



UNITED STATES DEPARTMENT OF EDUCATION

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

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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)

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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.

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*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 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.

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<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

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<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% (=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% (=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% (=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 Grades 3-8 and 10 R/LA 2018- 19</b>	<b>Students w/ Disabilities Grades 3-8 and 10 R/LA 2018- 19</b>	<i>All Students Grades 3-8 and 10 R/LA 2020-21</i>	<i>Students w/ Disabilities Grades 3-8 and 10 R/LA 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%