</i> . . . the department will continue to convene stakeholders and external partners to determine</p>
--	---

158. MICH. DEP’T OF EDUC., MICHIGAN’S CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT 105 (2017), <https://perma.cc/P6PL-L244>.

159. MINN. DEP’T OF EDUC., MINNESOTA STATE ESSA PLAN - TITLE III, PART A, SUBPART 1: ENGLISH LANGUAGE ACQUISITION AND LANGUAGE ENHANCEMENT 5 (2018), <https://perma.cc/6QXC-556C>.

160. NEV. DEP’T OF EDUC., NEVADA DEPARTMENT OF EDUCATION CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT 29 (2017) (emphasis added), <https://perma.cc/U9RY-CPAD>.

161. *Id.* at 116.

162. N.M. PUB. EDUC. DEP’T, NEW MEXICO RISING: NEW MEXICO’S STATE PLAN FOR THE EVERY STUDENT SUCCEEDS ACT 43 (2017), <https://perma.cc/FG57-K598> (emphasis added).

163. R.I. DEP’T OF ELEMENTARY AND SECONDARY EDUC., RHODE ISLAND’S EVERY STUDENT SUCCEEDS ACT STATE PLAN 69 (2017), <https://perma.cc/ZE93-73TP> (emphasis added).

	state-level support for serving long-term English learners.” ¹⁶⁴
States that Provide Expectations for English Language Acquisition Rate, but Do Not Expressly name Long-Term English Learners in their Plans	Alabama: 8 years ¹⁶⁵ Alaska: 7 years ¹⁶⁶ Connecticut: 5 years ¹⁶⁷ Delaware: 6 years ¹⁶⁸ Louisiana: 7 years ¹⁶⁹ Maryland: 6 years ¹⁷⁰ Nebraska: 6 years ¹⁷¹ Nevada: 6 years ¹⁷² Pennsylvania: 3 to 6 years ¹⁷³ Washington: 6 years ¹⁷⁴ West Virginia: 6 years ¹⁷⁵ Wisconsin: 6 years ¹⁷⁶

Of the fifty states and the District of Columbia, *only nine* explicitly mention long-term English learners in their State Compliance Plans.¹⁷⁷ This is indicative, in large part, of the fact that most states are not actively focusing on identifying this subgroup of the EL population in their accountability

164. TENN. DEP’T OF EDUC., EVERY STUDENT SUCCEEDS ACT: BUILDING ON SUCCESS IN TN 74 (2017) https://www.tn.gov/content/dam/tn/education/documents/TN_ESSA_State_Plan_Approved.pdf (emphasis added).

165. ALA. STATE DEP’T OF EDUC., REVISED STATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN 20 (2017), <https://perma.cc/3ZU7-QRUE>.

166. ALASKA DEP’T OF EDUC. AND EARLY DEV., REVISED STATE TEMPLATE FOR CONSOLIDATED STATE PLAN 23 (2017), <https://perma.cc/ZZ4T-R2FP>.

167. CONN. STATE DEP’T OF EDUC., CONNECTICUT CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT 13 (2017), https://portal.ct.gov/-/media/SDE/ESSA/august_4_ct_consolidated_state_essa_plan.pdf?la=en.

168. DEL. DEP’T OF EDUC., STATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT 13, 45 (2017), <https://perma.cc/A8AY-2W9G>.

169. LA. DEP’T OF EDUC., LOUISIANA’S ELEMENTARY & SECONDARY EDUC. PLAN PURSUANT TO THE FED. EVERY STUDENT SUCCEEDS ACT (ESSA) 16 (2017), <https://perma.cc/ABR6-98EF>.

170. MD. STATE DEP’T OF EDUC., MARYLAND. EVERY STUDENT SUCCEEDS ACT (ESSA) CONSOLIDATED STATE PLAN 16, 19-21, 25, 97-98 (2017), <https://perma.cc/L7UM-9J56>.

171. NEB. DEP’T OF EDUC., NEBRASKA’S CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT (ESSA) 28 (2018), <https://perma.cc/8RK7-JXQU>.

172. NEV. DEP’T OF EDUC., *supra* note 160 at 8, 14.

173. PA. DEP’T OF EDUC., EVERY STUDENT SUCCEEDS ACT: PENNSYLVANIA. CONSOLIDATED STATE PLAN 27 (2018), <https://perma.cc/6333-7LNV>.

174. WASH. OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION, WASHINGTON’S ESSA CONSOLIDATED PLAN 33 (2017), <https://perma.cc/RJQ6-XUJ3>.

175. W. VA. DEP’T OF EDUC., WEST VIRGINIA’S CONSOLIDATED STATE PLAN 18 (2017), <https://perma.cc/WN2X-UHNB>.

176. WIS. DEP’T OF EDUC., REVISED STATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN 33 (2017), <https://perma.cc/W5LD-Z54H>.

177. *See supra* Table 1: Discussion, Identification, and Description of Long-Term English Learners in ESSA State Compliance Plans - States that discuss “long-term English learner” or “long term English learner” in their State Compliance Plan.

metrics. Although this may seem harmless, this can have the effect of further marginalizing the LTEL population, as resources will likely be funneled to students the Compliance Plans actually address.

Review of the State Compliance plans also reveals another troubling fact—the majority of states that either directly mention long-term English learners or discuss the state’s expectation regarding the length of time in which ELs are expected to achieve ELP do not follow a standard that is consistent with current law. Only *three* states, Arkansas, Connecticut, and New Mexico, define LTELs as those EL students who have not achieved ELP within five years of classification.¹⁷⁸ These three states are the only ones that seem to comply with the mandate set forth in Title III of the ESEA, which states report on the number and percentage of ELs who have not exited within five years of identification. More commonly, states seem to consider those ELs who have not achieved ELP after six years of identification as LTELs. In fact, *nine* states, Indiana, Tennessee, Delaware, Maryland, Nebraska, Nevada, Washington, West Virginia, and Wisconsin, fall into this category.¹⁷⁹ Still, three states, Alabama, Alaska, and Louisiana, do not recognize ELs as LTELs until after *seven years* of receiving EL services.¹⁸⁰

These variances, in part, reflect that the current ESEA is written in a way that does not create a clear expectation for states to ensure that EL students achieve ELP within the amount of time provided in the statute—five years. Even more importantly, these standards increase the risk that a child in the United States could be identified as an EL and begin receiving EL services at the age of five, and that he or she would not be expected to attain English proficiency until seven years later at the age of 12, meaning that that child would have had difficulty accessing the content in his core classes until he walks through the school doors entering his seventh or eighth grade year, at best. This is not an expectation that educators and policymakers should be comfortable setting, and more needs to be done to ensure that EL students’ interests are being protected and promoted.

Second, the proposed change will also aid in promoting access to reliable, accurate data, a critical component of replicating successful academic models and ensuring EL students are receiving a high-quality education.¹⁸¹ Many education researchers recognize that “[d]ata policies on EL outcomes are often complexly designed and generate information that is frequently misinterpreted.”¹⁸² The impact of this ambiguous and often difficult to interpret data is that “many states’ and districts’ vision of what constitutes excellence for ELs is blurry at best.”¹⁸³ What is worse for students, “[w]hen exemplars are hard to see, it is hard to learn from and

178. Pennsylvania may be considered a fourth, as it defines the range as 3-6 years.

179. *See supra* notes 157, 164, 168, 170, 171, 172, 174, 175, 176.

180. *See supra* notes 165, 166, 169.

181. CARNOCK, *supra* note 101, at 4.

182. *Id.* at 2.

183. *Id.*

replicate their successes.”¹⁸⁴ However, with the dawn of ESEA, as amended by ESSA, researchers are hopeful that accountability metrics, and the required transparency associated with those metrics, will explain gaps in EL education while building “data literacy among a wider audience.”¹⁸⁵

The way ESEA is currently written, however, does not necessarily incentivize states and school districts to structure and implement data gathering and analytic systems that will capture needed information to improve outcomes for ELs and LTELs alike. Instead, the ESEA requires states to unilaterally choose to go above-and-beyond in investing in research that, hopefully, will help districts yield better results. The proposed change provides states with a foundation for data analyses that will help districts and educators across the country better understand which EL students are performing well under particular conditions and in what ways, in part through the inclusion of the LTEL definition in Title III, which specifies factors found to affect EL language acquisition rates.¹⁸⁶ This data, in turn, can be used to develop programs that help EL students acquire ELP more quickly, thus minimizing the number of LTELs, while also providing information regarding best practices for serving LTELs.

Lastly, by requiring states to report on the number and percentage of “long-term English learners,” that is, those ELs who have not exited the EL program after five years or sooner based on the state-selected student-level characteristics, states, and thus school districts and schools, are held more accountable for better serving EL students.¹⁸⁷ By mandating this reporting, states should be further encouraged, at a minimum, to consider how best to maximize the services being provided to EL students in the years immediately after identification. Further, the data gleaned from reports can call attention to the ways in which states are serving, or not serving, LTELs. The disclosure of this information prevents states from “hiding the ball” from the public, allowing parents, stakeholders, researchers, educators, leaders, and policymakers alike to have a greater understanding of the progress of ELs in schools across the country. This also creates a platform for schools, districts, and states that are getting it right for their EL students and provides

184. *Id.*

185. *Id.* at 3.

186. Due to the fact that “ELs are a highly diverse student population,” the U.S. Department of Education has encouraged states to “disaggregate student performance data” in order to “provide a more detailed picture of performance variation among different subgroups of ELs.” U.S. DEP’T OF EDUC., *supra* note 6, at 38. The proposed change models this recommendation and provides more incentive for states to take the opportunity to deepen their understanding of EL subgroup performance, and the appropriate expectations to set for those students, by specifying student-level characteristics the state may further consider.

187. Eric A. Hanushek, *Economics of Education*, 3 HANDBOOKS IN ECON. 383, 386-87 (2011), <https://perma.cc/YMN3-UW79> (explaining “measuring and reporting [of] school performance . . . objectives provides incentives that encourage educators to concentrate on the subjects and materials that are being measured and to potentially alter the methods through which they educate students”).

educators and advocates with more information to consider when promoting the interests of these students.

Therefore, amending the ESEA to provide for clearer standards, both in Title I and Title III, that clarify the expectation that states accelerate ELs' English language acquisition to achieve ELP within five years will assist in creating clearer, more uniform expectations for states that will assist in adding breadth and depth to current research, as well as greater accountability and transparency surrounding English learner outcomes.¹⁸⁸

CONCLUSION

The last several decades have brought tremendous, positive change in improving the rights and outcomes of English learners. As our understanding of how to best serve this population of students continues to develop, it is critical for the law to keep pace and to fully recognize and appreciate the high expectations that must be set in order to help EL students achieve at their highest levels. By amending the ESEA to set a clear expectation that states accelerate the English language acquisition of ELs so they achieve ELP within the first five years of receiving EL services, and by providing states with a vehicle to set even higher expectations for themselves and their schools and school districts, a step can be taken toward further protecting and promoting the EL population. With each year that policymakers continue to delay this critical work, students like David remain underserved and underrepresented in critical conversations.

188. The proposed change, however, while providing, potential, significant improvement to the current statute, is the first step in a multi-step process for further securing better outcomes for EL and LTELs. After key stakeholders are able to review data from the newly enacted ESEA, the statute should be further amended to include stronger accountability structures for states that are failing to ensure that English learners achieve ELP within five years. While the proposed change is incredibly helpful in improving the reporting requirement under Title III in particular, more will need to be done to hold those states accountable that are reporting higher percentages of students who are failing to exit the EL program after five years of receiving EL services.