



Jhone Ebert
Superintendent of Public Instruction
Nevada Dept of Education
c/o acthibault@doe.nv.gov

December 29, 2020

Re: Urgent Request to Postpone the WIDA ACCESS test on English Learner Proficiency Assessments During COVID-19

Dear Superintendent Ebert:

The National Association for Bilingual Education (NABE), TESOL International Association, Lawyers' Committee for Civil Rights Under Law, Multicultural Education Training and Advocacy, Inc. (META), Lawyers for Civil Rights and the Center for Law and Education bring to your immediate attention concerns about the testing of English learner (EL) students during the pandemic. Your state's window for WIDA ACCESS testing is from **January 4 to February 26, 2021**. This particular proficiency test, the WIDA ACCESS test, does not have a remote option. As such, schools could begin bringing EL students in for testing over several days **as early as January 4, 2021**.

Many grassroots organizations, advocates and EL students and families have begun voicing their concerns with state education commissioners and boards overseeing EL testing in Florida, Massachusetts and Colorado, among other places. We anticipate that the U.S. Department of Education under the new Biden Administration may want to review and weigh in on this matter.

Accordingly, we ask that your state inform local school districts that it will be postponing the WIDA ACCESS test at this time. It is important to note that the WIDA Founder and Director has recently stated: "WIDA is prepared to work with States regarding any requests to extend testing windows to address safety concerns, including extending testing into the summer of 2021."¹ Hence what we are asking of you is safe, legal and feasible.

We further ask that parents of EL students are informed, in their first language, of their option to forego in-person EL language proficiency testing during the pandemic if they are concerned that their children and families will not be safe in taking such in-person test at the present time. Parents must be informed that they and their children will not face any consequences or sanctions if they elect the option to forego in-person tests.

We do, of course, expect that your state and school districts will continue to measure an EL student's English proficiency for placement and exiting EL students using other reliable and appropriate information in a student's portfolio.

This requested guidance aligns with the U.S. Department of Education's instructions to SEAs and LEAs last year during the pandemic² when COVID-19 infection rates were lower than today's rates.

¹ Letter from Tim Boals, WIDA to Lawyers' Committee for Civil Rights Under Law (December 16, 2020) (on file with Lawyers' Committee).

² U.S. Dep't of Education Fact Sheet: Providing Services to English Learners During the COVID-19 Pandemic (May 18, 2020) <https://www2.ed.gov/documents/coronavirus/covid-19-el-factsheet.pdf>.

While measuring EL students' proficiency of English remains important, EL students and their families should not be forced into schools and expose themselves to unnecessary risks during these unprecedented times. As described below, beyond the imminent health risks, there are serious testing reliability and validity issues and civil rights concerns

Problem No. 1: EL students and their families face greater risks by testing in-person.

EL students comprise over 5 million, or one in ten, public school students.³ Approximately 94 percent are students of color.⁴ According to the Centers for Disease Control (CDC), Latinx persons are almost three times more likely to die from COVID-19 than white, non-Hispanics, 1.7 times more likely to become infected, and 4.1 times more likely to be hospitalized. Black persons are also almost three times more likely to die from COVID-19, 1.4 times more likely to become infected, and 3.7 times more likely to be hospitalized. Asians are 1.1 times more likely to die from COVID-19 and 1.2 times more likely to be hospitalized.⁵ Perhaps even more alarming, Latinx children are approximately eight times, and Black children five times, more likely to be hospitalized with COVID-19 than white children.⁶

Similarly, immigrants are at a disproportionately higher risk of becoming infected and developing severe or fatal COVID-19 symptoms because of the confluence of vulnerabilities such as high rates of poverty, limited access to healthcare, multigenerational households, employment in essential jobs, and fear of legal repercussions.⁷ For example, a research study determined that being a recent Latinx immigrant to the United States was the biggest predictor of being infected by COVID-19. This predictor was followed by living in a large household and working in the food service industry – common factors for homes of English learners.⁸

Given these disproportionate impacts on communities of color and immigrant communities, your State and School Districts should not insist upon in-person administration for its WIDA ACCESS test, or similar test, at this time.

Problem No. 2: Using norm-referenced tests like WIDA ACCESS for EL students otherwise receiving remote learning will likely yield invalid and unreliable results.

Beyond the imminent health risks imposed on EL students and their families and teachers during in-person assessment, the pandemic's compounding stressors also adversely impact their learning, which may impact their assessment results. Many states and school districts have shifted to full

³ Nat'l Center for Education Statistics. "English Language Learners in Public Schools," The Condition of Education (Last Updated May 2020) https://nces.ed.gov/programs/coe/indicator_cgf.asp.

⁴ National Center for Education Statistics. "Indicator 8: English Language Learners in Public Schools," Status and Trends in the Education of Racial and Ethnic Groups (updated Feb. 2019) <https://rb.gy/blvs1q>.

⁵ Centers for Disease Control and Prevention, "COVID-19 Hospitalization and Death by Race/Ethnicity," (Last updated Nov. 30, 2020) available at <https://rb.gy/oxhofa>.

⁶ Lindsay Kim, et al., "Hospitalization Rates and Characteristics of Children Aged <18 Years Hospitalized with Laboratory-Confirmed COVID-19-NET, 14 States, March 1-July 25, 2020," MMWR Morbidity and Mortality Weekly Report (August 14, 2020) <https://www.cdc.gov/mmwr/volumes/69/wr/mm6932e3.htm>.

⁷ See, e.g., Eva Clark, Karla Fredericks, Laila Woc-Colburn, Maria Elena Bottazzi, and Jill Weatherhead., "Disproportionate impact of the COVID-19 pandemic on immigrant communities in the United States," PLoS Neglected Tropical Diseases, 14(7), e0008484, (July 13, 2020) at <https://doi.org/10.1371/journal.pntd.0008484>.

⁸ See, e.g., Elizabeth Cooney, "Immigration status, housing, and food-service work explain COVID-19's burden on Latinos," STAT News (Aug. 27, 2020) <https://rb.gy/vrinvd>.

remote learning. With the increasing surge in COVID-19 cases, schools that operated in-person or hybrid learning models have also reverted back to virtual learning. Many districts that planned to reopen for in-person instruction in January 2021 have put those plans on hold.⁹ Many students and families are also struggling with economic and food insecurities, sick family members, and lack of social supports. Experts predict the pandemic to reach its highest levels through spring—the same time that WIDA ACCESS testing begins for several states.

Forcing students to attend schools that have been closed due to health risks solely for testing will likely only raise stress levels for students, impacting the validity and reliability of their assessment results. A federal district court monitor appointed in the EL student rights case, *Congress of Hispanic Educators and US v. Denver Public Schools*, recently sent a letter to Denver Public Schools advising the district to either cancel or postpone the WIDA ACCESS assessment this year, noting in part:

“ACCESS is a norm-referenced standardized test. A primary assumption of standardized testing is that the test is given to students under the same conditions which were in place when the norm group took the test, otherwise the comparison of a student’s score to the norm group could reflect on only the attribute measures (in this case English language proficiency) but might also reflect “measurement error” due to differences in the testing conditions between the norm group and those of the students later taking the test. *Clearly, the testing conditions in Spring 2021, during a pandemic that will have lasted a year and included lockdowns, different and varying learning modes, family and education stressors, limited opportunities to learn, and the surely surreal effect for a remote learning students of only going to school to take a test, clearly those conditions are not the same as those under which the norm group took the test.*”¹⁰

While some developers of English language proficiency assessments have adapted to provide for remote administration, like Data Recognition Corporation which administers the LAS,¹¹ WIDA and its consortium have not. **Nevada** should not move forward with WIDA testing.

Problem No. 3: Civil rights legal concerns abound in light of SEAs and LEAs forcing EL students to test in-person without options to opt-out.

Finally, there are several civil rights legal concerns. Forcing students into schools that may be unsafe during the heightened pandemic places students’ rights to bodily integrity at grave risk and raises serious due process concerns. It is a fundamental precept that parents have Fourteenth Amendment Due Process rights when it comes to the upbringing (and in this case the safety) of their children.¹² The fact that the EL students placed in harm’s way are virtually all students of color also raises issues of possible race and national origin discrimination under Title VI of the Civil Rights Act of 1964.¹³ There are also serious implications for EL students receiving services or accommodations under

⁹ See, e.g., Valerie Strauss, “Schools start closing — or delay reopening — as covid-19 cases jump across the country,” Washington Post (Nov. 14, 2020) <https://rb.gy/43ekoj>; Samantha Smylie, “Rising COVID-19 rates statewide prompt reopening delays, setbacks among Illinois’ largest school districts” Chalkbeat Chicago (Nov. 12, 2020) <https://rb.gy/y5ivm7>.

¹⁰ See Attached Letter from Chris Nelson, Ph.D. to Superintendent Cordova, Deputy Superintendent Jones, and the DPS Board (December 16, 2020) (emphasis added).

¹¹ LAS Links, <https://laslinks.com/> (last visited Dec. 10, 2020).

¹² *Meyer v. State of Nebraska*, 262 US 390 (1923).

¹³ *Royal v. Detroit Pub. Sch. Consol.*, No. 2:20-cv-11947, Stipulated Temporary Restraining Order, Doc. 13 (July 22, 2020); see also *id.*, Original Compl. at <https://rb.gy/cvyjxi>.

Section 504 of the Rehabilitation Act of 1973, the Individuals with Disabilities Education Act and Title II of the Americans with Disabilities Act of 1990. And the reliability and validity of testing for EL students during this pandemic noted above may run afoul of SEAs and LEA obligations owed under Section 1703(f) of the Equal Educational Opportunities Act of 1974.

Indeed, the U.S. Department of Education is keenly aware of these legal concerns, having stated in its own “Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students” (March 16, 2020):¹⁴

School officials have discretion to make educational decisions based on local health needs and concerns, and OCR recognizes this decision-making authority. As school leaders respond to evolving conditions related to coronavirus, they should be mindful of the requirements of Section 504, Title II, and Title VI, to ensure that all students are able to study and learn in an environment that is safe and free from discrimination.

We trust you share these concerns with us. Accordingly, **because testing could begin as early as January 4 in some districts, we respectfully request that you immediately postpone WIDA ACCESS testing in your state at this time and issue guidance to school districts consistent with the aforementioned** to ensure EL students access equal and equitable educational opportunities without placing themselves and their families in imminent harm.

We also ask that you advise us of your State’s intentions within a week from the date of this letter. To schedule a meeting or if you have questions, please contact Roger Rice with META at (617) 312-3996 or rlr24@comcast.net David Hinojosa with the Lawyers’ Committee at (210) 439-5880 or dhinojosa@lawyerscommittee.org.

Respectfully submitted,

David Hinojosa
Lawyers’ Committee for Civil Rights Under Law

Ivan Espinoza
Lawyers for Civil Rights

David Cutler
TESOL International Association

Roger Rice
META

Santiago Wood
NABE

Kathleen Boundy
Center for Law and Education

¹⁴ Available at: <https://rb.gy/qqaoi0>.