



## 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 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)

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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

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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

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<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)			