



UNITED STATES DEPARTMENT OF EDUCATION

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

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DATE: June 9, 2020

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Appendix A**

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

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

<b>Group</b>	<b>Total Grades 3-8 and 10 R/LA 2018-19</b>	<b>Total Children w Disabilities Grades 3-8 and 10 R/LA 2018-19</b>	<b># Take State R/LA AA-AAAS Gr. 3-8 and 10 2018-19</b>	<b>% Taking State R/LA AA-AAAS Gr. 3-8 and 10 2018-19</b>
All students	475,611	78,924	7,453	1.57% (=7,453/475,611)
English learners	41,232	9,812	911	2.21%
Black	46,258	9,933	1,116	2.41%
Hispanic	95,464	22,163	2,168	2.27%
Asian	31,956	2,817	432	1.35%
White	260,701	57,246	3,919	1.50%
Econ. Disadv.	172,190	44,725	4,754	2.76%
<b>Group</b>	<b><u>Estimated*</u> Total Grades 3-8 and 10 R/LA 2019-20</b>	<b><u>Estimated*</u> Total Children w Disabilities Grades 3-8 and 10 R/LA 2019-20</b>	<b><u>Estimated*</u> # Take State R/LA AA-AAAS Gr. 3-8 and 10 2019-20</b>	<b><u>Estimated*</u> % Taking State R/LA AA-AAAS Gr. 3-8 and 10 2019-20</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%

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