



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

March 17, 2023

The Honorable Elsie Arntzen  
Superintendent of Public Instruction  
Montana Office of Public Instruction  
P.O. Box 202501  
Helena, MT 59620

Dear Superintendent Arntzen:

I am writing in response to the Montana Office of Public Instruction's (OPI) request on December 13, 2022, for a waiver of section 1111(b)(2)(D)(i)(I) of the Elementary and Secondary Education Act of 1965 (ESEA), which stipulates that a State may not assess more than 1.0 percent of all students in the grades assessed using an alternate assessment aligned with alternate academic achievement standards (AA-AAAS). OPI requested this waiver because, based on State data for the 2021-2022 school year, OPI has concluded that it will assess more than 1.0 percent of students using an AA-AAAS in reading/language arts (R/LA), mathematics, and science in the 2022-2023 school year.

After reviewing OPI's request, I am declining to exercise my authority under section 8401(b) of the ESEA for a one-year waiver (for school year 2022-2023) of section 1111(b)(2)(D)(i)(I) of the ESEA. I am declining the request for R/LA, mathematics, and science because OPI did not meet the regulatory requirement in 34 CFR § 200.6(c)(4)(ii) that the State assess at least 95 percent of all students with disabilities in the prior year. Based on OPI's submission, the State did not assess 95 percent of students with disabilities in all three subjects. (The Department notes that Montana was very close to meeting 95 percent participation for students with disabilities in R/LA.) If OPI can otherwise demonstrate that it met the 95 percent assessment participation requirements for students with disabilities in the 2021-2022 school year it may revise its waiver request, consistent with section 8401(b)(4)(B)(ii) of the ESEA. The revised waiver request must be submitted no later than 60 days from the date of this letter.

I appreciate the work you are doing to improve your schools and provide a high-quality education for students in your State. If you have any questions, please contact my staff at [ESEA.Assessment@ed.gov](mailto:ESEA.Assessment@ed.gov).

Sincerely,

/s/

James F. Lane, Ed.D.  
Senior Advisor, Office of the Secretary  
Delegated the Authority to Perform the  
Functions and Duties of the Assistant Secretary  
Office of Elementary and Secondary Education

cc: Chris Noel, Senior Manager of Teaching and Learning

400 MARYLAND AVE., SW, WASHINGTON, DC 20202  
<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.*



U.S. Department of Education  
Office of Elementary and Secondary Education  
Attention: Clayton Hollingshead  
400 Maryland Ave., SW  
Washington, DC 20202

December 13, 2022

Dear Mr. Hollingshead:

Please find enclosed with this letter Montana's waiver extension request pursuant to 34 CFR §200.6(c)(4). The submission of an initial waiver in accordance with 34 CFR §200.6(c)(4) is warranted for English Language Arts (ELA, mathematics, and science for the 2022-2023 school year.

For more information or questions on the attached waiver request for the 2022-2023 school year AA-AAAS 1% participation requirement, please contact JP Williams, Director of Special Education for the state of Montana at [jp.williams@mt.gov](mailto:jp.williams@mt.gov).

Sincerely,

Elsie Arntzen, Superintendent  
Montana Office of Public Instruction





# The Montana Office of Public Instruction (OPI)

## AA-AAAS 1% THRESHOLD WAIVER REQUEST

### PURSUANT TO 34 C.F.R. §200.6(c)(4)

December 13, 2022

<https://opi.mt.gov/>





## The Montana Office of Public Instruction AA-AAAS 1% THRESHOLD WAIVER REQUEST

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## Introduction

The Montana Office of Public Instruction (OPI) has adopted alternate academic achievement standards for students with the most significant cognitive disabilities and measures the achievement of those standards with an alternate assessment aligned with alternate academic achievement standards (AA-AAAS). Federal regulation 34 C.F.R. § 200.6(c)(2) requires that, for each subject for which assessments are administered, the total number of students assessed in that subject using an alternate assessment with alternate academic achievement standards may not exceed 1% of the total number of students in the State who are assessed in that subject. OPI acknowledges that it is the state's responsibility to ensure that the 1% threshold is met regarding the AA-AAAS student participation rate.

The federal Every Student Succeeds Act (ESSA) caps the percentage of students who can take the alternate assessment at 1% of the total students tested. The ESSA also allows states that may exceed the 1% cap to apply for a one-year waiver. This is an initial waiver request for the state of Montana. After reviewing assessment data trends from the years of 2017-2022, the Montana Office of Public Instruction (OPI) believes the waiver may be necessary for the 2022-2023 school year. Based upon enrollment and previous participation data, the data indicates that the following percentages for Special Education students are expected to participate in the AA-AAAS for the 2022-2023 school year. In analyzing the data, the OPI identified 64 out of 395 local educational agencies (LEAs) that are projected to exceed the 1% participation cap in any subject for which the AA-AAAS is administered.

Anticipated 2022-2023 Participation by subject:

- ELA AA-AAAS 1.07% of Special Education Students Statewide
- Mathematics AA-AAAS 1.08% of Special Education Students Statewide
- Science AA-AAAS 0.87% of Special Education Students Statewide

During the 2021-2022 school year, Montana assessed at least 95 percent of all students enrolled. The Montana OPI acknowledges that the percent of children with disabilities in the previous year in the graded assessed for ELA, Mathematics, and Science was slightly below the 95 percent requirement. We believe this is a continuation of the impact of the COVID19 pandemic and as a result, the Montana OPI is still requesting the US Department of Education consider a waiver from the 1.0 percent cap in AA-AAAS participation for SY 2022-2023 for Mathematics, English Language Arts (ELA), and Science.

Consequently, the Montana OPI is submitting this request that the Secretary waive the cap under 34 C.F.R. §200.6(c)(2) for the subjects of ELA, Mathematics, and Science pursuant to 34 C.F.R. §200.6(c)(4). Montana used the federal and state guidelines and requirements including the necessary information for Montana's initial waiver request per the memo sent to states on September 20, 2022. As part of its waiver request, the





Montana OPI is submitting SY 2021-2022 assessment participation rates overall and for students with disabilities for each English Language Arts, Mathematics, and Science. The OPI is also providing a copy of the [LEA Assurance Form](#) that the OPI will use to verify that each local educational agency (LEA) that the OPI anticipates will assess more than 1.0 percent of its assessed students in any subject using an AA-AAAS have followed the State's guidelines for participation in the AA-AAAS and have addressed any disproportionality in the percentage of students in any subgroup taking an AA-AAAS. A copy of the OPI guidelines for participation can be found here: [Montana OPI Policies and Procedures for Participation in State Assessment Guidelines](#) and [Alternative Assessment Participation Decision Document](#). This verification will be done in SY 2022-2023. Once the assurance forms are verified by the OPI, LEA justifications will be made publicly available and easily accessible on our webpage. [OPI SPED Webpage](#).

Additionally, the Montana OPI has provided a plan and timeline with actionable steps and milestones that include:

- A clear description of how the Montana OPI 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 Montana meets the 1.0 percent cap in each subject for which assessments are administered in future school years;
- A clear description of how the Montana OPI 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 Montana OPI 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 Montana OPI 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.





### 1% Waiver Request Requirements

**REQUIREMENT 1:** Each new request and each extension request of the 1% 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.

### RESPONSE:

The Montana OPI will allow for public comment for a 60-day period from November 7, 2022, through January 7, 2023. The written 1% Waiver Request was published on the OPI website December 1, 2022. The public was made aware of the waiver request through publication on the OPI state website, targeted email communications, advocacy meetings, webinars, and a press release in the local newspaper.

On November 9, 2022, a Statewide Special Education Director Meeting was held to discuss the 1% Waiver. The OPI Task Force of Education Advocates and statewide educational stakeholders received an update on the 1% Waiver Request status and process on November 15, 2022. Additionally, two; 1-hour webinars have been hosted by OPI on November 17, 2022, and November 22, 2022, from 4pm to 5pm (MST). Public comment was collected via webinar chats, and direct emails to OPI and then summarized prior to the December 13, 2022, submission date. The OPI Special Education Advisory Panel held a meeting on November 21, 2022, to discuss the 1% Waiver Request and review future actions in the state action plan. A public listening review of the 1% Waiver Request occurred on December 8, 2022, via Zoom.

**Note:** To address concerns regarding the public comment period, OPI extended the public comment period through January 7, 2023, to ensure additional time for public review of the 1% Waiver request document. Public comments received after the December 13, 2022, submission date will be submitted by OPI in an additional addendum to the DOE on or by January 20, 2023. All comments and related information will be made available on the OPI website after January 7, 2023.

**REQUIREMENT 2:** 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.

















develop and implement guidance for the “Red Flag” criterion review process based upon four categorical variables:

1. Primary Disability,
2. Instructional Reading Level with Comprehension,
3. Math Computation Skills, and
4. Writing Skills.

(B) The Montana OPI will take additional steps to support and provide appropriate oversight to each LEA that the OPI anticipates will assess more than 1% of its assessed students with an AA-AAAS. The Montana OPI will review all LEAs who exceed the 1% cap through three tiers of compliance which are outlined below. Each tier includes action steps for compliance and technical assistance.

**Tier 1: Advisory**

**Description:** LEAs are under the 1% requirement. The school/district meets compliance, and no corrective actions are needed. Support as requested per LEA.

**Tier 1 Compliance:** LEAs will complete a self-audit of students identified as needing the AA-AAAS. LEAs will submit an LEA Assurance Form ([LEA Assurance Form 2022-2023 SY](#)) to OPI required before October 31 annually.

**Tier 1 Technical Assistance:** As requested by a school/district and recommended by OPI annually.

**Tier 2 Targeted:**

**Description:** LEAs are above 1% and have 1-3 students identified to take the alternate assessment. The school/district did not meet compliance. The OPI will complete a review of the LEA’s assurance forms and provide a letter to the LEA noting the compliance issue and required actions. Corrective actions and support may include professional development training on 1%, student file review, and virtual or on-site visits. The OPI Compliance follow up will begin in April of 2023 to be completed prior to the upcoming school year 2023-2024 spring testing window.

**Tier 2 Compliance:** LEAs will complete a self-audit of students identified as needing the AA-AAAS. For the 2022-2023 SY LEAs will submit the LEA Assurance form by January 31, 2023. Thereafter, LEAs will submit an LEA Assurance Form ([LEA Assurance Form 2022-2023 SY](#)) to OPI required before October 31 annually.

**Tier 2 Technical Assistance:** As requested by the LEA or may be required by OPI annually prior to February 1, the LEA will receive technical assistance that will include a review of AA-AAAS criteria eligibility ([Appendix A](#)). OPI will also provide support and assistance as necessary to understand opportunities and actions to take, when possible, to reduce the 1% Threshold.





**Tier 3 Intensive:**

**Description:** LEA is above 1% and has 4 or more students identified to take the alternate assessment. The LEA did not meet compliance. The OPI will complete a review of the LEA’s justification forms and provide a letter to LEA noting the compliance issue and required actions. Corrective actions and support may include professional development training on 1%, student file review, and virtual or on-site visits. Compliance follow up will begin in April of 2023 and be completed prior to the upcoming school year 2023-2024 spring testing window.

**Tier 3 Compliance:** LEAs exceeding the 1% threshold will submit an LEA Assurance form to the OPI required before October 31.

**Tier 3 Technical Assistance (Required):** As required by the OPI annually prior to February 1, the LEA will receive Technical assistance that will include a review of AA-AAAS criteria eligibility ([Appendix A](#)) with the LEA. OPI will also provide support and assistance as necessary to develop opportunities for the LEA to take actions, when possible, to reduce the 1% Threshold.

(C) The OPI 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. The OPI will annually examine the data on subgroup participation, as reported in ESSA, on the alternate assessment, to identify and address any disproportionality in the students taking the AA-AAAS. The OPI will utilize a data set to:

1. Annually examine the data on subgroup participation, as reported in ESSA, on the alternate assessment.
2. Provide data to LEAs via the OPI website on subgroup participation, as reported in ESSA, on the alternate assessment. LEAs will provide a written justification regarding any disproportionality that may occur based upon student participation in the AA-AAAS.
3. Ensure LEAs will communicate in writing how they address any disproportionality in the justifications.

**Summary of Reasonable Opportunity for Public Comment**

Prior to submitting this 1% Waiver Request to the Department, the Montana OPI afforded a reasonable opportunity for public comment and considered such comments consistent with the consolidated assurances under ESEA section 8304.

**When was public comment initiated and conducted for the 1% Waiver Request?**

- **November 7, 2022:** Initiated public comment, by sending email to stakeholders and posting information on the OPI webpage with links to the Montana Office of Public Instruction 1% Waiver Request.





- **November 9, 2022:** Discussion with Statewide SPED Director’s 2:00pm – 3:00pm via Zoom
- **November 15, 2022:** Education Advocates Meeting – 9:30am – 10:30am via Zoom
- **November 17, 2022:** Webinar 1 for public input, 4:00pm-5:00pm via Zoom
- **November 21, 2022:** Discussion with Special Education Advisory Panel via Zoom
- **November 22, 2022:** Webinar 2 for public input, 4:00pm to 5:00pm via Zoom
- **December 7, 2022:** Initial public comment deadline 4:00pm
- **December 8, 2022:** Webinar 3 for public input, 4:00 pm-5:00 pm via Zoom
- **December 13, 2022:** Final Draft prepared and submitted to the DOE
- **January 7, 2023:** Extended public comment deadline 4:00pm
- **January 20, 2023:** Submit a public comment addendum to the DOE

### How was public comment gathered for 1% Waiver Request?

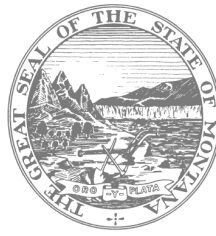
- **Email Submission:** Comments on this waiver were directed to: [OPIMSAAWaiver@mt.gov](mailto:OPIMSAAWaiver@mt.gov)
- **Webinars:** Conducted 3 Webinars which included discussion and collection of public comments.
- **Education Advocate Meeting:** Conducted an Education Advocates meeting, where public comment was solicited, including representatives from the governor’s office, the teacher’s union, school administrators, school board association, and other key advocates (Link with full list of advocates provided below).
- **Statewide SPED Director’s Meeting:** Conducted a meeting, where public comment was solicited, including 43 Special Education directors from across the state of Montana.
- **Special Education Advisory Panel Meeting:** Conducted a meeting, where public comment was solicited for the waiver. The panel includes representatives for: Private School, Regular Classroom Teacher, Parents of a Child with Disabilities, Subtitle B of Title VII of the McKinney-Vento Homeless Assistance Act, Higher Education Preparation Provider, Teacher of Children with Disabilities, Special Education Program Administrator, State/Local Administrative, State Child Welfare Agency Responsible for Foster Care, Vocational, Community or Business Concerned with the Provision of Transition Services to Children with Disabilities, Juvenile and Adult Corrections, Disability Rights of Montana, Other State Agencies involved in the Financing or Delivery of Related Services to Children with Disabilities, Montana Deaf-Blind Project/Transition and Employment Project, Student, and Part C/IDEA.

### What public comments were received and considered for the 1% Waiver Request?

Through the public comment opportunities, the Montana OPI has received the following public comments:

- Support of the OPI 1% Waiver Request through 6 email and/or verbal comments during webinars and meetings.





- No comments were received during the webinars, meetings, or emails in opposition of seeking the 1% waiver or concern about the content of the waiver.
- Comments and concerns were expressed about the process and timeline that the OPI utilized during the public comment period.
  - November 22, 2022: Received an email to request a copy of the draft waiver.
  - November 23, 2022: Received an email that expressed concern that OPI had not published a draft waiver prior to seeking public comment.
  - December 6, 2022: Received an email as a follow-up to the email sent on November 23 requesting OPI produce public records regarding the current 1% Waiver Request.
  - December 7, 2022: Received an email expressing concern that a waiver had not been requested previously to this initial request.

To address concerns regarding the public comment period and process, OPI reached out the Department to seek advice on November 28, 2022. Based on guidance received from the Department, the OPI extended the public comment period through January 7, 2023, to ensure additional time for stakeholders to review of the draft 1% Waiver request document ([December 1, 2022 Bulletin](#)). Public comments received after December 13, 2022, submission date will be submitted by OPI in an additional addendum to the Department on or by January 20, 2023. All comments and related information will be made available on the OPI website after January 7, 2023.

**Below is additional evidence to support the public comment process for the addendum:**

- Mass email bulletin: Published through a [Press Release](#), [December OPI Compass](#), and [SPED Bulletin](#) (govdelivery.com) distributed on November 9, 2022 and November 23, 2022

What	Sent to	Opened
Press Release - 11.9.22	665	262 (40%)
December Compass 11.23.22	19,644	4,001 (21%)







SPED Compass Bulletin 11.23.22	19,644	32 (0.2%)
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- The Public comment notices were also published on the state agency calendar [State Agency Calendar](#) and the [OPI Special Education Website](#).
- 11.15.22 Education Advocates agenda: <https://drive.google.com/file/d/1Lt06NVkjRD36qq9hmFXDZWdxjq99kre/view?usp=sharing>
- 11.9.22 Statewide SPED Director’s Meeting Agenda: <https://drive.google.com/file/d/1T0ZJFtRCbmponR4zbZOc7Oefo7d3rCFe/view?usp=sharing>
- 1% Waiver Request-Webinar Agendas: <https://drive.google.com/file/d/1fr-tyA8QWbRvaoNKprkYvbtG7d0ueYMJ/view?usp=sharing>
- 1% Waiver Request-Webinar Presentation Slides: <https://docs.google.com/presentation/d/1mUqTq-PjMAQGeTWOdIngXxJyv6EkxIF1/edit?usp=sharing&oid=110281799191588867763&rtpof=true&sd=true>





## Summary of Reasonable Opportunity for Public Comment Addendum

Prepared by the Office of Public Instruction on January 19, 2023

This document is submitted as an Addendum to the Montana Office of Public Instruction (OPI) 1% Waiver Request and completes the Summary of Reasonable Opportunity for Public Comment that was submitted to the department on December 13, 2022. Updates are found under the heading, “[What public comments were received and considered for the 1% Waiver Request?](#)” on page 2.

The OPI believes that the specific context of the 1% Waiver Request honors all concerns expressed by individuals both for and against the waiver. The 1% Waiver Request provides an opportunity for flexibility at the state, district, and individual level while addressing the requirement of the 1% AA-AAAS threshold.

### Summary of Reasonable Opportunity for Public Comment

Prior to submitting this 1% Waiver Request to the Department, the Montana OPI afforded a reasonable opportunity for public comment and considered such comments consistent with the consolidated assurances under ESEA section 8304.

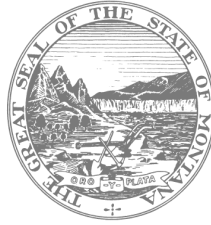
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- **Email Submission:** Comments on this waiver were directed to: [OPIMSAAWaiver@mt.gov](mailto:OPIMSAAWaiver@mt.gov)
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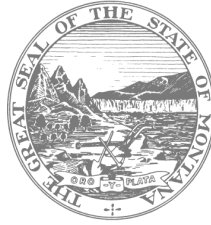
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- **Special Education Advisory Panel Meeting:** Conducted a meeting, where public comment was solicited for the waiver. The panel includes representatives for: Private School, Regular Classroom Teacher, Parents of a Child with Disabilities, Subtitle B of Title VII of the McKinney-Vento Homeless Assistance Act, Higher Education Preparation Provider, Teacher of Children with Disabilities, Special Education Program Administrator, State/Local Administrative, State Child Welfare Agency Responsible for Foster Care, Vocational, Community or Business Concerned with the Provision of Transition Services to Children with Disabilities, Juvenile and Adult Corrections, Disability Rights of Montana, Other State Agencies involved in the Financing or Delivery of Related Services to Children with Disabilities, Montana Deaf-Blind Project/Transition and Employment Project, Student, and Part C/IDEA.

### What public comments were received and considered for the 1% Waiver Request?

Through the public comment opportunities, the Montana OPI has received the following public comments:

- Support of the OPI 1% Waiver Request through 10 emails and/ 1 verbal comment during webinars and meetings.
- No comments were received during the webinars, meetings, or emails in opposition of seeking the 1% waiver or concern about the content of the waiver.
- Comments and concerns were expressed about the process and timeline that the OPI utilized during the public comment period.
  - November 22, 2022: Received an email to request a copy of the draft waiver.
  - November 23, 2022: Received an email that expressed concern that OPI had not published a draft waiver prior to seeking public comment.
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  - December 7, 2022: Received an email expressing concern that a waiver had not been requested previously to this initial request.
  - December 13, 2022: Received an email connected to the November 23, 2022 email noted above.
  - December 28, 2022: Received an email expressing concern if the OPI





provided the necessary information to comment on messaging presented by requesting a 1% waiver.

- o January 6, 2023: Received an email connected to the November 23, 2022 and December 13, 2022 emails noted above.

To address concerns regarding the public comment period and process, OPI reached out the Department to seek advice on November 28, 2022. Based on guidance received from the Department, the OPI extended the public comment period through January 7, 2023, to ensure additional time for stakeholders to review of the draft 1% Waiver request document ([December 1, 2022 Bulletin](#)). Public comments considered by the OPI and received after the December 13, 2022 submission date are included in this additional addendum. The three additional public comments submitted during the extended window were follow-ups to comments previously provided. All comments with redacted personal identifiable information, and related information will be made available on the OPI website after January 7, 2023.

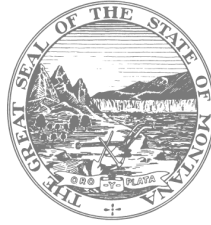
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SPED Compass Bulletin 11.23.22	19,644	32 (0.2%)

- [12.1.2022 The Notice of Additional Public Comment Meeting and Extended Window](#)
- The Public comment notices were also published on the state agency calendar [State Agency Calendar](#) and the [OPI Special Education Website](#).
- 11.15.22 Education Advocates





agenda: <https://drive.google.com/file/d/1Lt06NVkjRD36qq9hmFXDZWdxjq99kre/view?usp=sharing>

- 11.9.22 Statewide SPED Director's Meeting Agenda:  
<https://drive.google.com/file/d/1T0ZJFtRCbmponR4zbZOc7Oefo7d3rCFE/view?usp=sharing>
- 1% Waiver Request-Webinar Agendas:  
<https://drive.google.com/file/d/1fr-tyA8OWbRvaoNKprkYvbtG7d0ueYMJ/view?usp=sharing>
- 1% Waiver Request-Webinar Presentation Slides:  
<https://docs.google.com/presentation/d/1mUqTq-PjMAQGeTWODingXxJyv6EkxIF1/edit?usp=sharing&oid=110281799191588867763&rtpof=true&sd=true>

