



*A not-for-profit organization dedicated to services and projects that work to improve the lives of children, youth and adults with disabilities*

*One Percent Cap on the Percentage of Students with the Most Significant Cognitive Disabilities Who May be Assessed with an Alternate Assessment Aligned with Alternate Academic Achievement Standards (AA-AAAS):*

### **A Brief History**

**In December 2015 Congress passes and the President signs the [Every Student Succeeds Act \(ESSA\)](#), a bill to reauthorize the Elementary and Secondary Education Act of 1965 (ESEA), which includes a provision that places a limit (cap) on the percentage of students with the most significant cognitive disabilities that a state may assess with an AA-AAAS to no more than 1.0 percent of all students in the grades assessed in the state. ESSA also provides states an opportunity for a one-year waiver from the 1.0 percent participation requirement. This requirement took effect beginning with the 2017-2018 school year (SY).**

**On December 8, 2016**, the U.S. Department of Education (ED) published [final Federal regulations to implement the assessment provisions of ESSA](#).

Requirements for a waiver of the state-level cap on the percentage of students who can be assessed via the state alternate assessment (AA-AAAS) are found in Sec. 8401 of ESSA and Sec. 200.6 of the Federal regulations. See Attachment 1

**On May 16, 2017**, ED issued a memorandum to states providing information regarding procedures for a state that wishes to seek a waiver of the 1.0 percent cap for the 2017-2018 SY. See Attachment 2

**→ED granted 23 waivers for the 2017-2018 SY. The Department did not provide the states' waiver requests. Information on state waivers is [available here](#).**

**On November 7, 2017**, the Consortium for Citizens with Disabilities (CCD) Education Task Force wrote to ED requesting that the Department ensure an open and transparent process regarding state requests for a waiver. See Attachment 3.

**On January 8, 2018**, ED responded to the CCD request of Nov. 7, 2017. See Attachment 4

**On April 8, 2018**, several members of the Consortium for Citizens with Disabilities (CCD) Education Task Force met with ED officials to again request transparency in the waiver process. See Attachment 5

**On August 27, 2018**, ED issued a memorandum to states providing additional information regarding the requirements to request a waiver of the 1% cap for the 2018-2019 SY. See Attachment 6

→ED granted 21 waivers for the 2018-2019 SY. The Department did not provide the states' waiver requests. Information on state waivers is [available here](#).

**On March 28, 2019**, ED issued a memorandum to states providing information regarding consequences for states not meeting the requirement to assess not more than 1.0 percent of students on alternate assessments without an approved waiver. See Attachment 7

**In June 2019**, ED sent [letters to 14 states](#) that exceeded the cap without a waiver in the 2017-2018 SY. The letters included specific actions each state was required to complete, including the submission of a plan detailing how the state would reduce AA-AAAS participation by October 1, 2019. ED refused to make state plans available to the public. See Attachment 8.

**In April 2020**, ED granted every state a blanket waiver of the testing requirements of ESSA for the 2019-2020 school year due to widespread Covid19 school closures. Therefore, waivers of the 1% cap were not necessary for 2019-2020.

**On June 9, 2020**, ED issued a memorandum to states providing additional information to request a waiver for the 2020-2021 SY including data that could be used in light of the absence of test data for 2019-2020. See Attachment 9

→ED granted 20 waivers/extensions for the 2020-2021 SY. Information on state waivers is [available here](#). State waiver requests were appended to the Department's response letters for the first time.

**In February and July 2020**, ED sent [letters to 13 states](#) that exceeded the cap without a waiver in the 2018-2019 SY. Eight of these states had also exceeded the cap without a waiver in the 2017-2018 SY. States were required to submit a plan to reduce AA-AAAS participation to the Department by October 1, 2020. ED refused to make state plans available to the public. See Attachment 8

**On October 29, 2021**, ED issued a memorandum to states providing information regarding the requirements to request a waiver or waiver extension of the 1.0 percent cap for the 2021-2022 SY. See Attachment 10

→ED granted 22 waiver extensions for the 2021-2022 SY. Information on state waivers is [available here](#). State waiver extension requests were appended to the Department's response letters.

**On September 20, 2022**, ED issued a memorandum to states providing information regarding the requirements to request a waiver or waiver extension of the 1.0 percent cap for the 2022-2023 SY. See Attachment 11

→ED approved 9 waivers/extension requests and 14 denied waivers/extension requests for the 2022-2023 SY. Information on state waivers is [available here](#). State waiver/waiver extension requests were appended to the Department's response letters.

**On September 20, 2023**, ED issued a memorandum to states providing information regarding the requirements to request a waiver or waiver extension of the 1.0 percent cap for the 2023-2024 SY. See Attachment 12

**October 2023:** ED sent [letters to 15 states](#) that exceeded the cap without a waiver in the 2021-2022 SY. Twelve of these states had also exceeded the cap without a waiver in the 2018-2019 SY and 9 exceeded the cap without a waiver in the 2017-2018 SY. States were required to submit a plan to reduce AA-AAAS participation to the Department within 30 days. See attachment 8

**November 2023:** ED Office of Inspector General releases report on the [Department's Approval of Alternate Assessment Waivers and Extensions](#)

### **Waiver activity for 6 years is as follows:**

- 2017-2018: 23 waivers approved
- 2018-2019: 21 waivers/extensions approved
- 2019-2020: assessment requirements waived
- 2020-2021: 20 waivers/extensions approved
- 2021-2022: 22 waivers/extensions approved and 5 requests denied\*
- 2022-2023: 9 waivers/extensions approved and 14 requests denied\*

*\*Some states received both an approval and a denial*

## **EVERY STUDENT SUCCEEDS ACT (ESSA)**

### **REQUEST FOR WAIVER OF THE STATE-LEVEL CAP ON THE PERCENTAGE OF STUDENTS WHO CAN BE ASSESSED VIA THE STATE ALTERNATE ASSESSMENT ON ALTERNATE ACADEMIC ACHIEVEMENT STANDARDS (AA-AAAS)**

The Every Student Succeeds Act (ESSA), enacted in 2015, allows for the use of an alternate assessment aligned with alternate academic achievement standards (AA-AAAS) for students with the most significant cognitive disabilities. ESSA also places a 1% cap on the number of students who can participate in the AA-AAAS. Specifically, the state must ensure “that, for each subject, the total number of students assessed in such subject using the alternate assessments does not exceed one percent of the total number of all students in the State who are assessed in such subject.”

If a state anticipates that it will exceed the cap under paragraph (c)(2) of this section with respect to any subject for which assessments are administered under § 200.2(a)(1) in any school year, the State may request that the Secretary waive the cap for the relevant subject, pursuant to section 8401 of the Act, for one year. Requirements for a State Educational Agency to seek a waiver are set forth at 34 C.F.R §200.6(c)(4)(ii)-(v).

On May 16, 2017, the U.S. Department of Education sent a letter to state assessment directors, state Title I directors and state special education directors providing information about the implementation of the new provisions under ESSA. The letter is available at

<https://www2.ed.gov/admins/lead/account/saa/onepercentcapmemo51617.pdf>

### **Statutory Language re Waivers and Public Comment**

#### **Sec. 8401**

(b) REQUEST FOR WAIVER.—

(1) IN GENERAL.—A State educational agency, acting on its own behalf or on behalf of a local educational agency in accordance with subsection (a)(2), or Indian tribe that desires a waiver shall submit a waiver request to the Secretary, which shall include a plan that—

- (A) identifies the Federal programs affected by the requested waiver;
- (B) describes which Federal statutory or regulatory requirements are to be waived;
- (C) describes how the waiving of such requirements will advance student academic achievement;
- (D) describes the methods the State educational agency, local educational agency, school, or Indian tribe will use to monitor and regularly evaluate the effectiveness of the implementation of the plan;
- (E) includes only information directly related to the waiver request; and

(F) describes how schools will continue to provide assistance to the same populations served by programs for which waivers are requested and, if the waiver relates to provisions of subsections (b) or (h) of section 1111, describes how the State educational agency, local educational agency, school, or Indian tribe will maintain or improve transparency in reporting to parents and the public on student achievement and school performance, including the achievement of the subgroups of students identified in section 1111(b)(2)(B)(xi).

### **Sec. 8401**

(3) GENERAL REQUIREMENTS.—

(A) STATE EDUCATIONAL AGENCIES.—In the case of a waiver request submitted by a State educational agency acting on its own behalf, or on behalf of local educational agencies in the State under subsection (a)(2), the State educational agency shall—

- (i) provide the public and any interested local educational agency in the State with notice and a reasonable opportunity to comment and provide input on the request, to the extent that the request impacts the local educational agency;
- (ii) submit the comments and input to the Secretary, with a description of how the State addressed the comments and input; and
- (iii) provide notice and a reasonable time to comment to the public and local educational agencies in the manner in which the applying agency customarily provides similar notice and opportunity to comment to the public.

### **Regulatory Language on 1% Cap Waiver Request Requirements**

#### **34 C.F.R §200.6(c)(4)(ii)-(v)**

(4) If a State anticipates that it will exceed the cap under paragraph (c)(2) of this section with respect to any subject for which assessments are administered under § 200.2(a)(1) in any school year, the State may request that the Secretary waive the cap for the relevant subject, pursuant to section 8401 of the Act, for one year. Such request must—

- (i) Be submitted at least 90 days prior to the start of the State’s testing window for the relevant subject;
- (ii) Provide State-level data, from the current or previous school year, to show—
  - (A) The number and percentage of students in each subgroup of students defined in section 1111(c)(2)(A), (B), and (D) of the Act who took the alternate assessment aligned with alternate academic achievement standards; and
  - (B) The State has measured the achievement of at least 95 percent of all students and 95 percent of students in the children with disabilities subgroup under section 1111(c)(2)(C) of the Act who are enrolled in grades for which the assessment is required under § 200.5(a);
- (iii) Include assurances from the State that it has verified that each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in any subject for which assessments are administered under § 200.2(a)(1) in that school year using an alternate assessment aligned with alternate academic achievement standards—

(A) Followed each of the State’s guidelines under paragraph (d) of this section, except paragraph (d)(6); and

(B) Will address any disproportionality in the percentage of students in any subgroup under section 1111(c)(2)(A), (B), or (D) of the Act taking an alternate assessment aligned with alternate academic achievement standards;

(iv) Include a plan and timeline by which—

(A) The State will improve the implementation of its guidelines under paragraph (d) of this section, including by reviewing and, if necessary, revising its definition under paragraph (d)(1), so that the State meets the cap in paragraph (c)(2) of this section in each subject for which assessments are administered under § 200.2(a)(1) in future school years;

(B) The State will take additional steps to support and provide appropriate oversight to each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in a given subject in a school year using an alternate assessment aligned with alternate academic achievement standards to ensure that only students with the most significant cognitive disabilities take an alternate assessment aligned with alternate academic achievement standards. The State must describe how it will monitor and regularly evaluate each such LEA to ensure that the LEA provides sufficient training such that school staff who participate as members of an IEP team or other placement team understand and implement the guidelines established by the State under paragraph (d) of this section so that all students are appropriately assessed; and

(C) The State will address any disproportionality in the percentage of students taking an alternate assessment aligned with alternate academic achievement standards as identified through the data provided in accordance with paragraph (c)(4)(ii)(A) of this section; and

(v) If the State is requesting to extend a waiver for an additional year, meet the requirements in paragraph (c)(4)(i) through (iv) of this section and demonstrate substantial progress towards achieving each component of the prior year’s plan and timeline required under paragraph (c)(4)(iv) of this section.

## **RESOURCES**

ESSA Fact Sheet: Assessments for Students with the Most Significant Cognitive Disabilities

<http://www.parentcenterhub.org/essa-fact-sheet-alt-assess/>

Strategies for Meeting the 1% State-level Cap on Participation in the Alternate Assessment

<https://nceo.umn.edu/docs/OnlinePubs/NCEOBrief12OnePercentCap.pdf>

ESEA Academic Assessments Federal Regulations

<https://www.gpo.gov/fdsys/pkg/FR-2016-12-08/pdf/2016-29128.pdf>

**Prepared by The Advocacy Institute**  
**ESSA resources: [www.advocacyinstitute.org/ESSA](http://www.advocacyinstitute.org/ESSA)**



UNITED STATES DEPARTMENT OF EDUCATION

TO: State Assessment Directors  
State Title I Directors  
State Special Education Directors

FROM: Ruth E. Ryder  
Acting Director, Office of Special Education Programs  
Office of Special Education and Rehabilitative Services

Patrick Rooney  
Deputy Director, Office of State Support  
Office of Elementary and Secondary Education

DATE: May 16, 2017

SUBJECT: Requirements for the Cap on the Percentage of Students who may be Assessed with an Alternate Assessment Aligned with Alternate Academic Achievement Standards

States have requested information about the implementation of a new provision in Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA) regarding alternate assessments for students with the most significant cognitive disabilities.<sup>[1]</sup> In response to these requests, this memorandum provides information regarding procedures for a State that wishes to seek a waiver of the 1.0 percent cap in ESEA section 1111(b)(2)(D)(i)(I) on the number of students who participate in alternate assessments aligned with alternate academic achievement standards (AA-AAAS).

***A. General Provisions for States Regarding the Number of Students with the Most Significant Cognitive Disabilities Who Take Alternate Assessments Aligned with Alternate Academic Achievement Standards (AA-AAAS)***

ESEA section 1111(b)(2)(D) and 34 CFR 200.6(c) and (d) contain requirements for the participation of students with the most significant cognitive disabilities in the AA-AAAS. ESEA section 1111(b)(2)(D)(i)(I) limits the total number of students with the most significant cognitive disabilities who are assessed Statewide with an AA-AAAS to 1.0 percent of the total number of students in the State who are assessed in that subject. As described in 34 CFR 200.6(c)(3), a State may not prohibit an LEA from assessing more than 1.0 percent of its assessed students with an AA-AAAS. However, a State must require an LEA that assesses more than 1.0 percent of its assessed students in any subject with an AA-AAAS to submit information to the State justifying the need to exceed the 1.0 percent threshold. States must provide appropriate oversight of each LEA that is required to submit such a

---

<sup>[1]</sup> See <http://www2.ed.gov/documents/essa-act-of-1965.pdf>

justification and must make the justification publicly available, provided that it does not reveal personally identifiable information about an individual student.

***B. Requirements for States that Seek a Waiver of the 1.0 Percent Cap on Participation on an AA-AAAS***

If a State anticipates that it will exceed the 1.0 percent cap for any subject, the State may request that the Department waive the cap for that subject, pursuant to ESEA section 8401, for one year. The requirements for such waiver requests are summarized below.

In accordance with 34 CFR 200.6(c)(4), a State waiver request must:

- Be submitted at least 90 days prior to the start of the State’s testing window for the relevant subject;
- Provide State-level data, from the current or previous school year, to show—
  - The number and percentage of students in each subgroup of students who will take or took the AA-AAAS; and
  - That the State has measured the achievement of at least 95 percent of all students and 95 percent of students in the children with disabilities subgroup who are enrolled in grades for which the assessment is required;
- Include assurances from the State that it has verified that each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in any subject using an AA-AAAS—
  - Followed the State’s guidelines for participation in the AA-AAAS;<sup>[2]</sup> and
  - Will address any disproportionality in the percentage of students in any subgroup taking an AA-AAAS.

A State’s waiver request must include a plan and timeline by which—

- The State will improve the implementation of its guidelines for participation in the AA-AAAS, including by reviewing and, if necessary, revising its definition of students with the most significant cognitive disabilities (see 34 CFR 200.6(d)(1)), so that the State meets the 1.0 percent cap in each subject for which assessments are administered in future school years;
- The State will take additional steps to support and provide oversight to each LEA that the State anticipates will exceed the 1.0 percent threshold to ensure that only students with the most significant cognitive disabilities take an AA-AAAS. The State must describe how it will monitor and regularly evaluate each such LEA to ensure that the LEA provides sufficient training such that school staff who participate as members of an individualized education program (IEP) team or other placement team understand and implement the guidelines established by the State for participation in AA-AAAS so that all students are appropriately assessed; and
- The State will address any disproportionality in the percentage of students taking an AA-AAAS as identified through the data provided.<sup>[3]</sup>

If a State requests to extend a waiver for an additional year, it must demonstrate substantial progress towards achieving each component of the plan and timeline.

---

<sup>[2]</sup> 34 CFR 200.6(d), consistent with section 612(a)(16)(C) of the Individuals with Disabilities Education Act (IDEA).

<sup>[3]</sup> 34 CFR 200.6(c)(4)(iv)



As required annually for all States, a State must report separately to the Department the number and percentage of children with disabilities taking: (1) general assessments; (2) general assessments with accommodations; and (3) AA-AAAS.<sup>[4]</sup>

***C. Procedures for States that Seek a Waiver of the 1.0 Percent Cap on Participation on an AA-AAAS***

States that anticipate that they will need a waiver from the 1.0 percent cap on AA-AAAS participation should submit the request to the Department at least 90 days prior to the beginning of the testing window for the AA-AAAS.<sup>[5]</sup> Each waiver request must be made in accordance with ESEA section 8401(b)(3), which explains that a State must provide the public and any interested LEA in the State with notice and a reasonable opportunity to comment and provide input on the request, in the manner in which the State customarily provides similar notice and opportunity to comment to the public.

In its request, the State must include:

- Information regarding each requirement in 34 CFR 200.6(c)(4) (see section B), and
- Evidence that the State provided notice and a reasonable opportunity for the public and LEAs to comment and provide input on the request. This evidence must include:
  - Evidence or a description of the manner in which that the State provided such notice to the public and interested LEAs;
  - Copies of all comments that the State received from LEAs in response to this notice, with a description of how the State addressed the comments; and
  - Evidence that the State also provided notice and a reasonable opportunity to comment to the public and LEAs in the manner in which the State customarily provides similar notice and opportunity to comment.

As an additional resource, the National Center on Educational Outcomes (NCEO) recently hosted a webinar on strategies for meeting the 1.0 percent cap on participation in an AA-AAAS. Martha Thurlow and Sheryl Lazarus reviewed ESSA requirements regarding the 1.0 percent cap on participation in AA-AAAS, described the provisions in the regulation for requesting a waiver from the 1.0 percent cap, and suggested strategies for meeting the 1.0 percent cap. They also highlighted a new NCEO Brief on this topic. Both the [webinar](#) and the [brief](#) are available through NCEO's website.<sup>[6]</sup>

States with questions about this request should contact their Office of State Support contacts at: OSS.[State]@ed.gov (e.g., OSS.Nebraska@ed.gov) and/or their Office of Special Education Programs State Lead. Thank you for your continued commitment to our nation's students.

---

<sup>[4]</sup> 34 CFR 200.6(c)(5)

<sup>[5]</sup> 34 CFR 200.6(c)(4)(i)

<sup>[6]</sup> The reference to these materials is not intended to reflect their importance, nor is it intended to endorse any views expressed, or products or services offered. The opinions expressed in any of these materials do not necessarily reflect the positions or policies of the Department. The Department does not control or guarantee the accuracy, relevance, timeliness, or completeness of any outside information included in these materials.



November 7, 2017

Jason Botel  
Acting Assistant Secretary, Office of Elementary and Secondary Education

Kim Richey,  
Acting Assistant Secretary, Office of Special Education and Rehabilitative Services

Patrick Rooney  
Deputy Director, Office of State Support, Elementary and Secondary Education  
U.S. Department of Education  
400 Maryland Ave., S.W.  
Washington, D.C. 20202

Dear Acting Assistant Secretary Botel, Acting Assistant Secretary Richey and Deputy Director:

The Consortium for Citizens with Disabilities (CCD) Education Task Force writes to request your attention to important issues regarding alternate assessments for students with the most significant cognitive disabilities administered during the current (2017-2018) school year.

The CCD Education Task Force advocates for Federal public policy that ensures the self-determination, independence, empowerment, integration, and inclusion of children and adults with disabilities in all aspects of society. The CCD Task Force sees these principles as critical elements in a society that recognizes and respects the dignity and worth of all its members.

As noted in your May 16, 2017 memo to state directors of assessment, Title I and special education<sup>i</sup>, any state that anticipates that it will exceed the 1.0 percent cap on the number of students who participate in alternate assessments aligned with alternate academic achievement standards (AA-AAAS) for any subject, may request that the U.S. Department of Education (ED) waive the cap for that subject, pursuant to ESEA section 8401, for one year. State waiver requests to exceed the cap for any subject for one year must be submitted to ED at least 90 days prior to the start of the state's testing window.

As states begin to submit their requests for a one-year waiver of the 1.0 percent cap in ESEA section 1111(b)(2)(D)(i)(I) for the 2017-2018 school year, the CCD Education Task Force requests that ED undertake a thorough effort to ensure an open and transparent process

regarding these requests. Specifically, we ask that ED post the following information to a dedicated page on the ED.gov website in a timely manner and a fully accessible format<sup>ii</sup>:

- state waiver requests including all supporting information as required by ESEA section 8401 and 34 CFR 200.6(c)(4),
- all correspondence between states and ED regarding submitted waiver requests, and
- all decisions regarding waiver requests including official notices to states.

We also encourage ED to review with scrutiny the justification(s) provided by states to exceed the 1.0 percent cap, the impact on students with disabilities, especially as it relates to their access to the general curriculum in the regular classroom, and plans states will undertake to come into compliance with the law's requirements. CCD has weighed in consistently and worked with ED since 2003 to ensure the policies impacting students with the most significant cognitive disabilities are supported by accurate data, the latest research, and best practices. We urge ED to continue to evaluate state waiver requests with the necessary rigor to ensure consideration is given to the impact waiver approvals will have on the students with disabilities.

The Education Task Force is confident that you will agree with the need for a transparent process regarding these waiver requests. We appreciate your attention to this important matter. Please contact us if you have any questions or comments about this request.

Sincerely,

CCD Education Taskforce Co-Chairs:

Lindsay E. Jones, National Center for Learning Disabilities  
PH: 202.628.2662 • Email: [ljones@nclد.org](mailto:ljones@nclد.org)

Laura Kaloi, Council of Parent Attorneys and Advocates  
PH: 571-447-5005 • Email: [laurakaloi@mckeongrp.com](mailto:laurakaloi@mckeongrp.com)

Amanda Lowe, National Disability Rights Network  
PH: 202.403.8335 • Email: [amanda.lowe@ndrn.org](mailto:amanda.lowe@ndrn.org)

Kim Musheno, Association of University Centers on Disability  
PH: 301.588.8252 • Email: [kmusheno@aucd.org](mailto:kmusheno@aucd.org)

---

<sup>i</sup> May 16, 2017 Memo to State Assessment Directors, State Title I Directors, State Special Education Directors regarding Requirements for the Cap on the Percentage of Students who may be Assessed with an Alternate Assessment Aligned with Alternate Academic Achievement Standards available at <https://www2.ed.gov/admins/lead/account/saa/onepercentcapmemo51617.pdf>

<sup>ii</sup> All web pages and documents meet the accessibility standards established by Section 508 of the Rehabilitation Act available at <https://www.section508.gov/>



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

JAN 08 2018

Ms. Kim Musheno  
Task Force Co-Chair  
National Center for Learning Disabilities  
1825 K Street, NW – Suite 1200  
Washington, DC 20006

Dear Ms. Musheno:

I am writing in response to your letter dated November 7, 2017, to the U.S. Department of Education (the Department), regarding the process by which a State educational agency (SEA) may request a waiver of the new requirement in section 1111(b)(2)(D)(i)(I) of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA), that limits to one percent the percentage of students who may participate in alternate assessments aligned with alternate academic achievement standards (AA-AAAS) for students with the most significant cognitive disabilities. I am sending an identical response to each signatory of your original letter.

We appreciate your concern and your attention to this issue. The Department uses a thorough and rigorous process to review and consider all waiver requests. In order to submit a waiver request, an SEA must first meet the requirements in 34 CFR 200.6 as well as the general requirements for a waiver request outlined in ESEA section 8401. The Department then analyzes the request to ensure it meets all statutory and regulatory requirements, which include providing the opportunity for the public and local educational agencies to review and comment on the request and to submit those comments to the Department. I also wanted to share with you that the Department has a section of its website dedicated to posting responses to waiver requests ([www2.ed.gov/admins/lead/account/stateplan17/waivers/index.html](http://www2.ed.gov/admins/lead/account/stateplan17/waivers/index.html)).

If you have additional questions regarding the one-percent cap waiver process, please contact Donald Peasley of my staff at: [donald.peasley@ed.gov](mailto:donald.peasley@ed.gov). Thank you for your interest and support in advancing the educational achievement of all of America's children.

Sincerely,  


Jason Botel  
Principal Deputy Assistant Secretary  
Delegated the Authority to Perform the Functions  
and Duties of the Position of Assistant Secretary of  
Elementary and Secondary Education

[www.ed.gov](http://www.ed.gov)  
400 MARYLAND AVE., SW, WASHINGTON, DC 20202



## EVERY STUDENT SUCCEEDS ACT (ESSA)

### State Waivers to Exceed 1% Cap on Alternate Assessments aligned with Alternate Academic Achievement Standards

April 5, 2018

The Consortium for Citizens with Disabilities (CCD) Education Task Force respectfully requests that the U.S. Department of Education (ED) consider the following issues regarding implementation of the ESSA provision allowing States to request waivers to exceed the 1% cap on alternate assessments aligned with alternate academic achievement standards (AA-AAS) and respond to our requests.

#### ① TRANSPARENCY IN THE WAIVER PROCESS

The two sets of requirements (statutory and regulatory) for requesting a waiver to exceed the 1% cap make this particular waiver process unique. Review of submitted requests falls to both the Office of Elementary and Secondary Education and the Office of Special Education Programs – another unique characteristic of these requests. For these reasons, the CCD Education Task Force asked ED to post all submitted waiver requests and actions (similar to the manner in which ED treats ESSA Consolidated State Plan submissions). ED's refusal of our request requires advocates to locate waiver documents on state education websites. However, many States have failed to post their 1% waiver documents. **Therefore, we again request that ED post all waiver requests and responses beginning immediately.**

#### ② MONITORING OF APPROVED WAIVERS

States must commit to a series of activities in exchange for a waiver [34 C.F.R §200.6(c)(4)(iv)]. However, it is unclear how ED will monitor implementation of these activities and ensure compliance with them. **Therefore, we ask that ED provide detailed information on how it will monitor and enforce the implementation of these activities in states with approved waivers.**

### 3 STATES INELIGIBLE FOR WAIVERS

ESSA regulations require a state requesting a waiver to show that the State has measured the achievement of at least 95 percent of all students and 95 percent of students in the children with disabilities subgroup [34 C.F.R. §200.6(c)(4)(ii)(B)]. This requirement has resulted in several States refraining from submitting a waiver request because the State has failed to meet this test participation requirement—either for all students, students with disabilities, or both. As a result, by not requesting a waiver, several States (approx. 12) are in violation of both ESSA’s Annual Measurement of Achievement provision and its provision of the 1% cap on AA-AAAS. Failure to assess students with disabilities also violates the IDEA requirement to include all students with disabilities in statewide assessments [34 C.F.R. 300.160 (a)]. **Therefore, we ask ED to provide information on how such states will be brought into compliance with ESSA provisions.**

### 4 STATES EXCEEDING CAP/NOT APPLYING FOR WAIVERS

While approximately 24 States exceeded the 1% cap in recent years and, therefore, should be submitting a request for a waiver for the 2017-2018 school year, ED has acted on only 10 waiver requests to date (see box). **Therefore, we ask ED to provide information on how it intends to ensure that all States exceeding the cap will comply with ESSA waiver requirements.**

#### Status of State 1% Cap Waiver Requests as of April 2, 2018

- Waivers have been approved for the following states (8):  
AR, DE, LA, KY, MA, MS, OH, WI
- Waiver has been partially approved for IN  
(approved for ELA/Math, denied for Science assessment)
- Waiver denied for PA due to failure to test at least 95% of students with disabilities

Source: <https://www2.ed.gov/admins/lead/account/stateplan17/waivers/index.html>



**The Consortium for Citizens with Disabilities Education Task Force advocates for Federal public policy that ensures the self- determination, independence, empowerment, integration, and inclusion of children and adults with disabilities in all aspects of society.**

More at <http://www.c-c-d.org/>



**CONSORTIUM FOR CITIZENS  
WITH DISABILITIES**

**CCD Meeting with U.S. Department of Education (ED):** April 5, 2018

**RE:** Waivers of the Every Student Succeeds Act Requirement to Adhere to 1% Assessment Cap

**Groups attending:** Advocacy Institute, AUCD, ASAN, Autism Society, CEC, COPAA, NADDC, NASDSE, NCLD, NCSECS, NDRN, NDSC, The Arc

**Attending from ED:** Jason Botel, Acting Assistant Secretary, Office of Elementary and Secondary Education; Lisa Ramirez, Deputy Assistant Secretary for Policy and Programs, Office of Elementary and Secondary Education; Johnny Collett, Assistant Secretary, Office of Special Education and Rehabilitative Services; Kim Richey, Deputy Assistant Secretary, Office of Special Education and Rehabilitative Services; Ruth Ryder, Acting Director, Office of Special Education Services

---

**Summary of Meeting:**

- Kim Musheno, Chair of CCD and co-chair for the CCD Ed Task Force led with the history of CCD, our work in a bipartisan manner with every Administration since 1975 and our desire to develop an ongoing dialogue and relationship with the current ED team.
- She specifically asked Botel why the disability groups were not included in the invitation-only Summit on School Safety conducted the day prior by the Secretary and added that direct requests to Candice Jackson and Johnny Collett by groups were completely ignored. She expressed our deep concern that the Secretary is leading a conversation focused on the 2014 federal guidance on school discipline which CCD supports-- and that students with disabilities are disproportionately impacted by exclusionary disciplinary actions – without our input. She emphasized that disability advocacy groups must be included to ensure this population has a voice at the table.
- Botel explained that the Summit came together quickly, that the guidance was being examined just as any other existing guidance and that there would be future opportunities for participation. Collett said there was an interest by OSERS for more groups to participate and that they would try to help.
- Candace Cortiella then led the discussion focused on CCD's interest in the 1% policy, our past work on the statute, regulations and the monitoring of state requests. The attached document outlines the concerns discussed at the meeting.
- Botel expressed interest in hearing more from us but would not commit to meeting our requests, especially the first, which is to know upon application the states requesting waivers. He did, however, indicate that he is willing to reconsider his initial response to our request that ED post all waiver requests. We should follow-up on this as soon as possible.
- Staff said that in addition to their responses to state waiver requests they have posted on the ED website (showing ED approvals/denials of waivers), these additional states are in process: TX, NE, AZ, HI, OK.

- Lisa Ramirez engaged regarding OESE's process to review 1% waiver requests, making clear that OSERS was part of the evaluation team. Any state with a waiver (of any kind) incurs the following:
  - Elevated a states' 'risk' level under ESSA monitoring
  - Could require targeted monitoring--which is different than the compliance monitoring for all other states – not all states get monitored every year.
- OESE asked how we could help improve the recommendations they make to states to create useful state-level report cards that communicate to parents?
- CCD said that in addition to information for advocates that more technical assistance must be provided to states, so they can help their IEP teams make appropriate assessment decisions and help districts implement the state plan to reduce the number of students taking the alternate assessment on alternate standards consistent with an approved waiver request.
- CCD will continue to monitor and provide feedback to ED.





UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

TO: State Assessment Directors  
State Title I Directors  
State Special Education Directors

FROM: Ruth E. Ryder  
Acting Director, Office of Special Education Programs  
Office of Special Education and Rehabilitative Services

Patrick Rooney  
Deputy Director, Office of State Support  
Office of Elementary and Secondary Education

DATE: August 27, 2018

SUBJECT: Additional Information Regarding the Requirements to Request a Waiver from the One Percent Cap on the Percentage of Students Who May Be Assessed with an Alternate Assessment Aligned with Alternate Academic Achievement Standards (AA-AAAS)

The purpose of this memorandum is to provide an update on the requirement, in Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA), related to participation on an alternate assessment aligned with alternate academic achievement standards (AA-AAAS) for the 2018-2019 school year (SY). As a reminder, the ESEA requires that only students with the most significant cognitive disabilities may take an AA-AAAS and limits the number of students that a State may assess with an AA-AAAS to no more than 1.0 percent of all students in the grades assessed in a State.<sup>1</sup> However, a State that is able to meet a number of requirements may apply to the U.S. Department of Education (the Department) for a one-year waiver from the 1.0 percent participation requirement. On May 16, 2017, the Department posted information regarding the procedures for a State to apply for such a waiver for SY 2017-2018.<sup>2</sup> The Department granted the waiver to States that demonstrated compliance with the waiver requirements.<sup>3</sup>

For a State that was not granted this waiver last year, the same requirements apply. In addition, any State that was approved for a waiver of this requirement in SY 2017-2018 and that needs to extend the waiver

---

<sup>1</sup> See <http://www2.ed.gov/documents/essa-act-of-1965.pdf>

<sup>2</sup> See <https://www2.ed.gov/admins/lead/account/saa/onepercentcapmemo51617.pdf>

<sup>3</sup> See <https://www2.ed.gov/admins/lead/account/stateplan17/waivers/index.html>.

for SY 2018-2019 is required to demonstrate substantial progress towards achieving each component of the prior year's plan and timeline to ensure that the State is making progress towards meeting the 1.0 percent cap and assessing only students with the most significant cognitive disabilities with an AA-AAAS. The requirements associated with demonstrating substantial progress are described in more detail below.

### **Information for States Applying for a Waiver for the First Time in SY 2018-2019**

The letter on May 16, 2017, describes the requirements and procedures to request a waiver from the 1.0 percent cap. States applying for a waiver should ensure that their request addresses **each** requirement.

Among waiver requests submitted in 2017-2018, the Department noted that some States did not provide:

- Data from the **current or previous school year**<sup>4</sup> to show the number **and** percentage of students **overall and from each subgroup of students** who will take or took the AA-AAAS with respect to each subject for which the State seeks a waiver;

*Example (this is sample data only, it does not represent any single State's data):*

| <b>Group</b>            | <b>Total Grades 3-8 and 10 ELA</b> | <b># Taking State ELA AA AAAS Gr. 3-8 and 10</b> | <b>% Taking State ELA AA AAAS Gr. 3-8 and 10</b> |
|-------------------------|------------------------------------|--|--|
| <i>All Students</i>     | 475,611                            | 7,453  | 1.57%<br>(=7,453/475,611)                        |
| <i>English learners</i> | 41,232                             | 911  | 2.21%  |
| <i>Black</i>            | 46,258                             | 1,116  | 2.41%  |
| <i>Hispanic/Latino</i>  | 95,464                             | 2,168  | 2.27%  |
| <i>Asian</i>            | 31,956                             | 432  | 1.35%  |
| <i>White</i>            | 260,701                            | 3,919  | 1.50%  |
| <i>Econ. Disadv.</i>    | 172,190                            | 4,754  | 2.76%  |

- Data to show that the State has assessed the achievement of at least 95 percent of **all students** and 95 percent of **children with disabilities** who are enrolled in grades for which the assessment is required (note: include data separately for each requested subject – reading/language arts (R/LA), mathematics and/or science). This percentage must include all students assessed with the general assessment and the AA-AAAS for each applicable subject;

*Example (this is sample data only, it does not represent any single State's data):*

| <b>Subject Area/Group</b>                                       | <b>Enrolled</b> | <b>Assessed</b> | <b>% Assessed</b> |
|---|-----------------|-----------------|-------------------|
| <i>R/LA–All Students Total Gr. 3-8, 10</i>                      | 424,382         | 409,439         | 96.5%             |
| <i>R/LA–Children With Disabilities (CWD) Totals Gr. 3-8, 10</i> | 93,121          | 89,369          | 96.0%             |

<sup>4</sup> A State applying for a waiver for the 2018-2019 school year could submit data from either 2018-2019 (current school year) or 2017-2018 (previous school year).

|  |         |         |       |
|--|---------|---------|-------|
| <i>Math–All Students<br/>Totals<br/>Gr. 3-8, 10</i>    | 424,653 | 409,978 | 96.5% |
| <i>Math–CWD Totals Gr.<br/>3-8, 10</i>                 | 92,745  | 89,745  | 96.8% |
| <i>Science–All Students<br/>Totals<br/>Gr 4, 7, 10</i> | 141,460 | 138,957 | 98.2% |
| <i>Science–CWD Totals<br/>Gr. 4, 7, 10</i>             | 30,528  | 29,852  | 97.8% |

- Evidence that the **SEA has verified** that **each LEA** that the State anticipates will assess more than 1.0 percent of its assessed students in any subject using an AA-AAAS:
  - **followed the State’s guidelines for participation** in the AA-AAAS<sup>5</sup>; **and**
  - **will address any disproportionality** in the percentage of students in any subgroup taking an AA-AAAS.
- A **plan and timeline** with clear, actionable steps and milestones that includes:
  - A clear description of how the State will **improve the implementation of its guidelines for participation in the AA-AAAS**, including by reviewing and, if necessary, revising its definition of students with the most significant cognitive disabilities (see 34 CFR 200.6(d)(1)), so that the State meets the 1.0 percent cap in each subject for which assessments are administered in future school years;
  - A clear description of how it will **monitor and regularly evaluate each LEA** to ensure that the LEA provides sufficient training such that school staff who participate as members of an individualized education program (IEP) team or other placement team understand and implement the guidelines established by the State for participation in an AA-AAAS so that all students are appropriately assessed; and
  - A clear description of how the State will **address any disproportionality** in the percentage of students taking an AA-AAAS as identified through the data provided.<sup>6</sup>

### **Information for States Applying to Extend a Previously Granted Waiver**

A State that wishes to request an extension of a waiver that they received in SY 2017-2018 should provide **updated** information regarding **each requirement in the previous year’s submission**, as outlined in the May 16, 2017, memorandum. In preparing a waiver renewal request, States must continue to meet each requirement associated with a first-year waiver. **Additionally**, a State must demonstrate **substantial progress** towards achieving **each component of the prior year’s plan and timeline**. As noted above, in creating a plan and timeline, a State must address three areas within its plan and timeline:

- How the State will **improve the implementation of its guidelines for participation in the AA-AAAS** including by reviewing and, if necessary, revising its definition of students with the most significant cognitive disabilities (see 34 CFR 200.6(d)(1)), so that the State meets the 1.0 percent cap in each subject for which assessments are administered in future school years;
- How the State will **monitor and regularly evaluate each LEA** to ensure that the LEA provides sufficient training such that school staff who participate as members of an IEP team or other placement team understand and implement the guidelines established by the State for participation

<sup>5</sup> 34 CFR 200.6(d), consistent with section 612(a)(16)(C) of the Individuals with Disabilities Education Act (IDEA).

<sup>6</sup> 34 CFR 200.6(c)(4)(iv)

- in an AA-AAAS so that all students are appropriately assessed; and
- How the State will **address any disproportionality** in the percentage of students taking an AA-AAAS as identified through the data provided.<sup>7</sup>

The Department will base decisions about extensions of any 1.0 percent cap waivers by evaluating whether the State met the requirements as well as the degree to which it has demonstrated progress against the previous year's plan for improvement.

States with questions about these waiver requests should contact their Office of State Support contacts at: OSS.[State]@ed.gov (e.g., OSS.Nebraska@ed.gov) and their Office of Special Education Programs State Lead. Thank you for your continued commitment to our nation's students.

---

<sup>7</sup> 34 CFR 200.6(c)(4)(iv)

## Attachment 7



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

TO: State Assessment Directors  
State Title I Directors  
State Special Education Directors

FROM: Patrick Rooney  
Director, Evidence-Based Practices Assessment and Accountability and School  
Support and Accountability  
Office of Elementary and Secondary Education

Ruth Ryder  
Deputy Director, Office of Special Education Programs (OSEP)  
Office of Special Education and Rehabilitative Services

DATE: March 28, 2019

SUBJECT: Information Regarding Consequences for States Not Meeting the Requirement to  
Assess Not More than 1.0 Percent of Students on the Alternate Assessment

---

### Introduction

The purpose of this memorandum is to provide information regarding the implications for States not meeting the requirement, in Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA), related to participation in an alternate assessment aligned with alternate academic achievement standards (AA-AAAS). The ESEA requires that only students with the most significant cognitive disabilities may take an AA-AAAS and limits the percentage of students that a State may assess with an AA-AAAS to no more than 1.0 percent of all students in the grades assessed in a State for each subject (reading/language arts, mathematics and science). This requirement took effect beginning with the 2017-18 school year (SY).

Since most States previously assessed more than 1.0 percent of students with the AA-AAAS, the Department understands that States may need time to adjust their systems to come into compliance. To support States in meeting the requirement, the ESEA allows States to seek a waiver. The Department established regulations that describe the requirements States must meet to be granted a waiver. The Department granted 23 States such a waiver for the 2017-18 SY.<sup>1</sup> In receiving these waivers, each State had to meet specific requirements set forth in the ESEA statute and regulations.<sup>2</sup> Specifically, each State receiving the waiver had to demonstrate that at least 95 percent of all students and 95 percent of all students with disabilities participated in the

---

<sup>1</sup> DE, GA, ID, KY, MI, MS, MO, NE, NC, OH, OK, SD, TN, TX, WV, and WI each received waivers for reading/language arts, mathematics, and science; AZ, AR, IN, HI, LA, MA, and ND each received waivers for reading/language arts and mathematics.

<sup>2</sup> See <https://www2.ed.gov/admins/lead/account/saa/onepercentcapmemo51617.pdf> and <https://www2.ed.gov/admins/lead/account/saa/ossstateassessmentltr.pdf>.

required assessments. These States also provided the Department assurances and detailed plans on how they would work with local educational agencies (LEAs) to reduce the rates of students participating in AA-AAAS.

We encourage States that received a waiver to make readily and publicly available the State's plan for reducing the percentage of students assessed on the AA-AAAS so that parents, stakeholders, and the public are aware of the State's actions and progress in implementing their plans.

In addition, we want to remind all States of the requirement in 34 CFR 200.6(c)(3)(iv) to make the information submitted by an LEA justifying the need to assess more than 1.0 percent of its students with an AA-AAAS publicly available, provided that such information does not reveal personally identifiable information about an individual student.

### Technical Assistance

The Department understands that this new requirement necessitates robust engagement with LEAs and community members and may require an update to your AA-AAAS guidelines. To support the effort, the Department has been providing technical assistance. Last October, the National Center on Educational Outcomes (NCEO) hosted a convening, in partnership with OSEP and OSSA, "Supporting States in Implementing ESSA's 1.0 Percent State-Level Cap on Participation of Students in the AA-AAAS." NCEO and the Center on Standards and Assessment Implementation (CSAI) published a document summarizing the convening, "Proceedings of the 1% Cap National Convening", which is available at:

[1PercentNationalConveningProceedings.pdf](#). This document includes links to video clips of the plenary presentations as well as resources that were shared by States and others.

Additionally, NCEO and CSAI are hosting three Peer Learning Groups (PLGs) on topics that States identified at the convening:

- Digging into Your Data: Building a One Percent Data Analysis and Use Plan
- Guiding and Evaluating District Justifications for Exceeding the One Percent Cap
- Building Capacity of IEP Teams and Parents in Making Decisions about Assessment Participation

### Consequences for Exceeding the Cap

If a State did not receive a waiver for the 2017-18 SY and assessed more than 1.0 percent of assessed students in reading/language arts, mathematics, and/or science, in the State with the AA-AAAS, the State is out of compliance with ESSA. Based on the State's context and information, such as the extent to which the State exceeded the 1.0 percent cap, the Department will consider one of the following actions:

1. Sending a letter notifying the State that it has assessed more than 1.0 percent of tested students with an AA-AAAS and requiring the State to submit a plan to come into compliance with the 1.0 percent cap.
2. Placing a condition on the State's Title I Part A grant award. As part of the condition, a State would be required to submit a plan to assess no more than 1.0 percent of students with an AA-AAAS in each subject.
3. Imposing high risk status on the State's Title I Part A grant award. A State with such a high risk status would be required to submit a plan to come into compliance with the 1.0

percent cap and to participate in joint OESE/OSEP monitoring calls while the State works to meet the requirement.

4. Withholding Title I Part A State administrative funds. If the Department withholds funds, a State would be required to submit a plan to come into compliance with the 1.0 percent cap and participate in joint OESE/OSEP monitoring calls while they work to come into compliance.

When determining which of these consequences to apply, the Department will consider multiple factors, including **the extent** to which a State assessed more than 1.0 percent of tested students with an AA-AAAS (e.g., a rate of 1.2 percent compared to a rate of 2.5 percent); and the State’s **improvement over time** in reducing participation of students in alternate assessments.

The Department established the following framework for classifying consequences for State noncompliance with the 1.0 percent cap on AA-AAAS participation, which will guide our actions this year and in future years. This framework considers the complexity States face in addressing rates of AA-AAAS participation and takes into account the amount of time that may be necessary for States to make the changes to come into compliance with this new requirement. Accordingly, the most severe consequences are not contemplated until after the 2019-20 SY and then only if the State has not demonstrated improvement in reducing AA-AAAS participation rates.

| <b>Classification Criteria</b>  | <b>Consequence for State</b>  |
|---|---|
| Between <b>1.0-1.3 percent</b> of students assessed with an AA-AAAS in at least one subject without a waiver and the State would have been eligible for (i.e., assessed at least 95 percent of all students and students with disabilities in the previous year), but did not request, a waiver.  | Notification letter and a State is required to submit a plan for compliance with the requirement.   |
| <p>Between <b>1.0-1.3 percent</b> of students assessed with an AA-AAAS in at least one subject without a waiver. The State would not have been eligible for a waiver request because assessment participation rates in that subject for all students or students with disabilities were below 95 percent.</p> <p>OR</p> <p>More than 1.3 percent of students assessed with an AA-AAAS in at least one subject without a waiver.</p> <p>OR</p> <p>State received a <b>notification letter</b> in the preceding year and did not come into compliance by reducing the AA-AAAS participation rate below 1.0 percent.</p> | Title I Part A grant award condition. As part of the condition, a State is required to submit a plan to come into compliance with the 1.0 percent cap and submit data via <i>EDFacts</i> for the 2018-19 SY by October 1, 2019. |

| <b>Classification Criteria</b>   | <b>Consequence for State</b>   |
|--|--|
| State received a Title I grant condition in the preceding year and did not make progress in decreasing the AA-AAAS participation rate by at least 0.1 percent.                                   | High-risk status for the Title I Part A grant award. A State with high-risk status would be required to submit a plan to come into compliance with the 1.0 percent cap and participate in joint OESE/OSEP monitoring calls until it meets the requirement. |
| State was on high-risk status or had Title I administrative funds withheld in the preceding year and did not make progress in decreasing the AA-AAAS participation rate by at least 0.1 percent. | Withhold a percentage of Title I Part A State administrative funds. A State would be required to submit a plan to come into compliance with the requirement and participate in joint OESE/OSEP monitoring calls while until it meets the requirement.      |

States with requests for technical assistance, or with questions about these consequences or the process to request a waiver, should contact their Office of School Support and Accountability contacts at: OSS.[State]@ed.gov (e.g., OSS.Nebraska@ed.gov) and their Office of Special Education Programs State Leads.

Thank you for your continued commitment to our nation’s students.





UNITED STATES DEPARTMENT OF EDUCATION

TO: State Assessment Directors  
State Title I Directors  
State Special Education Directors

FROM: Patrick Rooney  
Director, School Support and Accountability  
Office of Elementary and Secondary Education

Laurie Vanderploeg  
Director, Office Special Education Programs  
Office of Special Education and Rehabilitative Services

DATE: June 9, 2020

SUBJECT: Additional Information Regarding the Requirements to Request a Waiver for the 2020-21 School Year (SY) from the One Percent Cap on the Percentage of Students With the Most Significant Cognitive Disabilities Who May Be Assessed with an Alternate Assessment Aligned with Alternate Academic Achievement Standards (AA-AAAS)

---

We understand that State educational agencies (SEAs) are facing unprecedented challenges right now due to the impacts of the national pandemic caused by the novel Coronavirus Disease 2019, COVID-19, and that those challenges will likely continue into the coming school year. We at the U.S. Department of Education (Department) want to commend you for your efforts to ensure that learning continues for all students and we appreciate the difficulties you are facing. In this memorandum, we are providing information regarding the submission of waiver requests for the 1.0 percent cap on AA-AAAS participation in the 2020-21 SY, particularly in light of the waivers that were granted this spring from the requirement to administer statewide assessments in SY 2019-20.

Section 612(a)(16)(C) of the Individuals with Disabilities Education Act (IDEA) requires that States have developed and implemented guidelines for the participation of children with disabilities in AA-AAAS for those children who cannot participate in regular assessments with accommodations as indicated in their respective individualized education programs (IEPs). Title I of the Elementary and Secondary Education Act of 1965 (ESEA) requires that only students with the most significant cognitive disabilities may take an AA-AAAS; it also limits the number of students that a State may assess with an AA-AAAS to no more than 1.0 percent of all students in the grades assessed in a State.<sup>1</sup> This requirement was first in effect for SY 2017-18. The Department recognizes, however, that most States were exceeding this percentage prior to SY 2017-18 and that it would likely take several years

---

<sup>1</sup> See <http://www2.ed.gov/documents/essa-act-of-1965.pdf>.

for a State to come into compliance with this requirement. As a result, the ESEA permits the Department to grant a waiver to a State, if it meets certain statutory and regulatory requirements, to assess more than 1.0 percent of students on an AA-AAAS.

In May 2017, the Department provided information regarding the procedures for a State to apply for such a waiver.<sup>2</sup> In August 2018, the Department published additional information for States that may wish to apply to extend their existing one-year waiver for an additional year.<sup>3</sup> This memorandum clarified the requirements for such an extension, which include demonstrating substantial progress towards achieving each component of the prior year's plan and timeline, to ensure that the State is making progress towards meeting the 1.0 percent cap and assessing only students with the most significant cognitive disabilities with an AA-AAAS. The Department has posted all waiver requests and the Department's response for SYs 2017-18, 2018-19, and 2019-20 at <https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/essa-state-plans-assessment-waivers/>.

In March 2020, COVID-19 resulted in widespread and extended school closures. As a result, it was not feasible for most schools to administer annual statewide assessments. The Department invited States to request a waiver for SY 2019-20 of the assessment requirements in ESEA section 1111(b)(2) of the ESEA, the accountability and school identification requirements in ESEA sections 1111(c)(4) and 1111(d)(2)(C)-(D), and related reporting requirements in ESEA section 1111(h). Every State applied for and received this waiver.

### **States Applying for a New Waiver**

The requirements and procedures to request a waiver from the 1.0 percent cap are unchanged and are provided in detail in the prior documents from May 2017 and August 2018. States applying for a new waiver should ensure that their request addresses each requirement detailed in those documents, including the requirements in section 8401 of the ESEA related to public comment.

The waiver request must include data from the current or previous school year<sup>4</sup> to show the number and percentage of students overall and from each subgroup of students who will take or took the AA-AAAS with respect to each subject for which the State seeks a waiver. However, we understand that most States will not have data for SY 2019-20, so they will not be able to provide AA-AAAS data from the previous school year.

For that reason, the Department encourages a State to use current year (2020-21) IEP<sup>5</sup> or test registration data to make a credible estimate of the number and percentage of students (including by subgroup, if possible) who will take the AA-AAAS in SY 2020-21 or who would have taken the AA-AAAS in SY 2019-20 if testing had been conducted. States should also provide actual participation data on this population, overall and by subgroup, from SY 2018-19. An example of such data is

---

<sup>2</sup> See <https://www2.ed.gov/admins/lead/account/saa/onepercentcapmemo51617.pdf>.

<sup>3</sup> See <https://oese.ed.gov/files/2020/02/ossstateassessmentltr.pdf>.

<sup>4</sup> For example, a State could have applied for a waiver for SY 2018-19 school year using data from either 2018-19 (current school year) or 2017-18 (previous school year).

<sup>5</sup> In accordance with IDEA, the IEP team determines whether a child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, and the IEP team must document such a decision in the child's IEP.

provided in appendix A of this memorandum. The Department believes that using IEP/test registration data to create a credible estimate for SY 2019-20 or 2020-21 participation rates may help the State demonstrate that they are making progress in reducing the percentage of AA-AAAS participation.

As in previous years, the State will also need to provide data to show that the State has assessed the achievement of at least 95 percent of **all students** and 95 percent of **children with disabilities** who are enrolled in grades for which the assessment is required. This percentage must include all students assessed with the general assessment and the AA-AAAS for each requested subject. Because States will not have valid participation data for SY 2019-20, the State will need to rely on participation data from SY 2018-19.

The State will need to provide evidence that the SEA has verified that **each LEA** that the State anticipates will assess more than 1.0 percent of its assessed students in any subject using an AA-AAAS followed the State's guidelines for participation in the AA-AAAS<sup>6</sup> and will address any disproportionality in the percentage of students in any subgroup taking an AA-AAAS. This can be done in SY 2020-21 and must have occurred before submission of the waiver request.

Finally, the State will need to provide a plan and timeline with clear, actionable steps and milestones that includes:

- A clear description of how the State will improve the implementation of its guidelines for participation in the AA-AAAS, including by reviewing and, if necessary, revising its definition of students with the most significant cognitive disabilities (see 34 CFR 200.6(d)(1)), so that the State meets the 1.0 percent cap in each subject for which assessments are administered in future school years;
- A clear description of how it will monitor and regularly evaluate each LEA to ensure that the LEA provides sufficient training such that school staff who participate as members of an IEP team or other placement team understand and implement the guidelines established by the State for participation in an AA-AAAS so that all students are appropriately assessed; and
- A clear description of how the State will address any disproportionality in the percentage of students taking an AA-AAAS as identified through the data provided.<sup>7</sup>

### **States Applying to Extend a Waiver Granted or Extended in a Prior Year**

A State that wishes to request an extension of a waiver that it received in a prior year should provide updated information regarding each requirement in the previous year's submission. In preparing a waiver renewal request, the State must continue to meet each requirement associated with the first waiver it received from this requirement. Additionally, a State must demonstrate substantial progress towards achieving each component of the prior year's plan and timeline. **If a State's plan and timeline was disrupted due to COVID-19, its waiver request should explain the impact of those disruptions.**

As noted above, the Department encourages the State to use current year IEP or test registration data to make a credible estimate of the number and percentage of students (including by subgroup, if possible) who will take the AA-AAAS in SY 2020-21 or who would have taken the AA-AAAS in SY 2019-20 if

---

<sup>6</sup> 34 CFR 200.6(d), consistent with section 612(a)(16)(C) of the Individuals with Disabilities Education Act (IDEA).

<sup>7</sup> 34 CFR 200.6(c)(4)(iv).

testing had been conducted. States should also provide actual participation data, overall and by subgroup, from SY 2018-19.

### **States Denied a Waiver in SY 2019-20**

States that were **denied** a 1.0 percent cap waiver in SY 2019-20 will need to follow the instructions for applying for a new waiver if they wish to seek a waiver in SY 2020-21. States should be sure to address the concern that led to the denial of their SY 2019-20 waiver request.

### **States Seeking a Combination New Waiver and an Extension of a Waiver**

Some States were denied or did not apply for a waiver in a particular subject area (typically due to participation rates below 95 percent) but received a waiver in other subject areas. As in previous years, this will be treated as a combination new/extension waiver request and all of the applicable requirements apply to each subject area included in the State's request. That is, for the waivers the State requested be extended, the State must provide information described in "[States Applying to Extend a Waiver Granted or Extended in a Prior Year](#)." For the subjects that are new waivers, the State must provide information described in "[States Applying for a New Waiver](#)."

### **States with Early Testing Windows**

The Department reminds States that a request for a waiver of the 1.0 percent cap requirement, whether new or extension, must be submitted 90 days before the beginning of the State's testing window. For a State that tests throughout the year, this deadline *may* occur during summer 2020. The State should follow this requirement even if all of the necessary information is not yet available. The Department encourages the State to explain in its requests any missing information and provide a clear timeline for when the data will become available. Once the Department receives the required information, the waiver will be considered for approval.

States with questions about these waiver requests should contact the Office of School Support and Accountability's Assessment Team at [ESEA.Assessment@ed.gov](mailto:ESEA.Assessment@ed.gov). All requests for 1.0 percent cap waivers should be submitted to [ESEA.Assessment@ed.gov](mailto:ESEA.Assessment@ed.gov). Thank you for your continued commitment to our nation's students.

**Appendix A**

*Example of Data Display to Support a State's Waiver Request to Exceed the 1.0 Percent Cap on AA-AAAS Participation*

*(Note: This is sample data only, it does not represent any single State's data)*

| <b>Group</b>     | <b>Total Grades 3-8 and 10 R/LA 2018-19</b>                       | <b>Total Children w Disabilities Grades 3-8 and 10 R/LA 2018-19</b>                       | <b># Take State R/LA AA-AAAS Gr. 3-8 and 10 2018-19</b>                       | <b>% Taking State R/LA AA-AAAS Gr. 3-8 and 10 2018-19</b>                       |
|------------------|---|---|---|---|
| All students     | 475,611   | 78,924  | 7,453   | 1.57%<br>(=7,453/475,611)   |
| English learners | 41,232  | 9,812   | 911   | 2.21%   |
| Black            | 46,258  | 9,933   | 1,116   | 2.41%   |
| Hispanic         | 95,464  | 22,163  | 2,168   | 2.27%   |
| Asian            | 31,956  | 2,817   | 432   | 1.35%   |
| White            | 260,701   | 57,246  | 3,919   | 1.50%   |
| Econ. Disadv.    | 172,190   | 44,725  | 4,754   | 2.76%   |
| <b>Group</b>     | <b><u>Estimated*</u><br/>Total Grades 3-8 and 10 R/LA 2019-20</b> | <b><u>Estimated*</u><br/>Total Children w Disabilities Grades 3-8 and 10 R/LA 2019-20</b> | <b><u>Estimated*</u><br/># Take State R/LA AA-AAAS Gr. 3-8 and 10 2019-20</b> | <b><u>Estimated*</u><br/>% Taking State R/LA AA-AAAS Gr. 3-8 and 10 2019-20</b> |
| All students     | 476,834   | 79,412  | 7,021   | 1.47%<br>(=7,021/476,834)   |
| English learners | 42,491  | 10,011  | 798   | 1.88%   |
| Black            | 45,876  | 10,438  | 986   | 2.15%   |
| Hispanic         | 96,348  | 23,045  | 2,053   | 2.13%   |
| Asian            | 31,123  | 2,790   | 401   | 1.29%   |
| White            | 263,128   | 58,291  | 3,919   | 1.49%   |
| Econ. Disadv.    | 178,897   | 45,865  | 4,234   | 2.37%   |

\* Estimates are based on test registration; depending on the availability of State data, this could be 2019-20 or 2020-21 test registration data.

## U.S. DEPT OF EDUCATION LETTERS TO STATES EXCEEDING 1% CAP WITHOUT A WAIVER

### YEAR 1: 2017-2018

| Letters sent to states that exceeded cap in 2017-2018 without a waiver in<br>ELA, Math and Science unless noted otherwise.<br>All states required to submit plan to USED by October 1, 2019 unless noted. |       |              |  |
|---|-------|--------------|--|
|   | STATE | DATE         | SOURCE   |
| 1   | CA    | June<br>2019 | <a href="https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequenceca.pdf">https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequenceca.pdf</a>                |
| 2   | CO    | June<br>2019 | <a href="https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequenceco.pdf">https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequenceco.pdf</a>                |
| 3   | CT    | June<br>2019 | <a href="https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequencect.pdf">https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequencect.pdf</a>                |
| 4   | DC    | →            | Exceeded cap in 2017-18 but did not receive a letter b/c waiver request made for 2018-19   |
| 5   | FL    | June<br>2019 | <a href="https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequencefl.pdf">https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequencefl.pdf</a>                |
| 6   | HI    | June<br>2019 | <a href="https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequencehi.pdf">https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequencehi.pdf</a> (Science only) |
| 7   | IL    | June<br>2019 | <a href="https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequenceil.pdf">https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequenceil.pdf</a>                |
| 8   | KS    | June<br>2019 | <a href="https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequenceks.pdf">https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequenceks.pdf</a>                |
| 9   | MD    | June<br>2019 | <a href="https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequencemd.pdf">https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequencemd.pdf</a>                |
| 10  | MN    | June<br>2019 | <a href="https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequencemn.pdf">https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequencemn.pdf</a>                |
| 11  | NJ    | June<br>2019 | <a href="https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequencenj.pdf">https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequencenj.pdf</a>                |
| 12  | NY    | June<br>2019 | <a href="https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequenceny.pdf">https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequenceny.pdf</a>                |
| 13  | OR    | June<br>2019 | <a href="https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequenceor.pdf">https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequenceor.pdf</a>                |
| 14  | PA    | June<br>2019 | <a href="https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequencepa.pdf">https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequencepa.pdf</a>                |
| 15  | RI    | →            | Exceeded cap in 2017-18 but did not receive a letter b/c waiver request was made for 2018-19   |
| 16  | VA    | June<br>2019 | <a href="https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequenceva.pdf">https://www2.ed.gov/policy/elsec/guid/stateletters/1percentconsequenceva.pdf</a>                |

## YEAR 2: 2018-2019

| <p>Letters sent to states that exceeded cap in 2018-2019 without a waiver in ELA, Math and Science unless noted otherwise.<br/>                     All states required to submit plan to USED by October 1, 2020<br/> <i>*indicates state that exceeded cap without a waiver 2 consecutive years.</i></p> |       |           |  |
|--|-------|-----------|--|
|  | STATE | DATE      | SOURCE   |
| 1  | AZ    | July 2020 | <a href="https://oese.ed.gov/files/2020/07/Arizona-1percent-letter-2020.pdf">https://oese.ed.gov/files/2020/07/Arizona-1percent-letter-2020.pdf</a>                                    |
| 2  | CA*   | Feb 2020  | <a href="https://oese.ed.gov/files/2020/02/CA1percent020420.pdf">https://oese.ed.gov/files/2020/02/CA1percent020420.pdf</a>  |
| 3  | CT*   | Feb 2020  | <a href="https://oese.ed.gov/files/2020/02/CT1percent020420.pdf">https://oese.ed.gov/files/2020/02/CT1percent020420.pdf</a>  |
| 4  | DE    | July 2020 | <a href="https://oese.ed.gov/files/2020/07/Delaware-1percent-letter-2020.pdf">https://oese.ed.gov/files/2020/07/Delaware-1percent-letter-2020.pdf</a>                                  |
| 5  | DC    | July 2020 | <a href="https://oese.ed.gov/files/2020/07/District-Columbia-1percent-letter-2020.pdf">https://oese.ed.gov/files/2020/07/District-Columbia-1percent-letter-2020.pdf</a> (Science only) |
| 6  | IL*   | July 2020 | <a href="https://oese.ed.gov/files/2020/07/Illinois-1-percent-letter-2020.pdf">https://oese.ed.gov/files/2020/07/Illinois-1-percent-letter-2020.pdf</a>                                |
| 7  | MN*   | Feb 2020  | <a href="https://oese.ed.gov/files/2020/02/MN1percent020420.pdf">https://oese.ed.gov/files/2020/02/MN1percent020420.pdf</a>  |
| 8  | NJ*   | Feb 2020  | <a href="https://oese.ed.gov/files/2020/02/NJ1percent020420.pdf">https://oese.ed.gov/files/2020/02/NJ1percent020420.pdf</a>  |
| 9  | NM    | July 2020 | <a href="https://oese.ed.gov/files/2020/07/New-Mexico1percent-letter-2020.pdf">https://oese.ed.gov/files/2020/07/New-Mexico1percent-letter-2020.pdf</a>                                |
| 10   | NY*   | Feb 2020  | <a href="https://oese.ed.gov/files/2020/02/NY1percent020420.pdf">https://oese.ed.gov/files/2020/02/NY1percent020420.pdf</a>  |
| 11   | OR*   | Feb 2020  | <a href="https://oese.ed.gov/files/2020/02/OR1percent020420.pdf">https://oese.ed.gov/files/2020/02/OR1percent020420.pdf</a>  |
| 12   | PA*   | Feb 2020  | <a href="https://oese.ed.gov/files/2020/02/PA1percent020420.pdf">https://oese.ed.gov/files/2020/02/PA1percent020420.pdf</a>  |
| 13   | RI    | July 2020 | <a href="https://oese.ed.gov/files/2020/07/Rhode-Island-1percent-letter-2020.pdf">https://oese.ed.gov/files/2020/07/Rhode-Island-1percent-letter-2020.pdf</a> (Science only)           |

## YEAR 3: 2019-2020

No letters were sent due to USED waiver to administer annual assessments in 2019-2020.

## YEAR 4: 2020-2021

No letters were sent due to impact of COVID-19 pandemic.

## YEAR 5: 2021-2022

| <p>Letters sent to states that exceeded cap in 2021-2022 without a waiver in ELA, Math and Science unless noted otherwise.<br/> All states required to submit plan to USED within 30 days<br/> <i>*indicates state that exceeded cap without a waiver multiple years.</i></p> |       |          |   |
|---|-------|----------|---|
|   | STATE | DATE     | SOURCE  |
| 1   | CA*   | Oct 2023 | <a href="https://oese.ed.gov/files/2023/10/CA1percentletter10.27.23.pdf">https://oese.ed.gov/files/2023/10/CA1percentletter10.27.23.pdf</a><br>(ELA, Math)    |
| 2   | CT*   | Oct 2023 | <a href="https://oese.ed.gov/files/2023/10/CT1percentletter10.27.23.pdf">https://oese.ed.gov/files/2023/10/CT1percentletter10.27.23.pdf</a>                   |
| 3   | DE    | Oct 2023 | <a href="https://oese.ed.gov/files/2023/10/DE1percentletter10.27.23.pdf">https://oese.ed.gov/files/2023/10/DE1percentletter10.27.23.pdf</a><br>(Science only) |
| 4   | HI    | Oct 2023 | <a href="https://oese.ed.gov/files/2023/10/HI1percentletter10.27.23.pdf">https://oese.ed.gov/files/2023/10/HI1percentletter10.27.23.pdf</a><br>(Science only) |
| 5   | IL*   | Oct 2023 | <a href="https://oese.ed.gov/files/2023/10/IL1percentletter10.27.23.pdf">https://oese.ed.gov/files/2023/10/IL1percentletter10.27.23.pdf</a><br>(Science only) |
| 6   | MN*   | Oct 2023 | <a href="https://oese.ed.gov/files/2023/10/MN1percentletter10.27.23.pdf">https://oese.ed.gov/files/2023/10/MN1percentletter10.27.23.pdf</a>                   |
| 7   | MT    | Oct 2023 | <a href="https://oese.ed.gov/files/2023/10/MT1percentletter10.27.23.pdf">https://oese.ed.gov/files/2023/10/MT1percentletter10.27.23.pdf</a><br>(ELA, Math)    |
| 8   | NJ*   | Oct 2023 | <a href="https://oese.ed.gov/files/2023/10/NJ1percentletter10.27.23.pdf">https://oese.ed.gov/files/2023/10/NJ1percentletter10.27.23.pdf</a>                   |
| 9   | NM    | Oct 2023 | <a href="https://oese.ed.gov/files/2023/10/NM1percentletter10.27.23.pdf">https://oese.ed.gov/files/2023/10/NM1percentletter10.27.23.pdf</a>                   |
| 10  | NY*   | Oct 2023 | <a href="https://oese.ed.gov/files/2023/10/NY1percentletter10.27.23.pdf">https://oese.ed.gov/files/2023/10/NY1percentletter10.27.23.pdf</a>                   |
| 11  | OR*   | Oct 2023 | <a href="https://oese.ed.gov/files/2023/10/OR1percentletter10.27.23.pdf">https://oese.ed.gov/files/2023/10/OR1percentletter10.27.23.pdf</a><br>(ELA, Math)    |
| 12  | PA*   | Oct 2023 | <a href="https://oese.ed.gov/files/2023/10/PA1percentletter10.27.23.pdf">https://oese.ed.gov/files/2023/10/PA1percentletter10.27.23.pdf</a>                   |
| 13  | RI*   | Oct 2023 | <a href="https://oese.ed.gov/files/2023/10/RI1percentletter10.27.23.pdf">https://oese.ed.gov/files/2023/10/RI1percentletter10.27.23.pdf</a><br>(Science only) |
| 14  | VT    | Oct 2023 | <a href="https://oese.ed.gov/files/2023/10/VT1percentletter10.27.23.pdf">https://oese.ed.gov/files/2023/10/VT1percentletter10.27.23.pdf</a><br>(ELA only)     |
| 15  | WY    | Oct 2023 | <a href="https://oese.ed.gov/files/2023/10/WY1percentletter10.27.23.pdf">https://oese.ed.gov/files/2023/10/WY1percentletter10.27.23.pdf</a>                   |





UNITED STATES DEPARTMENT OF EDUCATION

DATE: October 29, 2021

TO: State Assessment Directors  
State Title I Directors  
State Special Education Directors

FROM: Patrick Rooney  
Director, School Support and Accountability  
Office of Elementary and Secondary Education

David Cantrell, Ph.D.  
Acting Director, Office of Special Education Programs  
Office of Special Education and Rehabilitative Services

SUBJECT: Information Regarding the Requirements to Request a Waiver for the 2021-2022 School Year (SY) from the One Percent Cap on the Percentage of Students with the Most Significant Cognitive Disabilities Who May Be Assessed with an Alternate Assessment Aligned with Alternate Academic Achievement Standards (AA-AAAS)

---

The 2020-2021 school year presented unprecedented challenges for States and local educational agencies (LEAs) throughout the country because of the national pandemic caused by the novel coronavirus disease 2019 (COVID-19).

We at the U.S. Department of Education (Department) value your commitment to ensuring that learning for all students continued despite these tremendous challenges. For successful recovery efforts, it is essential to examine the expectations for children with disabilities, English learners with disabilities, and children with the most significant cognitive disabilities. Holding high expectations is key to helping all students meet or exceed State challenging academic standards.

One important step is the inclusion of all children with disabilities in State and districtwide assessments as determined in their respective individualized education programs (IEPs), as required under section 612(a)(16) of the Individuals with Disabilities Education Act (IDEA) – either in a general grade level assessment with or without accommodations or, for those students with the most significant cognitive disabilities, an alternate assessment aligned with alternate academic achievement standards (AA-AAAS). Children with the most significant cognitive disabilities are among those disproportionately affected by school closures and other disruptions in instruction. It is especially important for educators to collect accurate information on the academic performance of these children to inform decisions about programs, instruction, and individualized supports and services in the 2021-2022 school year.

400 MARYLAND AVE., SW, WASHINGTON, DC 20202  
[www.ed.gov](http://www.ed.gov)

The Department recognizes that, with appropriate services and supports, the vast majority of students with disabilities should be expected to make academic progress in the general curriculum. The alternate academic achievement standards were designed to be appropriate only for a very small number of students, no more than 1.0 percent of all students assessed. As such, in this memorandum, we are providing information regarding the submission of waiver requests for the 1.0 percent cap on AA-AAAS participation in SY 2021-2022, particularly in light of challenges States faced in SY 2020-2021 and the waivers that were granted from the requirement to administer statewide assessments in SY 2019-2020. We know this is time-sensitive information given the requirement that a State seeking this waiver must submit the waiver at least 90 days before the beginning of the its testing window for administration of the State assessments.

As background, Title I of the Elementary and Secondary Education Act of 1965 (ESEA) requires that only students with the most significant cognitive disabilities may take an AA-AAAS; it also limits the number of students that a State may assess with an AA-AAAS to no more than 1.0 percent of all students in the grades assessed.<sup>1</sup> This requirement was first in effect for SY 2017-2018 when most States were exceeding this percentage. The ESEA permits the Department to grant a waiver to a State, if it meets certain statutory and regulatory requirements, to assess more than 1.0 percent of students with an AA-AAAS. On December 8, 2016, the Department published final regulations,<sup>2</sup> based on the consensus reached through negotiated rulemaking, related to academic assessment under title I, part A of the ESEA, including the requirements for State waiver requests if a State anticipates it will exceed the cap (34 CFR § 200.6(c)(4)).

In May 2017, the Department provided information regarding the procedures for a State to apply for such a waiver.<sup>3</sup> In August 2018, the Department published additional information for States that may wish to apply to extend their existing one-year waiver for an additional year.<sup>4</sup> This memorandum clarified the requirements for such an extension, which include demonstrating substantial progress towards achieving each component of the prior year's plan and timeline, to ensure that the State is making progress towards meeting the 1.0 percent cap and assessing only students with the most significant cognitive disabilities with an AA-AAAS. The Department has posted all waiver requests and the Department's responses for SYs 2017-2018, 2018-2019, 2019-2020, and 2020-2021 at <https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/essa-state-plans-assessment-waivers/>.

In March 2020, COVID-19 resulted in widespread and extended school closures. As a result, it was not feasible for most schools to administer annual statewide assessments in SY 2019-2020. The Department invited States to request a waiver for SY 2019-2020 of the assessment requirements in ESEA section 1111(b)(2), the accountability and school identification requirements in ESEA sections 1111(c)(4) and 1111(d)(2)(C)-(D), and related reporting requirements in ESEA section 1111(h). Every State applied for and received this waiver.

---

<sup>1</sup> See ESEA section 1111(b)(2)(D)(I)(i) at <http://www2.ed.gov/documents/essa-act-of-1965.pdf>.

<sup>2</sup> See <https://www.federalregister.gov/documents/2016/12/08/2016-29128/title-i-improving-the-academic-achievement-of-the-disadvantaged-academic-assessments>.

<sup>3</sup> See <https://www2.ed.gov/admins/lead/account/saa/onepercentcapmemo51617.pdf>.

<sup>4</sup> See <https://oese.ed.gov/files/2020/02/ossstateassessmentltr.pdf>.

On June 9, 2020, the Department provided States with additional information regarding the requirements to request a waiver for SY 2020-2021 from the 1.0 percent cap on the number of students who may be assessed with an AA-AAAS.<sup>5</sup> The Department outlined the process for States to follow for submitting a request for a new waiver, a waiver extension, and/or a combination of a new waiver and a waiver extension.

### **States Applying for a New Waiver in SY 2021-2022**

In order for a State to be eligible for a 1.0 percent AA-AAAS waiver, it must have assessed at least 95 percent of all students enrolled and 95 percent of children with disabilities in the previous year.<sup>6</sup> The Department recognizes, however, that due to COVID-related testing disruptions, the State may not have met the 95 percent requirements in SY 2020-2021, the previous year. Therefore, for this year only, a State may meet this requirement by requesting a waiver to the 95 percent participation rate requirement found in 34 CFR 200.6(c)(4)(ii)(B), and then providing its SY 2018-2019 participation rate along with all the other information necessary for a waiver of the 1.0 percent AA-AAAS requirement as outlined in the Department documents noted above from May 2017, August 2018, and June 2020. As part of its waiver request, a State must submit SY 2020-2021 participation rates overall and for students with disabilities for each subject for which it is requesting a waiver. In considering the State's request, we will evaluate the extent to which the assessment participation rate for all students in SY 2020-2021 is proportionate to the assessment participation rate for students with disabilities in SY 2020-2021. The Department expects that these rates should be very similar to each other, all else being equal. If the SY 2020-2021 rate of assessment participation for students with disabilities is demonstrably lower than that for all students, the State must provide an explanation for this difference in participation. For a State that opted to move its SY 2020-2021 assessment administration to fall of SY 2021-2022, the Department would expect the State to submit data from that administration.

In addition to including actual SY 2018-2019 and/or SY 2020-2021 AA-AAAS participation rates, a State may provide in its waiver request a credible estimate of the number and percentage of students (including by subgroup, if possible) it expects to take the AA-AAAS in SY 2021-2022. Because some States and LEAs may have encountered difficulties with assessment administration in SY 2020-2021, credible estimates of participation based on SY 2020-2021 or SY 2021-2022 IEPs<sup>7</sup> or test registration data may help demonstrate a more accurate view of anticipated AA-AAAS participation.

The State will also need to provide evidence that the State has verified that each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in any subject using an AA-AAAS followed the State's guidelines for participation in the AA-AAAS and will address any disproportionality in the percentage of students in any subgroup taking an AA-AAAS. This verification can be done in SY 2021-2022 and occur before submission of the waiver request.

Finally, the State will need to provide a plan and timeline with clear, actionable steps and milestones that include:

- A clear description of how the State will improve the implementation of its guidelines for participation in the AA-AAAS, including by reviewing and, if necessary, revising its definition

---

<sup>5</sup> See <https://oese.ed.gov/files/2020/06/One-percent-waiver-memo-to-states-2020-FINAL.pdf>.

<sup>6</sup> See 34 CFR 200.6(c)(4)(ii)(B) at [https://www.ecfr.gov/cgi-bin/text-idx?node=pt34.1.200&rgn=div5#se34.1.200\\_16](https://www.ecfr.gov/cgi-bin/text-idx?node=pt34.1.200&rgn=div5#se34.1.200_16).

<sup>7</sup> In accordance with IDEA, the IEP Team determines whether a child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, and the IEP Team must document such a decision in the child's IEP.

of students with the most significant cognitive disabilities (see 34 CFR 200.6(c)(4)(iv)(A)), so that the State meets the 1.0 percent cap in each subject for which assessments are administered in future school years;

- A clear description of how it will monitor and regularly evaluate each LEA to ensure that the LEA provides sufficient training such that school staff who participate as members of an IEP Team or other placement team understand and implement the guidelines established by the State for participation in an AA-AAAS so that all students are appropriately assessed; (see 34 CFR 200.6(c)(4)(iv)(B));
- A clear description of how the State will address any disproportionality in the percentage of students taking an AA-AAAS as identified through the data provided; (see 34 CFR 200.6(c)(4)(iv)(C)); and
- Fulfillment of requirements in section 8401 of the ESEA related to public comment.

If a State did not meet the 95 percent participation rate in SY 2018-2019 or SY 2020-2021 (SY 2019-2020 is excluded because every State applied for and received a waiver from these assessments), it is not eligible to request a waiver from the 1.0 percent AA-AAAS requirement for SY 2021-2022.

#### **States Applying to Extend a Waiver Granted or Extended in SY 2020-2021**

A State that wishes to request an extension of a waiver that it received in SY 2020-2021 should provide updated information regarding each requirement in the previous year's submission. In preparing a waiver renewal request, the State must continue to meet each requirement associated with the first waiver it received from this requirement (except for the 95 percent participation rate, as discussed above). The State must provide the overall rates of assessment participation for all students and for students with disabilities for 2020-2021, regardless of whether the State met the 95 percent participation rate criterion in that school year. A State must also ensure it reports on the progress of its plan and timeline.

Also as noted above, along with including actual SY 2020-2021 AA-AAAS participation data, the Department encourages a State to use the most current year's IEP or test registration data to make a credible estimate of the number and percentage of students (including by subgroup, if possible) who may take the AA-AAAS in SY 2021-2022 or who would have taken the AA-AAAS in SY 2020-2021 if all students in the State participated in statewide testing. The Department believes that using IEP or test registration data to create a credible estimate for SY 2021-2022 participation rates may help the State demonstrate that it is making progress in reducing the percentage of AA-AAAS participation, a requirement of a waiver extension.

#### **States Denied a Waiver in SY 2020-2021**

A State that was denied a 1.0 percent cap waiver in SY 2020-2021 must follow the instructions for applying for a new waiver if it wishes to seek a waiver in SY 2021-2022. The State should be sure to address any concerns that led to the denial of their SY 2020-2021 waiver request and provide the information described above.

#### **States Seeking a Combination New Waiver and an Extension of a Waiver**

Some States were denied or did not apply for a waiver in a particular subject area (typically due to participation rates below 95 percent) but received a waiver in other subject areas. As in previous years, an application for an extension of a waiver in a subject area received in SY 2021-2021 that is coupled

with a request for a waiver in a subject area for which the State did not receive or request a waiver in SY 2020-2021 will be treated as a combination new/extension waiver request and all of the applicable requirements apply to each subject area included in the State's request. That is, for a State's waiver extension request, the State must provide information described in "States Applying to Extend a Waiver Granted or Extended in SY 2020-2021." For a State's new waiver request, the State must provide information described in "States Applying for a New Waiver in SY 2021-2022."

### **States with Early Testing Windows**

The Department reminds States that a request for a waiver of the 1.0 percent cap requirement, whether new or an extension, must be submitted 90 days before the beginning of the State's testing window. If a State is interested in submitting a waiver request, the Department encourages the State to submit the request as soon as possible, even if there are fewer than 90 days before the beginning of the State's testing window. If the State cannot provide all of the required information (such as all of the required data), the Department encourages the State to explain in its request any missing information and provide a clear timeline for when the data will become available. Once the Department receives the required information, it will consider the waiver request.

An appendix with example data is attached to this memorandum, to assist States in considering the organization and format of the data they submit with any waiver request. States with questions about submitting a waiver request should contact the Office of School Support and Accountability's Assessment Team at [ESEA.Assessment@ed.gov](mailto:ESEA.Assessment@ed.gov). All requests for a 1.0 percent cap waiver should be submitted to [ESEA.Assessment@ed.gov](mailto:ESEA.Assessment@ed.gov). Thank you for your continued commitment to our Nation's students.

**Appendix A**

*Example of Data Display to Support a State's Waiver Request to Exceed the 1.0 Percent Cap on AA-AAAS Participation for Reading/Language Arts*

*(Note: This is sample data only; it does not represent any single State's data)*

| <b>Group</b>            | <b>Total # of Students in Grades 3-8 and 10 R/LA 2018-19</b>          | <b>Total # of Students w/ Disabilities Grades 3-8 and 10 R/LA 2018-19</b>          | <b># of Students Taking State R/LA AA-AAAS Grades 3-8 and 10 2018-19</b>          | <b>% of Students Taking State R/LA AA-AAAS Grades 3-8 and 10 2018-19</b>          |
|-------------------------|---|--|---|---|
| All students            | 475,611   | 78,924   | 7,453   | 1.57%<br>(=7,453/475,611)   |
| English learners        | 41,232  | 9,812  | 911   | 2.21%   |
| Black                   | 46,258  | 9,933  | 1,116   | 2.41%   |
| Hispanic                | 95,464  | 22,163   | 2,168   | 2.27%   |
| Asian                   | 31,956  | 2,817  | 432   | 1.35%   |
| White                   | 260,701   | 57,246   | 3,919   | 1.50%   |
| Econ. Disadv.           | 172,190   | 44,725   | 4,754   | 2.76%   |
| <b>Group</b>            | <b>Total # of Students in Grades 3-8 and 10 R/LA 2020-21</b>          | <b>Total # of Students w/ Disabilities Grades 3-8 and 10 R/LA 2020-21</b>          | <b># of Students Taking State R/LA AA-AAAS Grades 3-8 and 10 2020-21</b>          | <b>% of Students Taking State R/LA AA-AAAS Grades. 3-8 and 10 2020-21</b>         |
| All students            | 476,834   | 79,412   | 7,021   | 1.47%<br>(=7,021/476,834)   |
| English learners        | 42,491  | 10,011   | 798   | 1.88%   |
| Black                   | 45,876  | 10,438   | 986   | 2.15%   |
| Hispanic                | 96,348  | 23,045   | 2,053   | 2.13%   |
| Asian                   | 31,123  | 2,790  | 401   | 1.29%   |
| White                   | 263,128   | 58,291   | 3,919   | 1.49%   |
| Econ. Disadv.           | 178,897   | 45,865   | 4,234   | 2.37%   |
| <b>Group (Estimate)</b> | <b>Total # of Students in Grades 3-8 and 10 R/LA 2021-22 Estimate</b> | <b>Total # of Students w/ Disabilities Grades 3-8 and 10 R/LA 2021-22 Estimate</b> | <b># of Students Taking State R/LA AA-AAAS Grades 3-8 and 10 2021-22 Estimate</b> | <b>% of Students Taking State R/LA AA-AAAS Grades 3-8 and 10 2021-22 Estimate</b> |
| All students            | 479,561   | 79,412   | 7,060   | 1.47%<br>(=7,060/479,561)   |
| English learners        | 43,202  | 10,431   | 688   | 1.59%   |
| Black                   | 45,035  | 10,538   | 802   | 1.78%   |
| Hispanic                | 96,981  | 23,743   | 1,787   | 1.84%   |
| Asian                   | 31,422  | 2,703  | 354   | 1.13%   |
| White                   | 262,921   | 58,885   | 3,429   | 1.30%   |
| Econ. Disadv.           | 179,702   | 46,704   | 4,019   | 2.24%   |

*Example of Overall Rates of Assessment Participation Data for 2018-19 and 2020-21. (Note: This is sample data only; it does not represent any single State's data)*

| <b>Group</b>                  | <b>All Students<br/>Grades 3-8<br/>and 10<br/>R/LA 2018-<br/>19</b> | <b>Students w/<br/>Disabilities<br/>Grades 3-8 and<br/>10 R/LA 2018-<br/>19</b> | <i>All Students<br/>Grades 3-8 and 10<br/>R/LA 2020-21</i> | <i>Students w/<br/>Disabilities Grades<br/>3-8 and 10 R/LA<br/>2020-21</i> |
|-------------------------------|---|---|--|--|
| Students Assessed             | 475,611   | 78,924  | 375,921  | 63,188   |
| Students Enrolled             | 478,432   | 80,458  | 477,213  | 79,821   |
| Assessment Participation Rate | 99.41%  | 98.10%  | 78.88%   | 79.10%   |



UNITED STATES DEPARTMENT OF EDUCATION

DATE: September 20, 2022

TO: State Assessment Directors  
State Title I Directors  
State Special Education Directors

FROM: Patrick Rooney  
Director, School Support and Accountability  
Office of Elementary and Secondary Education

Valerie Williams  
Director, Office of Special Education Programs  
Office of Special Education and Rehabilitative Services

SUBJECT: Information Regarding the Requirements to Request a Waiver or Waiver Extension for the 2022-2023 School Year (SY) from the One Percent Cap on the Percentage of Students with the Most Significant Cognitive Disabilities Who May Be Assessed with an Alternate Assessment Aligned with Alternate Academic Achievement Standards (AA-AAAS)

---

The U.S. Department of Education (Department) appreciates the work you are doing to provide a high-quality education for all your students. In that same spirit, it is essential to examine the expectations for children with disabilities, including English learners with disabilities and children with the most significant cognitive disabilities. Holding high expectations for these students is key to helping all students meet or exceed State challenging academic standards.

One important step is the inclusion of all children with disabilities in State and districtwide assessments as determined by their respective individualized education programs (IEPs), as required under section 612(a)(16) of the Individuals with Disabilities Education Act (IDEA) – either in a general grade level assessment with or without accommodations or, for those students with the most significant cognitive disabilities, an alternate assessment aligned with alternate academic achievement standards (AA-AAAS). IDEA requires that if an IEP Team determines that the student must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, it must include a statement in the student’s IEP of why the student cannot participate in the regular assessment; and why the particular alternate assessment selected is appropriate for the student (34 CFR § 300.320(a)(6)(ii)). Children with the most significant cognitive disabilities are among those disproportionately affected by school closures and other disruptions in instruction. It is especially important for educators to collect accurate information on the academic performance of these children to inform decisions about resources, programs, instruction, and individualized supports and services in the 2022-2023 school year (SY).

The Department recognizes that, with appropriate services and supports, the vast majority of students with disabilities should be expected to make academic progress in the general curriculum. The alternate academic achievement standards were designed to be appropriate only for a very small number of students, no more than 1.0 percent of all students assessed. As such, in this memorandum, we are providing information regarding the submission of waiver requests for the 1.0 percent cap on AA-AAAS participation in SY 2022-2023. We know

400 MARYLAND AVE., SW, WASHINGTON, DC 20202  
[www.ed.gov](http://www.ed.gov)



that this information is time-sensitive given the requirement that a State seeking this waiver must submit the waiver at least 90 days before the start of the relevant alternate assessment testing window.

As background, Title I of the Elementary and Secondary Education Act of 1965 (ESEA) requires that only students with the most significant cognitive disabilities may take an AA-AAAS; it also limits the number of students that a State may assess with an AA-AAAS to no more than 1.0 percent of all students in the grades assessed.<sup>1</sup> This requirement was first in effect for SY 2017-2018 when most States were exceeding this percentage. The ESEA permits the Department to grant a one-year waiver to a State, if it meets certain statutory and regulatory requirements, to assess more than 1.0 percent of students with an AA-AAAS. On December 8, 2016, the Department published final regulations,<sup>2</sup> based on the consensus reached through negotiated rulemaking, related to academic assessment under Title I, Part A of the ESEA, including the requirements for State waiver requests if a State anticipates it will exceed the 1.0 percent cap (34 CFR § 200.6(c)(4)).

The Department has previously issued guidance to States on applying for 1.0 percent cap waivers in May 2017,<sup>3</sup> August 2018,<sup>4</sup> June 2020,<sup>5</sup> and October 2021.<sup>6</sup> The Department has also posted all waiver requests and the Department's responses<sup>7</sup> for SYs 2017-2018, 2018-2019, 2019-2020, 2020-2021, and 2021-2022. This memorandum describes the Department's expectations for 1.0 percent cap waiver requests and waiver extension requests for SY 2022-2023.

### **States Applying for a New Waiver in SY 2022-2023**

In order for a State to be eligible to receive a 1.0 percent cap waiver for a subject area, it must have assessed at least 95 percent of all students enrolled and 95 percent of children with disabilities in the previous year in the grades assessed in that subject area.<sup>8</sup> As part of its waiver request, a State must submit SY 2021-2022 assessment participation rates overall and for students with disabilities for each subject for which it is requesting a waiver. If a State did not meet the 95 percent assessment participation requirement in SY 2021-2022, it is not eligible to receive a waiver from the 1.0 percent cap in AA-AAAS participation for SY 2022-2023.

A State must also provide evidence that the State has verified that each local educational agency (LEA) that the State anticipates will assess more than 1.0 percent of its assessed students in any subject using an AA-AAAS followed the State's guidelines for participation in the AA-AAAS and will address any disproportionality in the percentage of students in any subgroup taking an AA-AAAS. This verification can be done in SY 2022-2023 but should occur before submission of the waiver request. The Department notes that LEA justifications must **also be made publicly available**.<sup>9</sup> As part of its submission, the State must show where these justifications are available and that they are easily accessible.

Finally, a State must provide a plan and timeline with actionable steps and milestones that include:

- A clear description of how the State will improve the implementation of its guidelines for participation in the AA-AAAS, including by reviewing and, if necessary, revising its definition of students with the most significant cognitive disabilities (see 34 CFR § 200.6(c)(4)(iv)(A)), so that the State meets the 1.0 percent cap in each subject for which assessments are administered in future school years;
- A clear description of how it will monitor and regularly evaluate each LEA to ensure that the LEA provides sufficient training such that school staff who participate as members of an IEP Team or other placement team understand and implement the guidelines established by the State for participation in an

---

<sup>1</sup> See [ESEA section 1111\(b\)\(2\)\(D\)\(I\)\(i\)](#).

<sup>2</sup> See [Final Regulations-Title I-Academic Assessments the- disadvantaged-academic-assessments](#).

<sup>3</sup> See [Information Regarding Requirements to Request a 1.0 Percent Cap Waiver for SY 2017-2018 \(May 2017\)](#).

<sup>4</sup> See [Information Regarding Requirements to Request a 1.0 Percent Cap Waiver for SY 2018-2019 \(August 2018\)](#).

<sup>5</sup> See [Information Regarding Requirements to Request a 1.0 Percent Cap Waiver for SY 2020-2021 \(June 2020\)](#).

<sup>6</sup> See [Information Regarding Requirements to Request a 1.0 Percent Cap Waiver for SY 2021-2022 \(October 2021\)](#).

<sup>7</sup> See [State Requests for Waivers of ESEA Provisions for SSA-Administered Programs](#).

<sup>8</sup> See [34 CFR 200.6\(c\)\(4\)\(ii\)\(B\)](#).

<sup>9</sup> See [34 CFR 200.6\(c\)\(3\)\(iv\)](#).

AA-AAAS so that all students are appropriately assessed; (see 34 CFR § 200.6(c)(4)(iv)(B));

- A clear description of how the State will address any disproportionality in the percentage of students taking an AA-AAAS as identified through the data provided; (see 34 CFR § 200.6(c)(4)(iv)(C)); and
- Fulfillment of requirements in section 8401 of the ESEA related to public comment.

The Department strongly recommends that that these plans be posted and easily accessible on the State's website, as well, and encourages the State to provide the location of the plan in its waiver submission.

For **each new 1.0 percent cap waiver request**, a State must provide the public and any interested LEA in the State with notice and a reasonable opportunity to comment and provide input on the **entire waiver request (including the plan and timeline described above)**, in the manner in which the State customarily provides similar notice and opportunity to comment to the public. The State must submit the comments and input to the Department with a description of how the State addressed the comments and input.

### **States Applying to Extend a Waiver Granted or Extended in SY 2021-2022**

A State that wishes to request an extension of the waiver it received in SY 2021-2022 must:

1. **Provide updated information regarding each requirement in 34 CFR § 200.6(c)(4)(i)-(iv).**  
Specifically, the State must provide the overall assessment participation rates for all students enrolled and for students with disabilities in the grades assessed in each subject for SY 2021-2022.
2. **Assure that it has verified** that each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in any subject for which assessments are administered in that school year using an AA-AAAS followed each of the State's guidelines and will address any disproportionality in the percentage of students in any subgroup taking an AA-AAAS.
3. **Report on the progress of its plan and timeline** under 34 CFR § 200.6(c)(4)(iv) including milestones achieved. As noted above, the Department strongly recommends that the plan and report of progress be posted on the State's website.
4. **Have reduced the percentage of students taking an AA-AAAS in a content area in order to receive an extension of a waiver of the 1.0 percent cap for that content area.**

In addition to providing actual SY 2021-2022 AA-AAAS participation data, the Department encourages a State to use the current year's IEP or test registration data to make a credible estimate of the number and percentage of students (including by subgroup, if possible) who may take an AA-AAAS in SY 2022-2023. The Department believes such analysis may help the State demonstrate that it is making progress in reducing the percentage of AA-AAAS participation, which is a requirement for a waiver extension.

To approve an extension of a waiver of the 1.0 percent cap, the Department must determine that the State has demonstrated that the waiver has been effective in enabling the State to carry out an AA-AAAS for students with the most significant cognitive disabilities and has contributed to improved achievement for those students. The Department must also determine that the State has demonstrated that the extension is in the public interest. The Department is committed to ensuring that all students, particularly students with the most significant cognitive disabilities, are held to challenging State academic achievement standards and are appropriately assessed. It is critical that students with disabilities are not inappropriately included in an AA-AAAS if such assessment does not meet their individual needs as determined by the IEP Team.

This is the fifth year that the Department will be considering extensions of waivers of the 1.0 percent cap. Most States that received a 1.0 percent cap waiver have since reduced their rates of alternate assessment participation, although many of these States remain above the 1.0 percent cap. To date, the Department has evaluated a State's request to extend its waiver of the 1.0 percent cap against the factors in section 8401(d)(2) of the ESEA using the State's participation rates, assessment data on the AA-AAAS, and progress in implementing the State's plan and timeline for reducing the number of students included in an AA-AAAS, including data on the percentage of students taking the AA-AAAS over time.

Given that some States have already received multiple extensions, as well as the continued importance that students with the most significant cognitive disabilities be appropriately assessed and the value of stakeholder input, the Department has determined public comment would be highly relevant to the question of whether a State's request to extend its waiver of the 1.0 percent cap is in the public interest. Including public comment would allow the Department to hear directly from the public in that State on whether the waiver has been effective, has contributed to improved student achievement, and is in the public interest. Public comment would also help the Department evaluate whether the State has demonstrated substantial progress towards achieving each component of the State's prior year's plan and timeline.

To that end, the Department will use a rebuttable presumption that waiver extension requests that do not include public comment have not met the public interest threshold in section 8401(d)(2)(B) of the ESEA. In this context, "public comment" means that a State seeking an extension would (1) provide the State's entire waiver extension request to the public and any interested LEA in the State, in the manner in which the State customarily provides similar notice and opportunity to comment to the public, and (2) submit the comments and input to the Department with a description of how the State addressed the comments and input it received. The comments should be made on the State's entire intended submission of the waiver extension request, including the State's plan, timeline, and progress implementing that plan. States may rebut the presumption with sufficient evidence to illustrate the extension is in the public interest.

#### **States Denied a Waiver in SY 2021-2022**

A State that was denied a 1.0 percent cap waiver in SY 2021-2022 must follow the instructions for applying for a new waiver for SY 2022-2023. The instructions can be found in the section above on new waiver requests ("States Applying for a New Waiver in SY 2022-2023"). In its new waiver request, the State should be sure to address any concerns that led to the denial of its waiver request in SY 2021-2022.

#### **States Seeking a Combination New Waiver and an Extension of a Waiver Granted in SY 2021-2022**

Some States were denied or did not apply for a 1.0 percent cap waiver in a particular subject area (typically due to assessment participation rates below 95 percent) in SY 2021-2022 but were granted a waiver in other subject areas. As in previous years, a request for a waiver in a subject area for which the State did not receive or request the waiver in SY 2021-2022, and that is coupled with a request for an extension of a waiver granted in SY 2021-2022, will be treated as a combination new/extension waiver request and all applicable requirements apply to each subject area included in the State's request. That is, the State must provide the required information for new waiver requests (see the section above on "States Applying for a New Waiver in SY 2022-2023"); and the State must provide the required information for waiver extension requests (see the section above on "States Applying to Extend a Waiver Granted or Extended in SY 2021-2022").

#### **States with Early Testing Windows**

The Department reminds States that a request for a waiver of the 1.0 percent cap requirement, whether new or an extension, must be submitted 90 days before the beginning of the State's AA-AAAS testing window. If a State is interested in submitting a waiver request, the Department encourages the State to submit the request as soon as possible. If a State does not have all of the required information, it should still submit its waiver request in order to meet the 90-day requirement. However, the Department is unable to fully evaluate and provide a response to the waiver request until all the required information has been provided.

Two appendices are attached to this memorandum to assist States in organizing their 1.0 percent cap waiver request. Appendix A provides the statutory or regulatory requirements that each waiver request is evaluated against. Appendix B provides a suggested format for organizing the assessment participation data tables in the waiver request. States with questions about submitting a 1.0 percent cap waiver request should contact the Office of School Support and Accountability's Assessment Team at [ESEA.Assessment@ed.gov](mailto:ESEA.Assessment@ed.gov). All requests for a 1.0 percent cap waiver should be submitted to [ESEA.Assessment@ed.gov](mailto:ESEA.Assessment@ed.gov). Thank you for your continued commitment to our Nation's students.

**Appendix A: Statutory and Regulatory Requirements for Requests for Waivers or Waiver Extensions from the 1.0 Percent Cap on the Percentage of Students with the Most Significant Cognitive Disabilities Who May Be Assessed with an AA-AAAS**

**All requests (new and extensions)**

- Each **new request** and each **extension request** of the 1.0 percent AA-AAAS participation cap must be made in accordance with ESEA section 8401(b)(3), which explains that a State must provide the public and any interested LEA in the State with notice and a reasonable opportunity to comment and provide input **on the entire waiver/waiver extension request**, in the manner in which the State customarily provides similar notice and opportunity to comment to the public.
- States are required in 34 CFR § 200.6(c)(4)(i) to submit their AA-AAAS waiver request (or extension request) **at least 90 days prior** to the start of the relevant subject testing windows.
- States are required in 34 CFR § 200.6(c)(4)(ii) to submit data showing the **number and percentage** of students in each subgroup of students who took alternate assessments in each required subject.
- 34 CFR § 200.6(c)(4)(ii) also requires that States demonstrate that they have assessed **at least 95 percent of all students and 95 percent of all students with disabilities** in each required subject.
- 34 CFR § 200.6(c)(4)(iii), requires assurances from the SEA that it **has verified** that each district with more than 1.0 percent participation in the alternate assessment has:
  - (A) **Followed participation guidelines** and
  - (B) **Will address any disproportionality** in participation in the alternate assessment.
- 34 CFR § 200.6(c)(4) requires a plan and timeline by which:
  - (A) The State will **improve the implementation of its guidelines for participation** in the AA-AAAS (including by reviewing and, if necessary, revising its definition of children with significant cognitive disabilities so that the State is under the cap in each subject in future school years).
  - (B) The State will take **additional steps to support and provide appropriate oversight to each LEA** that the State anticipates will assess more than 1.0 percent of its assessed students with an AA-AAAS to ensure that only students with the most significant cognitive disabilities take an AA-AAAS. The State **must describe how it will monitor and regularly evaluate** each such LEA to ensure that the LEA provides sufficient training such that school staff who participate as members of an IEP team or other placement team understand and implement the guidelines established by the State so that all students are appropriately assessed.
  - (C) The State will **address any disproportionality** in the percentage of students taking an alternate assessment aligned with alternate academic achievement standards as identified through the data provided in accordance with paragraph (c)(4)(ii)(A) of this section;

**Extension requests only**

- As required in 34 CFR § 200.6(c)(4)(v), the State must demonstrate substantial progress towards achieving each component of the prior year's plan and timeline in the following areas:
  - (A) Improve the **implementation of its guidelines for participation** in the AA-AAAS.
  - (B) **Support and provide appropriate oversight to each LEA** that the State anticipates will assess more than 1.0 percent of its assessed students with an AA-AAAS to ensure that only students with the most significant cognitive disabilities take an AA-AAAS.
  - (C) **Address any disproportionality** in the percentage of students taking an alternate assessment aligned with alternate academic achievement standards.
- **Demonstrate a reduction in the rate** of AA-AAAS participation last year compared to prior years.

**Appendix B: Suggested Format for Organizing the Assessment Participation Data Tables in a 1.0 Percent Cap Waiver Request**

**Table 1: Overall Rates of Assessment Participation for 2021-22**

*(Note: The data in this table are fictitious and do not represent any single State's data; R/LA means Reading/Language Arts; include data for all subject areas to which the waiver request pertains)*

| <b>Group</b>                  | <b>All Students Grades 3-8 and High School R/LA</b>    | <b>Students with Disabilities Grades 3-8 and High School R/LA</b>    |
|-------------------------------|--|--|
| Students Assessed             | 288,005  | 41,004   |
| Students Enrolled             | 296,099  | 42,210   |
| Assessment Participation Rate | 97.27%   | 97.14%   |
| <b>Group</b>                  | <b>All Students Grades 3-8 and High School Math</b>    | <b>Students with Disabilities Grades 3-8 and High School Math</b>    |
| Students Assessed             | 289,003  | 41,009   |
| Students Enrolled             | 296,092  | 42,226   |
| Assessment Participation Rate | 97.61%   | 97.12%   |
| <b>Group</b>                  | <b>All Students Grades 3-8 and High School Science</b> | <b>Students with Disabilities Grades 3-8 and High School Science</b> |
| Students Assessed             | 288,011  | 41,018   |
| Students Enrolled             | 296,079  | 42,230   |
| Assessment Participation Rate | 97.28%   | 97.13%   |

**Table 2: Alternate Assessment Participation Rates by Subgroup for 2021-22**

*(Note: The data in this table are fictitious and do not represent any single State's data; R/LA means reading/language arts; include data for all subject areas to which the waiver request pertains)*

| <b>Group</b>                   | <b>Total Number in Grades 3-8 &amp; HS</b> | <b>Num. Taking AA-AAAS in Grades 3-8 &amp; HS</b> | <b>Percent Taking AA-AAAS in Grades 3-8 &amp; HS</b> |
|--------------------------------|--|---|--|
| <b>R/LA</b>                    |  |   |  |
| All Students                   | 288,400                                    | 2,400   | 0.83%  |
| Hispanic                       | 41,082                                     | 346   | 0.84%  |
| American Indian/Alaskan Native | 1,705                                      | 19  | 1.11%  |
| Asian                          | 48,001                                     | 76  | 0.16%  |
| Black                          | 54,091                                     | 598   | 1.11%  |
| Hawaiian/Pacific Islander      | 2,965                                      | 23  | 0.78%  |
| White                          | 143,134                                    | 1,401   | 0.98%  |
| Two or More Races              | 7,698                                      | 98  | 1.27%  |
| Male                           | 144,030                                    | 1,680   | 1.17%  |
| Female                         | 141,001                                    | 904   | 0.64%  |
| English Learner                | 22,908                                     | 261   | 1.14%  |
| Econ. Disadvantaged            | 182,309                                    | 1,789   | 0.98%  |
| <b>Mathematics</b>             |  |   |  |
| All Students                   | 288,390                                    | 2,390   | 0.83%  |
| Hispanic                       | 41,072                                     | 336   | 0.82%  |

|                                |         |       |       |
|--------------------------------|---------|-------|-------|
| American Indian/Alaskan Native | 1,700   | 10    | 0.59% |
| Asian                          | 48,000  | 70    | 0.15% |
| Black                          | 54,089  | 590   | 1.09% |
| Hawaiian/Pacific Islander      | 2,955   | 19    | 0.64% |
| White                          | 143,130 | 1,399 | 0.98% |
| Two or More Races              | 7,688   | 92    | 1.20% |
| Male                           | 144,020 | 1,675 | 1.16% |
| Female                         | 140,090 | 900   | 0.64% |
| English Learner                | 22,899  | 254   | 1.11% |
| Econ. Disadvantaged            | 182,307 | 1,776 | 0.97% |
| <b>Science</b>                 |         |       |       |
| All Students                   | 288,140 | 2,410 | 0.84% |
| Hispanic                       | 41,092  | 350   | 0.85% |
| American Indian/Alaskan Native | 1,715   | 20    | 1.17% |
| Asian                          | 48,100  | 79    | 0.16% |
| Black                          | 54,011  | 601   | 1.11% |
| Hawaiian/Pacific Islander      | 2,972   | 25    | 0.84% |
| White                          | 143,140 | 1,410 | 0.99% |
| Two or More Races              | 7,700   | 100   | 1.30% |
| Male                           | 144,032 | 1,691 | 1.17% |
| Female                         | 141,010 | 914   | 0.65% |
| English Learner                | 22,900  | 271   | 1.18% |
| Econ. Disadvantaged            | 182,304 | 1,790 | 0.98% |

**Table 3: AA-AAAS Rates by Subject, by Year**

(Note: The data in this table are fictitious and do not represent any single State's data; R/LA means reading/language arts; include data for all subject areas to which the waiver request pertains)

| School Year          | R/LA  | Mathematics | Science |
|----------------------|-------|-------------|---------|
| 2017-2018            | 1.42% | 1.44%       | 1.48%   |
| 2018-2019            | 1.35% | 1.37%       | 1.38%   |
| 2020-2021            | 1.31% | 1.33%       | 1.36%   |
| 2021-2022            | 1.21% | 1.24%       | 1.27%   |
| 2022-2023 (Estimate) |       |             |         |



## United States Department of Education

DATE: September 20, 2023

TO: State Assessment Directors  
State Title I Directors  
State Special Education Directors

FROM: Patrick Rooney  
Director, School Support and Accountability  
Office of Elementary and Secondary Education

Valerie Williams  
Director, Office of Special Education Programs  
Office of Special Education and Rehabilitative Services

SUBJECT: Requirements to Request a Waiver/Waiver Extension for the 2023-24 School Year from the 1.0 Percent Cap on the Percentage of Students with the Most Significant Cognitive Disabilities Who May Be Assessed with an Alternate Assessment Aligned with Alternate Academic Achievement Standards (AA-AAAS)

---

The U.S. Department of Education (Department) appreciates your continued work to provide a high-quality education for all students. These efforts include regularly examining the expectations for children with disabilities, including English learners with disabilities and children with the most significant cognitive disabilities. Holding high expectations for these students is key to helping all students meet or exceed State challenging academic standards.

One important step is the inclusion of all children with disabilities in State- and district-wide assessments as determined by their respective individualized education programs (IEPs), as required under section 612(a)(16) of the Individuals with Disabilities Education Act (IDEA) – either in a general grade level assessment with or without accommodations or, for those students with the most significant cognitive disabilities, an alternate assessment aligned with alternate academic achievement standards (AA-AAAS). IDEA requires that if an IEP Team determines that the student must take an alternate assessment instead of a particular regular State or district-wide assessment of student achievement, the IEP Team must include a statement in the student’s IEP of why the student cannot participate in the regular assessment; and why the particular alternate assessment selected is appropriate for the student (34 CFR § 300.320(a)(6)(ii)).

400 MARYLAND AVE., SW, WASHINGTON, DC 20202  
[www.ed.gov](http://www.ed.gov)

*The Department of Education’s mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

The vast majority of students with disabilities should be expected to make academic progress measured against grade-level achievement standards. Alternate academic achievement standards are appropriate for only a very small number of students—those with the most significant cognitive disabilities—who comprise no more than 1.0 percent of all students assessed. It is critical that students with disabilities are not inappropriately included in an AA-AAAS if such assessment does not meet their individual needs as determined by the IEP Team or other placement team (e.g., 504 placement team).

As such, in this memorandum, we are providing information regarding the submission of waiver requests for the 1.0 percent cap on AA-AAAS participation in the school year (SY) 2023-24 assessment administration. With the passage of the Every Student Succeeds Act (ESSA) of 2015, which amended the Elementary and Secondary Education Act of 1965 (ESEA), a State may not assess more than 1.0 percent of students with an AA-AAAS in the grades assessed.<sup>1</sup>

On December 8, 2016, the Department published final regulations,<sup>2</sup> based on the consensus reached through negotiated rulemaking, related to academic assessments under Title I, Part A of the ESEA. These regulations included the requirements for a State to request a waiver if it anticipates exceeding the 1.0 percent cap (34 CFR § 200.6(c)(4)). This requirement was first in effect for SY 2017-18. The Department may grant a one-year waiver to a State to assess more than 1.0 percent of students with an AA-AAAS, provided the State meets certain statutory and regulatory requirements. The Department previously issued guidance to States on applying for 1.0 percent cap waivers in May 2017,<sup>3</sup> August 2018,<sup>4</sup> June 2020,<sup>5</sup> October 2021,<sup>6</sup> and September 2022.<sup>7</sup> The Department also posted all waiver requests and the Department's responses<sup>8</sup> for SYs 2017-18 through 2022-23.

This is the sixth year that the Department will be considering new waivers or extensions of existing waivers of the 1.0 percent cap. We note many States are assessing fewer than 1.0 percent of their students with an AA-AAAS. Figure 1 displays the general trend in these rates among all States. In the year before the implementation of the 1.0 percent cap in (2016-17), there were 42 States that exceeded 1.0 percent of students taking an AA-AAAS in mathematics, compared to 30 States in SY 2021-22. In addition, as shown in Figure 2, AA-AAAS participation rates decreased in 33 States in SY 2021-22 compared to 2016-17. We appreciate the progress across the country and look forward to continued gains in reducing AA-AAAS participation this year. The Department recently announced a conference<sup>9</sup> on State assessments that will focus, in part, on sharing lessons learned from States that have been successful in reducing overall AA-AAAS rates.

---

<sup>1</sup> See [ESEA section 1111\(b\)\(2\)\(D\)\(i\)](#).

<sup>2</sup> See [Final Regulations-Title I-Improving the Academic Achievement of the Disadvantaged-Academic Assessments](#).

<sup>3</sup> See [Information Regarding Requirements to Request a 1.0 Percent Cap Waiver for SY 2017-2018 \(May 2017\)](#).

<sup>4</sup> See [Information Regarding Requirements to Request a 1.0 Percent Cap Waiver for SY 2018-2019 \(August 2018\)](#).

<sup>5</sup> See [Information Regarding Requirements to Request a 1.0 Percent Cap Waiver for SY 2020-2021 \(June 2020\)](#).

<sup>6</sup> See [Information Regarding Requirements to Request a 1.0 Percent Cap Waiver for SY 2021-2022 \(October 2021\)](#).

<sup>7</sup> See [Information Regarding Requirements to Request a 1.0 Percent Cap Waiver for SY 2022-2023 \(September 2022\)](#).

<sup>8</sup> See [State Requests for Waivers of ESEA Provisions for SSA-Administered Programs](#).

<sup>9</sup> See <https://apps1.seiservices.com/2023SSA/Default.aspx>.



Figure 1: Median AA-AAAS Participation Rates Among All States, 2016-17, 2017-18, 2018-19 & 2021-22 School Years

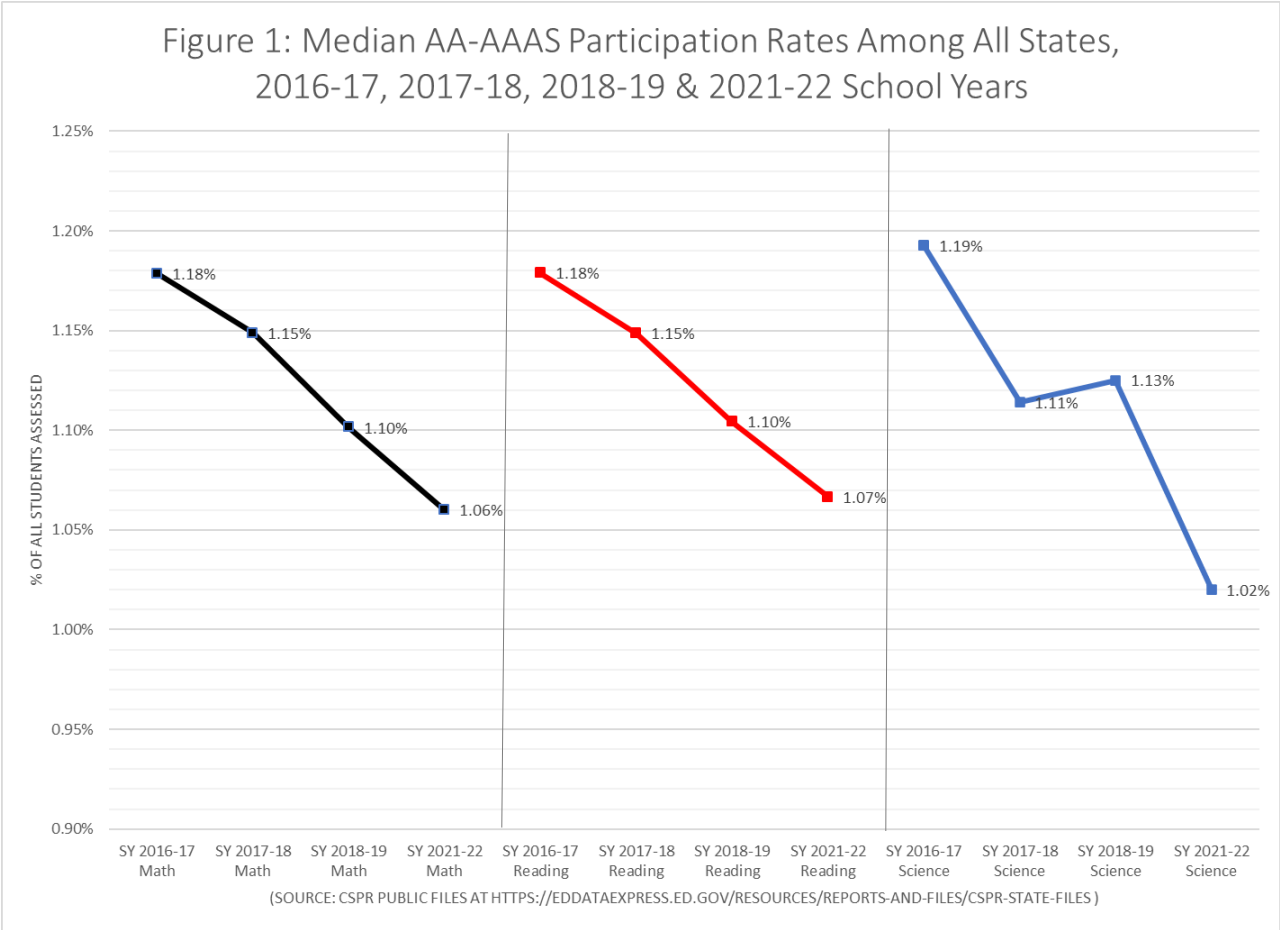
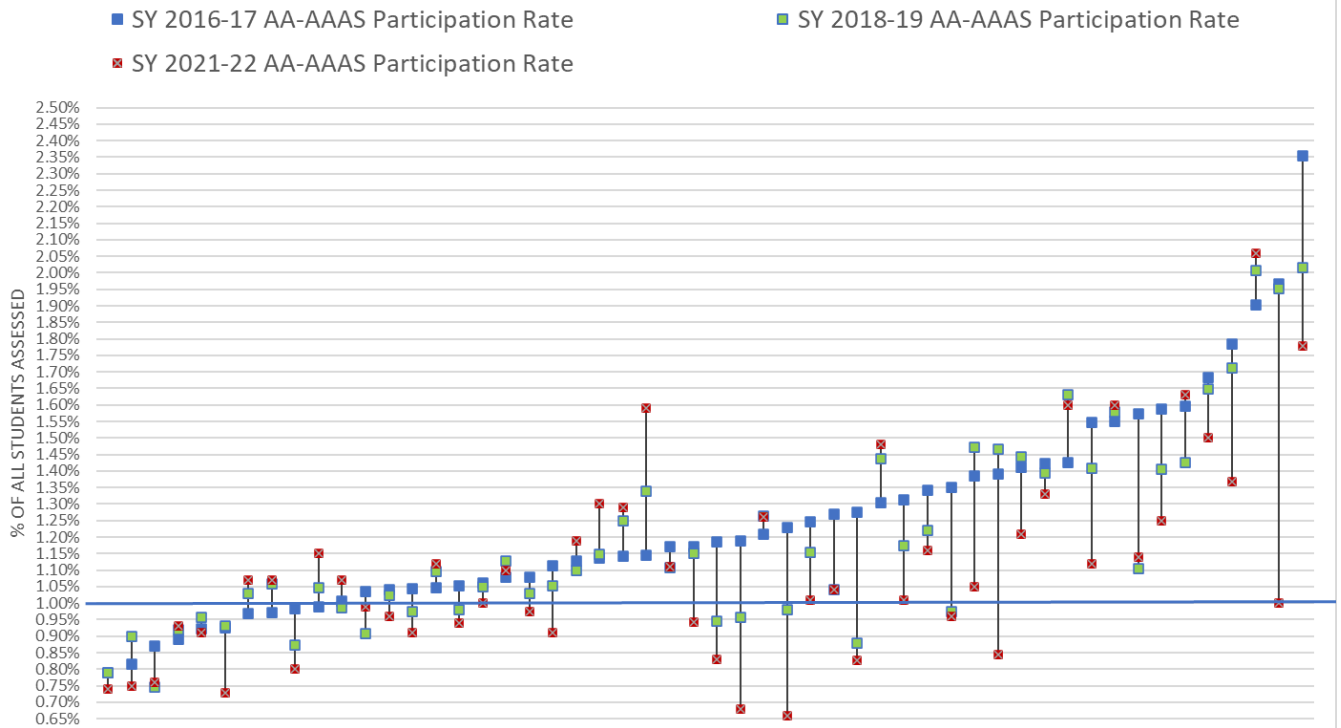


Figure 2: Statewide Mathematics AA-AAAS Participation Rates in SYs 2016-17, 2018-19 & 2021-22

Shown in Ascending Order of SY 2016-2017 Rates



(Source: CSPR Public Files at <https://eddataexpress.ed.gov/resources/reports-and-files/cspr-state-files>)

**States Applying for a New Waiver in SY 2023-24**

For a State to be eligible to receive a 1.0 percent cap waiver for a subject area, it must have assessed at least 95 percent of all students enrolled and 95 percent of children with disabilities in the previous year in the grades assessed in that subject area.<sup>10</sup> As part of its waiver request, a State must submit SY 2022-23 assessment participation rates overall and for students with disabilities for each subject for which it is requesting a waiver. If a State did not meet the 95 percent assessment participation requirement in SY 2022-23, it is not eligible to receive a waiver from the 1.0 percent cap in AA-AAAS participation for SY 2023-24.

A State must also provide evidence that the State verified that each local educational agency (LEA) that the State anticipates will assess more than 1.0 percent of its assessed students in any subject using an AA-AAAS followed the State’s guidelines for participation in the AA-AAAS and will address any disproportionality in the percentage of students in any subgroup taking an AA-AAAS. This verification can occur in SY 2023-24 but should occur before submission of the waiver request. In addition, the State must require that all LEAs that expect to assess more than 1.0 percent of its students using an AA-AAAS submit information justifying the need of the LEA

<sup>10</sup> See [https://www.ecfr.gov/cgi-bin/text-idx?node=pt34.1.200&rgn=div5&se34.1.200\\_1634](https://www.ecfr.gov/cgi-bin/text-idx?node=pt34.1.200&rgn=div5&se34.1.200_1634) CFR 200.6(c)(4)(ii)(B).

to exceed 1.0 percent. The LEA justifications must **also be made publicly available**.<sup>11</sup> As part of its submission, the State must show where these justifications are available and that they are easily accessible.

Finally, a State must provide a plan and timeline with actionable steps and milestones that include:

- A clear description of how the State will improve the implementation of its guidelines for participation in the AA-AAAS, including by reviewing and, if necessary, revising its definition of students with the most significant cognitive disabilities (see 34 CFR § 200.6(c)(4)(iv)(A)) so that the State meets the 1.0 percent cap in each subject for which assessments are administered in future school years.
- A clear description of how it will monitor and regularly evaluate each LEA to ensure that the LEA provides sufficient training such that school staff who participate as members of an IEP Team or other placement team understand and implement the guidelines established by the State for participation in an AA-AAAS so that all students are appropriately assessed (see 34 CFR § 200.6(c)(4)(iv)(B)).
- A clear description of how the State will address any disproportionality in the percentage of students taking an AA-AAAS as identified through the data provided (see 34 CFR § 200.6(c)(4)(iv)(C)).
- Fulfillment of requirements in section 8401 of the ESEA related to public comment.

The Department strongly recommends that these complete plans be posted and easily accessible on the State's website and encourages the State to provide the location of the plan in its waiver request submission.

Crucially, for **all 1.0 percent cap waiver requests**, a State must provide the public and any interested LEA in the State with notice and a reasonable opportunity to comment and provide input on the **entire waiver request (including the plan and timeline described above)**, in the manner in which the State customarily provides similar notice and opportunity to comment to the public. The State must submit the actual comments and input to the Department with a description of how the State addressed the comments and input. **This also applies to all waiver extension requests, as noted in the following section.**

### **States Applying to Extend a Waiver Granted or Extended in SY 2022-23**

A State that wishes to request an extension of the 1.0 percent cap waiver it received in SY 2022-23 must:

1. Have assessed at least 95 percent of all students enrolled and 95 percent of children with disabilities in the previous year in the grades assessed in that subject area.
2. Demonstrate that it sought and collected public comment on the State's complete waiver extension request.
3. Provide updated information regarding each requirement in 34 CFR § 200.6(c)(4)(i)-(iv). Specifically, the State must provide the overall assessment participation rates for all students enrolled and for all students with disabilities in the grades assessed for each subject in SY 2022-23.
4. Assure that it verified that each LEA that the State anticipates will assess more than 1.0

---

<sup>11</sup> See [34 CFR 200.6\(c\)\(3\)\(iv\)](#).

percent of its assessed students in any subject for which assessments are administered in SY 2023-24 using an AA-AAAS followed each of the State's guidelines and will address any disproportionality in the percentage of students in any subgroup taking an AA-AAAS.

5. Report on the progress of its plan and timeline submitted last year and additional actions the State plans for SY 2023-24, including milestones previously achieved. The Department expects States to describe the plan for SY 2023-24, and report on the work performed on the plan that was submitted for SY 2022-23. This progress report should clearly demonstrate and explain how the State's plan has evolved and been improved from the prior year's waiver request. The Department strongly recommends that the plan and report of progress be posted on the State's website.
6. Have reduced the percentage of students taking an AA-AAAS in a content area to be eligible to receive an extension of a waiver of the 1.0 percent cap for that content area.

To approve an extension of a waiver of the 1.0 percent cap, the Department must determine that the State demonstrated that the waiver has been effective in enabling the State to carry out an AA-AAAS for students with the most significant cognitive disabilities and has contributed to improved achievement for those students. The Department must also determine that the State demonstrated that the extension is in the public interest. Finally, the Department must determine that the State demonstrated substantial progress toward achieving each component of the prior year's plan and timeline. The Department expects that States with relatively high rates of alternate assessment participation should demonstrate greater reductions in their rates year over year when compared to States near the 1.0 percent cap.

Given that some States have already received multiple extensions and the continued importance of appropriately assessing students with the most significant cognitive disabilities, the Department determined that public comment is highly relevant to the question of whether a State's request to extend its waiver of the 1.0 percent cap is in the public interest. This public comment provides critical information on whether the waiver has been effective, has contributed to improved student achievement, and is in the public interest. Public comment also helps the Department evaluate whether the State has demonstrated substantial progress towards achieving each component of the State's prior year's plan and timeline.

To that end, the Department will continue to use a rebuttable presumption that waiver extension requests that do not include public comment have not met the public interest threshold in section 8401(d)(2)(B) of the ESEA. In this context, "public comment" means that a State seeking an extension would (1) provide the State's entire waiver extension request to the public and any interested LEA in the State, in the manner in which the State customarily provides similar notice and opportunity to comment to the public; and (2) submit the comments and input to the Department with a description of how the State addressed the comments and input it received. The comments should be made on the State's entire intended submission of the waiver extension request, including the State's plan, timeline, and progress implementing that plan. States may rebut the presumption with sufficient evidence to illustrate the extension is in the public interest.

### **States Denied a Waiver in SY 2022-23**

A State that was denied a 1.0 percent cap waiver in SY 2022-23 must follow the instructions for applying for a **new waiver** for SY 2023-24. See above for the instructions, which can be found in the section on new waiver requests (“States Applying for a New Waiver in SY 2023-24”). In its new waiver request, the State should **be sure to address any concerns** that led to the denial of its waiver request in SY 2022-23.

### **States Seeking a Combination New Waiver in SY 2023-24 and an Extension of a Waiver Granted in SY 2022-23**

Some States were denied or did not apply for a 1.0 percent cap waiver in a particular subject area (typically due to assessment participation rates below 95 percent) in SY 2022-23 but were granted a waiver in other subject areas. As in previous years, a request for a 1.0 percent cap waiver in a subject area for which the State did not receive or request a waiver in SY 2022-23, that has been coupled with a request for an extension of a waiver granted in SY 2022-23, will be treated as a combination new/extension waiver request and all applicable requirements apply to each subject area included in the State’s request. That is, the State must provide the required information for new waiver requests (see the section above on “States Applying for a New Waiver in SY 2023-2024”) and the State must provide the required information for waiver extension requests (see the section above on “States Applying to Extend a Waiver Granted or Extended in SY 2022-2023”).

### **Timeline to Apply**

A State’s request for a waiver of the 1.0 percent cap requirement, whether new or an extension, must be submitted 90 days before the beginning of the State’s AA-AAAS testing window. If a State is interested in submitting a waiver request, the Department encourages the State to submit the request as soon as possible. If a State does not have all the required information, it should still submit its waiver request to meet the 90-day requirement. However, the Department is unable to fully evaluate and provide a response to the waiver request until all the required information has been provided.

### **Verification of Assessment Participation Data Required for Waiver Requests**

When preparing the required assessment participation data for waiver/waiver extension requests, States should make every effort to ensure that these data match the assessment participation data provided to the Department via the *EDFacts* reporting system. In cases where the State knows the data do not match, the State should provide an explanation for the discrepancy as part of the request. To the extent possible, the Department will look at the State’s assessment participation data submitted to *EDFacts* in the State’s request. If there are differences, the Department will request information to explain the discrepancy, which will likely delay our response to the waiver request.

**Resources and Procedures for Completing Waiver/Waiver Extension Requests**

Two appendices are attached to this memorandum to assist States in organizing their 1.0 percent cap waiver request. Appendix A provides the statutory or regulatory requirements that each waiver request is evaluated against. Appendix B provides a suggested format for organizing the assessment participation data tables in the waiver request. States with questions about submitting a 1.0 percent cap waiver request should contact the Office of School Support and Accountability's Assessment Team at [ESEA.Assessment@ed.gov](mailto:ESEA.Assessment@ed.gov) and all requests for a 1.0 percent cap waiver should be submitted to [ESEA.Assessment@ed.gov](mailto:ESEA.Assessment@ed.gov).

Thank you for your continued commitment to our Nation's students.

## **Appendix A: Statutory and Regulatory Requirements for Requesting Waivers or Waiver Extensions from the 1.0 Percent Cap on the Percentage of Students with the Most Significant Cognitive Disabilities Who May Be Assessed with an AA-AAAS**

### **All requests (new and extensions)**

- Each **new request** and each **extension request** of the 1.0 percent AA-AAAS participation cap must be made in accordance with ESEA section 8401(b)(3), which explains that a State must provide the public and any interested LEA in the State with notice and a reasonable opportunity to comment and provide input **on the entire waiver/waiver extension request**, in the manner in which the State customarily provides similar notice and opportunity to comment to the public.
- States are required in 34 CFR § 200.6(c)(4)(i) to submit their AA-AAAS waiver request (or extension request) **at least 90 days prior** to the start of the relevant subject testing windows.
- States are required in 34 CFR § 200.6(c)(4)(ii) to submit data showing the **number and percentage** of students in each subgroup of students who took alternate assessments in each required subject.
- 34 CFR § 200.6(c)(4)(ii) also requires that States demonstrate that they have assessed **at least 95 percent of all students and 95 percent of all students with disabilities** in each required subject.
- 34 CFR § 200.6(c)(4)(iii), requires assurances from the SEA that it **verified** that each district with more than 1.0 percent participation in the alternate assessment has:
  - (A) **Followed participation guidelines**; and
  - (B) **Will address any disproportionality** in participation in the alternate assessment.
- 34 CFR § 200.6(c)(4) requires a plan and timeline by which:
  - (A) The State will **improve the implementation of its guidelines for participation** in the AA-AAAS (including by reviewing and, if necessary, revising its definition of children with significant cognitive disabilities so that the State is under the cap in each subject in future school years).
  - (B) The State will take **additional steps to support and provide appropriate oversight to each LEA** that the State anticipates will assess more than 1.0 percent of its assessed students with an AA-AAAS to ensure that only students with the most significant cognitive disabilities take an AA-AAAS. The State **must describe how it will monitor and regularly evaluate** each such LEA to ensure that the LEA provides sufficient training such that school staff who participate as members of an IEP Team or other placement team understand and implement the guidelines established by the State so that all students are appropriately assessed.
  - (C) The State will **address any disproportionality** in the percentage of students taking an alternate assessment aligned with alternate academic achievement standards as identified through the data provided in accordance with paragraph (c)(4)(ii)(A) of this section;

### **Extension requests only**

- As required in 34 CFR § 200.6(c)(4)(v), the State must demonstrate substantial progress towards achieving each component of the prior year's plan and timeline. The Department expects States to describe the plan for the SY 2023-2024, and report on the work performed on the plan that was submitted for SY 2022-2023. This progress report **should clearly demonstrate and explain** how the State's plan **evolved and been improved from the prior year's** waiver request. This progress report must address each of the following areas:
  - (A) How the State **improved the implementation of its guidelines for participation** in the AA-AAAS.

- (B) How the State **supported and provided appropriate oversight to each LEA** that the State anticipates will assess more than 1.0 percent of its assessed students with an AA-AAAS to ensure that only students with the most significant cognitive disabilities take an AA-AAAS.
- (C) How the State is **addressing any disproportionality** in the percentage of students taking an AA-AAAS.
- In addition, the State **must demonstrate how it reduced the rate of AA-AAAS participation in SY 2022-2023 compared to prior years.**



**Appendix B: Suggested Format for Organizing the Assessment Participation Data Tables in a 1.0 Percent Cap Waiver Request**

**Table 1: Overall Rates of Assessment Participation for SY 2022-23**

(Note: The data in this table are fictitious and do not represent any single State's data; R/LA means reading/language arts; include data for all subject areas to which the waiver request pertains)

| <b>Group</b>                  | <b>All Students Grades 3-8 and High School R/LA</b>    | <b>Students with Disabilities Grades 3-8 and High School R/LA</b>    |
|-------------------------------|--|--|
| Students Assessed             | 288,005  | 41,004   |
| Students Enrolled             | 296,099  | 42,210   |
| Assessment Participation Rate | 97.27%   | 97.14%   |
| <b>Group</b>                  | <b>All Students Grades 3-8 and High School Math</b>    | <b>Students with Disabilities Grades 3-8 and High School Math</b>    |
| Students Assessed             | 289,003  | 41,009   |
| Students Enrolled             | 296,092  | 42,226   |
| Assessment Participation Rate | 97.61%   | 97.12%   |
| <b>Group</b>                  | <b>All Students Grades 3-8 and High School Science</b> | <b>Students with Disabilities Grades 3-8 and High School Science</b> |
| Students Assessed             | 288,011  | 41,018   |
| Students Enrolled             | 296,079  | 42,230   |
| Assessment Participation Rate | 97.28%   | 97.13%   |

**Table 2: AA-AAAS Participation Rates by Subgroup for SY 2022-23**

(Note: The data in this table are fictitious and do not represent any single State's data; R/LA means reading/language arts; include data for all subject areas to which the waiver request pertains)

| <b>Group</b>                   | <b>Total Number in Grades 3-8 &amp; HS</b> | <b>Num. Taking AA-AAAS in Grades 3-8 &amp; HS</b> | <b>Percent Taking AA-AAAS in Grades 3-8 &amp; HS</b> |
|--------------------------------|--|---|--|
| <b>R/LA</b>                    |  |   |  |
| All Students                   | 288,400                                    | 2,400   | 0.83%  |
| Hispanic                       | 41,082                                     | 346   | 0.84%  |
| American Indian/Alaskan Native | 1,705                                      | 19  | 1.11%  |
| Asian                          | 48,001                                     | 76  | 0.16%  |
| Black                          | 54,091                                     | 598   | 1.11%  |
| Hawaiian/Pacific Islander      | 2,965                                      | 23  | 0.78%  |
| White                          | 143,134                                    | 1,401   | 0.98%  |
| Two or More Races              | 7,698                                      | 98  | 1.27%  |
| Male                           | 144,030                                    | 1,680   | 1.17%  |
| Female                         | 141,001                                    | 904   | 0.64%  |
| English Learner                | 22,908                                     | 261   | 1.14%  |
| Econ. Disadvantaged            | 182,309                                    | 1,789   | 0.98%  |
| <b>Mathematics</b>             |  |   |  |
| All Students                   | 288,390                                    | 2,390   | 0.83%  |
| Hispanic                       | 41,072                                     | 336   | 0.82%  |

|                                |         |       |       |
|--------------------------------|---------|-------|-------|
| American Indian/Alaskan Native | 1,700   | 10    | 0.59% |
| Asian                          | 48,000  | 70    | 0.15% |
| Black                          | 54,089  | 590   | 1.09% |
| Hawaiian/Pacific Islander      | 2,955   | 19    | 0.64% |
| White                          | 143,130 | 1,399 | 0.98% |
| Two or More Races              | 7,688   | 92    | 1.20% |
| Male                           | 144,020 | 1,675 | 1.16% |
| Female                         | 140,090 | 900   | 0.64% |
| English Learner                | 22,899  | 254   | 1.11% |
| Econ. Disadvantaged            | 182,307 | 1,776 | 0.97% |
| <b>Science</b>                 |         |       |       |
| All Students                   | 288,140 | 2,410 | 0.84% |
| Hispanic                       | 41,092  | 350   | 0.85% |
| American Indian/Alaskan Native | 1,715   | 20    | 1.17% |
| Asian                          | 48,100  | 79    | 0.16% |
| Black                          | 54,011  | 601   | 1.11% |
| Hawaiian/Pacific Islander      | 2,972   | 25    | 0.84% |
| White                          | 143,140 | 1,410 | 0.99% |
| Two or More Races              | 7,700   | 100   | 1.30% |
| Male                           | 144,032 | 1,691 | 1.17% |
| Female                         | 141,010 | 914   | 0.65% |
| English Learner                | 22,900  | 271   | 1.18% |
| Econ. Disadvantaged            | 182,304 | 1,790 | 0.98% |

**Table 3: AA-AAAS Rates by Subject, by Year**

(Note: The data in this table are fictitious and do not represent any single State's data; R/LA means reading/language arts; include data for all subject areas to which the waiver request pertains)

| School Year          | R/LA  | Mathematics | Science |
|----------------------|-------|-------------|---------|
| 2017-2018            | 1.42% | 1.44%       | 1.48%   |
| 2018-2019            | 1.35% | 1.37%       | 1.38%   |
| 2020-2021            | 1.31% | 1.33%       | 1.36%   |
| 2021-2022            | 1.21% | 1.24%       | 1.27%   |
| 2022-2023            | 1.10% | 1.13%       | 1.14%   |
| 2023-2024 (estimate) |       |             |         |