



Request for Waiver of State-Level Cap on the Percentage of Students who can be Assessed via the State Alternate Assessment on Alternate Academic Achievement Standards

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The Every Student Succeeds Act (ESSA), the latest version of the Elementary and Secondary Education Act 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.” This 1% cap equals approximately 10% of students with disabilities in most states, depending on the percentage of students with disabilities as compared to the percentage of all students who are being assessed in a particular state.

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 (SEA) to seek a waiver are set forth at 34 C.F.R §200.6(c)(4)(ii)-(v). The full text of these provisions can be found at the end of this document.

On May 16, 2017, the U.S. Department of Education sent a letter to state assessment directors, state Title I directions 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>

Note: ESSA also permits states to develop and award a state-defined “alternate diploma.” This diploma is specifically for students with the most significant cognitive

disabilities who are assessed using the state's alternate assessment aligned to alternate academic achievement standards (AA-AAAS). Tips for advocates in states developing an alternate diploma are available at <http://www.advocacyinstitute.org/ESSA/State-defined.Alternate.Diploma.Tips.for.Advocates.pdf>

TIPS FOR ADVOCATES

Advocates for students with disabilities should review and comment on state requests for a waiver to exceed the cap on assessing students via an AA-AAAS. Use these tips to review and comment.

- **Reasonable Opportunity to Comment**

The state is required by ESSA to provide stakeholders with the proposed waiver request document and a reasonable opportunity to provide comments in the manner in which the state educational agency customarily provides similar notice and opportunity to comment to the public.

It is NOT sufficient to ask stakeholders to comment on a notice of intent to request a waiver—the actual waiver document must be provided.

For example, **Michigan** asked for comments on a document describing the waiver request, but did not actually provide the proposed request (see http://www.michigan.gov/documents/mde/Alt_Assessment_waiver_606177_7.pdf) **Georgia** took the same approach with its document for comment (see <https://www.gadoe.org/School-Improvement/Federal-Programs/title-i/Documents/Title%20I,%20Part%20A/FY18/Alternate%20Assessment%20Cap%20Waiver%20Public%20Notice%20-%202017.08.22.pdf>.)

On the other hand, **Ohio** provided its proposed waiver request with all required information, making it easy for stakeholders to review and comment (see <https://education.ohio.gov/Topics/Testing/Ohio-English-Language-Proficiency-Assessment-OELPA/Ohios-Alternate-Assessment-for-Students-with-Sign>.) **Texas** is also an example of a state that provided the required information (see https://tea.texas.gov/draft_waiver_request/)

Once the public comment period closes, Section 8401 of ESSA requires that every comment be submitted to the U.S Department of Education (the Department) with the waiver request, as well as a description of how the State addressed the comments and input.

- **Information Required to be Provided in the Waiver Request**

The requirements in ESSA section 8401 and 34 C.F.R §200.6(c)(4)(ii)-(v) are provided at the end of this document. ***You should review your state's waiver document to determine, as best you can, whether all the requirements have been met. Below are many of the key components that must be included in a state's request to waive the 1% cap:***

- The comments and input provided by the public on the waiver request along with a description of how the state addressed the comments and input
- A description of how the waiving of the 1% cap will advance student academic achievement
- A description of the methods the state educational agency, local educational agency (school district), school, or Indian tribe will use to monitor and regularly evaluate the effectiveness of the implementation of the plan
- State-level data, from the current or previous school year, to show—
 - The number and percentage of students with disabilities who belong to each subgroup of students who took the AA-AAAS (major racial and ethnic groups, economically disadvantaged students, English learners); and
 - The state has assessed at least 95 percent of all students and 95 percent of students with disabilities subgroup who are enrolled in grades for which the assessment is required (Note: states that have not assessed at least 95% of all students and at least 95% of students with disabilities on the most recent statewide assessments in reading/language arts and mathematics MAY NOT request a waiver. You should check to see if this applies to your state.)
- Assurances that each school district that will exceed the 1% cap--
 - Has followed the state guidelines for IEP teams regarding students with the most significant cognitive disabilities (described later in this document)-except for the one about incorporating universal design for learning in the assessment to the extent feasible (that is a state, not a local, responsibility)
 - Will address any disproportionality in the percentage of students in any subgroup taking an AA-AAAS
- A plan and timeline by which the state will—
 - Improve the implementation of its guidelines for IEP teams regarding students with the most significant cognitive disabilities, including by reviewing and, if necessary, revising its definition of this term so that the State meets the 1% cap in each subject for which assessments are administered in future school years
 - Take additional steps to support and provide appropriate oversight to each district that the State anticipates will assess more than 1.0 percent of its total assessed students in a given subject in a school

year using an AA-AAAS to ensure that only students with the most significant cognitive disabilities take this assessment.

- The State must describe how it will monitor and regularly evaluate each such district to ensure it provides sufficient training such that school staff who participate as members of an IEP team or other placement team understand and implement the guidelines so that all students are appropriately assessed
- Address any disproportionality in the percentage of students taking an AA-AAAS

Strategies to Meet the 1% Cap

The cap is applied at the state level, not at the district or school level. However, that does not mean the state has no role in ensuring that schools and districts make appropriate assessment decisions. States have known about this cap since ESSA was signed into law in December 2015 and they should have been taking steps to ensure that district/school practices do not result in excessive participation in the AA-AAAS. The National Center on Educational Outcomes (NCEO) developed a brief providing strategies for meeting the 1% cap on alternate assessment participation at

<https://nceo.info/Resources/publications/OnlinePubs/briefs/brief12/brief12.html>.

You can also view a webinar on this topic at

<https://www.youtube.com/watch?v=EM4PskvhIqo&feature=youtu.be>.

Your comments should mention the importance of these strategies and question whether the state is using them. At the very least, the state's waiver request should commit to implementing these strategies immediately.

- **State Definition of "Students with the Most Significant Cognitive Disabilities"**

ESSA permits states to define the term "students with the most significant cognitive disabilities." Additionally, ESSA federal regulations on Assessments (available at <https://www.gpo.gov/fdsys/pkg/FR-2016-12-08/pdf/2016-29128.pdf>) provide criteria that the definition must meet. A definition of "students with the most significant cognitive disabilities" that is overly broad is one factor that will lead to excessive participation in the AA-AAAS. These are the only students who the state is permitted to assess using an AA-AAAS. ***You should find your state's definition of this term and consider if it meets the requirements in the ESSA regulations. If not, this should be pointed out in your comments on the waiver.***

The NCEO brief summarizes the regulatory criteria as follows:

"A particular disability or English learner (EL) designation should not determine whether a student is a student with the most significant cognitive

disabilities, nor should the student be identified solely on the basis of the student's previous low academic achievement or need for accommodations. The definition should include the need that students with the most significant cognitive disabilities have for extensive, direct individualized instruction, as well as their need for substantial supports to achieve measurable gains on challenging grade-level academic content standards.”

- **Guidance to IEP Teams for AA-AAAS Participation Decision-making**

Another important issue to consider in providing comments about your state's request to waive the 1% AA-AAAS participation cap is whether the state has provided the IEP team, including parents, with guidance to help them make appropriate decisions about which students should participate in an AA-AAAS.

The requirements for this guidance, as well as information that must be provided to parents, is found in ESSA regulation 34 C.F.R §200.6 (d) and IDEA regulations 34 C.F.R. §300.160. The full text of these regulations is provided at the end of this document. Below is a summary of some key provisions. ***Your comments about the waiver request should address whether IEP teams have been given the guidance required under the regulations. The state must provide assurances in the waiver request that the requirements for the guidelines have been met and you should point out if that is not the case, as well. Also, you should point out if educators have not been provided with professional development and/or parents have not been provided with information sessions about the guidance to ensure that the IEP team can work together to make appropriate assessment participation decisions.***

The guidance for IEP teams regarding students with the most significant cognitive disabilities must:

- Include a definition of “students with the most significant cognitive disabilities” that follows the regulatory requirements (discussed earlier)
- Provide to IEP teams a clear explanation of the differences between assessments based on grade-level academic achievement standards (the general assessment) and those based on alternate academic achievement standards (the AA-AAAS), including any effects of state and local policies on a student's education resulting from taking an AA-AAAS, such as how participation in such alternate assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma
- Require that parents be informed about these possible effects of taking an AA-AAAS
- Inform IEP teams that:
 - Taking an AA-AAAS does not preclude a student from attempting to complete the requirements for a regular high school diploma
 - The AA-AAAS must promote the involvement and progress of students with the most significant cognitive disabilities in the general

education curriculum that is based on the state’s academic content standards for the grade in which the student is enrolled

- The AA-AAAS must incorporate the principles of universal design for learning, to the extent feasible
- The state must develop, disseminate information on, and promote the use of appropriate accommodations to ensure that a student with a significant cognitive disabilities who does not meet the definition of a “students with the MOST significant cognitive disabilities” participates in the general assessment with accommodations

Statutory and Regulatory Background

Waiver Requirements

ESSA 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).

ESSA 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.

ESSA 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.

IEP Team Guidance, Definition of “Students with the Most Significant Cognitive Disabilities” and Notice to Parents

IDEA Regulation §300.160 Participation in assessments.

(c) Alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities.

(1) If a State has adopted alternate academic achievement standards for children with disabilities who are students with the most significant cognitive disabilities as permitted in section 1111(b)(1)(E) of the ESEA, the State (or, in the case of a district-wide assessment, an LEA) must develop and implement alternate assessments and guidelines for the participation in alternate assessments of those children with disabilities who cannot participate in regular assessments, even with accommodations, as indicated in their respective IEPs, as provided in paragraph (a) of this section.

(2) For assessing the academic progress of children with disabilities who are students with the most significant cognitive disabilities under title I of the ESEA, the alternate assessments and guidelines in paragraph (c)(1) of this section must—

(i) Be aligned with the challenging State academic content standards under section 1111(b)(1) of the ESEA and alternate academic achievement standards under section 1111(b)(1)(E) of the ESEA; and

(ii) Measure the achievement of children with disabilities who are students with the most significant cognitive disabilities against those standards.

(3) Consistent with section 1111(b)(1)(E)(ii) of the ESEA and [34 CFR 200.6\(c\)\(6\)](#), a State may not adopt modified academic achievement standards or any other alternate academic achievement standards that do not meet the requirements in section 1111(b)(1)(E) of the ESEA for any children with disabilities under section 602(3) of the IDEA.

(d) *Explanation to IEP Teams.* A State (or in the case of a district-wide assessment, an LEA) must—

(1) Provide to IEP teams a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on alternate academic achievement standards, including any effects of State and local policies on a student's education resulting from taking an alternate assessment aligned with alternate academic achievement standards, such as how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma; and

(2) Not preclude a student with the most significant cognitive disabilities who takes an alternate assessment aligned with alternate academic achievement standards from attempting to complete the requirements for a regular high school diploma.

(e) *Inform parents.* A State (or in the case of a district-wide assessment, an LEA) must ensure that parents of students selected to be assessed using an alternate assessment aligned with alternate academic achievement standards under the State's guidelines in paragraph (c)(1) of this section are informed, consistent with [34 CFR 200.2\(e\)](#), that their child's achievement will be measured based on alternate academic achievement standards, and of how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma.

ESSA regulation §200.6 Inclusion of all students

(d) State guidelines for students with the most significant cognitive disabilities. If a State adopts alternate academic achievement standards for students with the most significant cognitive disabilities and administers an alternate assessment aligned with those standards, the State must—

(1) Establish, consistent with section 612(a)(16)(C) of the IDEA, and monitor implementation of clear and appropriate guidelines for IEP teams to apply in determining, on a case-by-case basis, which students with the most significant cognitive disabilities will be assessed based on alternate academic achievement standards. Such guidelines must include a State definition of “students with the most significant cognitive disabilities” that addresses factors related to cognitive functioning and adaptive behavior, such that—

(i) The identification of a student as having a particular disability as defined in the IDEA or as an English learner does not determine whether a student is a student with the most significant cognitive disabilities;

(ii) A student with the most significant cognitive disabilities is not identified solely on the basis of the student's previous low academic achievement, or the student's previous need for accommodations to participate in general State or districtwide assessments; and

(iii) A student is identified as having the most significant cognitive disabilities because the student requires extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled;

(2) Provide to IEP teams a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on alternate academic achievement standards, including any effects of State and local policies on a student's education resulting from taking an alternate assessment aligned with alternate academic achievement standards, such as how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma;

(3) Ensure that parents of students selected to be assessed using an alternate assessment aligned with alternate academic achievement standards under the State's guidelines in paragraph (d) of this section are informed, consistent with §200.2(e), that their child's achievement will be measured based on alternate academic achievement standards, and how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma;

(4) Not preclude a student with the most significant cognitive disabilities who takes an alternate assessment aligned with alternate academic achievement standards from attempting to complete the requirements for a regular high school diploma;

(5) Promote, consistent with requirements under the IDEA, the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum that is based on the State's academic content standards for the grade in which the student is enrolled;

(6) Incorporate the principles of universal design for learning, to the extent feasible, in any alternate assessments aligned with alternate academic achievement standards that the State administers consistent with § 200.2(b)(2)(ii); and

(7) Develop, disseminate information on, and promote the use of appropriate accommodations consistent with paragraph (b) of this section to ensure that a student with significant cognitive disabilities who does not meet the criteria in paragraph (a)(1)(ii) of this section—

(i) Participates in academic instruction and assessments for the grade in which the student is enrolled; and

(ii) Is assessed based on challenging State academic standards for the grade in which the student is enrolled.

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