

Every Student Succeeds Act 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

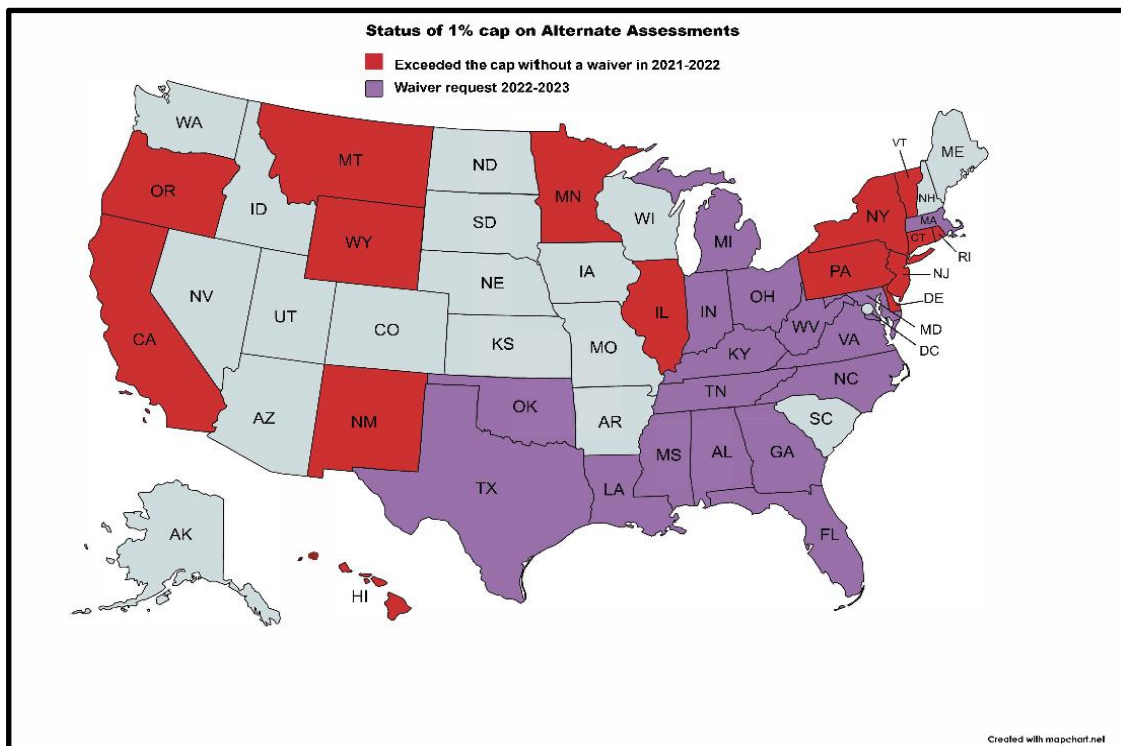
Examining Implementation, Compliance, Monitoring and Enforcement

The **Every Student Succeeds Act (ESSA)**, which amended the Elementary and Secondary Education Act of 1965 (ESEA) in 2015, includes a provision that places a limit (cap) on the percentage of students with the most significant cognitive disabilities that a state may assess with an alternate assessment aligned with alternate academic achievement standards (AA-AAAS) to **no more than 1.0 percent of all students in the grades assessed in the state**. This requirement took effect beginning with the 2017-2018 school year (SY). One percent of *all students* is estimated at approximately *ten percent of students with disabilities eligible for special education services under the Individuals with Disabilities Education Act (IDEA)*. ESSA also provides states an opportunity to request a one-year waiver from the 1.0 percent participation requirement. Federal regulations implementing the assessment provisions of ESSA were issued on December 8, 2016 and became effective on January 9, 2017.

The **U.S. Department of Education (ED)** has issued a [series of communications to states](#) regarding this provision including an annual letter outlining the requirements for requesting a waiver or waiver extension. The Office of Elementary and Secondary Education's (OESE) Office of School Support and Accountability (SSA) is responsible for monitoring and enforcing this provision, in collaboration with the Office of Special Education Programs (OSEP). Technical assistance is provided by the [National Center on Educational Outcomes](#).

Fully six (6) years into the requirement that states limit the number of students assessed via an AA-AAAS to one percent or fewer of all students assessed, thirty-three (33) states (65 percent of states) remain out of compliance. These states either requested a waiver in 2022-2023 or exceeded the cap *without a waiver* in 2021-2022. See map.

The widespread and persistent lack of compliance with the one percent cap is resulting in hundreds of thousands of students with disabilities being inappropriately assigned to the AA-AAAS. For example, based on recent assessment data in California, in order to comply the state would need to reduce its AA-AAAS participation by 10,000 students, or roughly one in every four students. These students can be impacted in a myriad of ways, including the possibility of failing to earn a regular high school diploma and exit school prepared for postsecondary education and career. These negative outcomes are occurring despite ESSA provisions that require states to ensure that taking an alternate assessment does not preclude students from these opportunities.



State Waiver Requests

Requirements for requesting a one-year waiver are found at ESEA Sec. 8401 and 34 CFR 200.6(c)(4). ED has referenced both of these requirements in its annual letters to states. However, some of the requirements have not been enforced by ED. These include:

- The requirement found at ESEA Sec. 8401 (b)(1)(C) which requires a state’s waiver request must include a plan that “describes how the waiving of such requirements will advance student academic achievement.” At no time has ED required states to satisfy this requirement in their waiver requests.
- The requirement found at ESEA Sec. 8401 (b)(3)(A)(iii) that mandates that states must “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.” Many states have failed to satisfy this requirement. For example, Maryland’s announcement for public comment was buried deep in the special education section of the state department of education’s website. ED has failed to identify these insufficiencies in its waiver review process. Additionally, stakeholders pointed out two issues regarding waiver extension requests in an email sent on 11-23-21 to Patrick Rooney, SSA Director, regarding states that were putting out a notice for public comment without providing the draft waiver extension but merely a notice of intent to submit a waiver extension request. The initial response from ED took the position that public comment was not required for a waiver extension request but only for an initial waiver request. Following a response pointing out the legal insufficiency of this position, ED agreed that public comment was required on all waiver requests – both initial and extensions – and included this in its memos to states. ED also informed states that the entire waiver request was to be posted for public comment.
- Waiver extension requests must comply with 34 CFR 200.6(c)(4)(v) requiring states to demonstrate substantial progress toward achieving the state’s prior year’s plan. ED has indicated through communications that progress as little as a reduction of .1 percent of the number of AA-AAAS students satisfies this requirement. This has led to many states being provided a waiver extension when the data indicates that it will take many, many years to meet the one percent cap, resulting in “perpetual” waivers, which ED stated, in response to comments to the proposed federal regulations, would not be allowed (81 Fed. Reg. 88915).
- ED responses denying waiver requests/waiver extension requests frequently fail to identify all of the failures of the state. Rather, ED rests its denial on one issue – generally failure to meet the test participation requirement or failure to make progress – when other requirements have also not been met, such as the public comment requirements under ESEA Sec. 8401. Since states denied a waiver/waiver extension have been directed to submit a new request and “should be sure to address any concerns that led to the denial of its waiver request,” it is imperative that ED address all deficiencies in a state’s request.
- Waiver denials carry no consequences for the state. ED’s notice to states advising them of the denial of their waiver request contains no consequences that the state will face going forward. Of the 13 waiver denials issued in SY 2022-2023 only one state – Mississippi – had a grant condition placed on the state’s Title I, Part A award.

States Exceeding the Cap without a Waiver

In March 2019 – more than eighteen (18) months after the 1 percent cap took effect – ED sent a [memo to states](#) providing information regarding the consequences for states not meeting the requirement to assess not more than one percent of all students on the alternate assessment (approximately 10% of students with disabilities) as follows:

If a State did not receive a waiver for the 2017-18 SY and assessed more than 1.0 percent of assessed students in reading/language arts, mathematics, and/or science, in the State with the AA-AAAS, the State is out of compliance with ESSA. Based on the State’s context and information, such as the extent to which the State exceeded the 1.0 percent cap, the Department will consider one of the following actions:

1. Sending a letter notifying the State that it has assessed more than 1.0 percent of tested students with an AA-AAAS and requiring the State to submit a plan to come into compliance with the 1.0 percent cap.

2. Placing a condition on the State’s Title I Part A grant award. As part of the condition, a State would be required to submit a plan to assess no more than 1.0 percent of students with an AA-AAAS in each subject.
3. Imposing high risk status on the State’s Title I Part A grant award. A State with such a high risk status would be required to submit a plan to come into compliance with the 1.0 percent cap and to participate in joint OESE/OSEP monitoring calls while the State works to meet the requirement.
4. Withholding Title I Part A State administrative funds. If the Department withholds funds, a State would be required to submit a plan to come into compliance with the 1.0 percent cap and participate in joint OESE/OSEP monitoring calls while they work to come into compliance.

Since issuing the March 2019 notice, ED has sent letters to states as follows:

June 2019: ED sent the first set of letters to fourteen (14) states that had exceeded the one percent cap in 2017-2018 without a waiver. A condition was placed on each state’s Title I Part A grant award and each state was required to submit a “plan” to come into compliance with the 1.0 percent cap. (ED declined to make the submitted plans publicly available.)

February/July 2020: ED sent the second batch of letters in February 2020 to seven (7) states and in July 2020 to six (6) states that exceeded the cap in 2018-2019, again directing the states to submit a “plan” to come into compliance as a condition of their Title I Part A grant award .

NOTE: No letters were sent in the following two years - 2019-2020 and 2020-2021 - due to the impact of the COVID-19 pandemic on school assessments.

October 2023: ED sent a third batch of letters in October 2023 to fifteen (15) states that exceeded the cap in 2021-2022. Again, states were directed to submit a “plan.” Only one state – Pennsylvania - was assigned to high-risk status.

This approach to monitoring the 1 percent cap provision of ESSA appears to be having limited effectiveness. Importantly, **eight (8) states exceeded the cap in each of the years addressed by the letters** – CA, CT, IL, MN, NJ, NY, OR, and PA. In some cases, the percent of students assessed via the state’s AA-AAAS either did not decrease very much or actually increased over time. For example:

- Minnesota’s rate of assessment in 2017-18 was 1.36% in ELA and 1.38% in Math. In 2022-2023 the rate declined only marginally to 1.30% in ELA and 1.33% in Math.
- New Jersey’s rate of assessment in 2017-18 was 1.23% in ELA, 1.26% in Math and 1.46% in Science. In 2022-2023 the rate increased to 1.62% in ELA, 1.59% in Math and 1.51% in Science.

ED’s use of “plan” submissions as a monitoring tool also has several troubling aspects beyond its relative lack of effectiveness. These include:

- No requirement for stakeholder involvement
- No requirement for public comment;
- No requirement to make “plans” publicly available;
- No requirement to address disproportionality in the percentage of students in any subgroup.

Looking Forward

Special education advocates, parents and other stakeholders are anxious to see more progress made toward achieving compliance with this important ESSA provision. In order to achieve this, the following recommendations are offered:

- Issue waiver denial letters that identify all failures to meet all statutory and regulatory waiver requirements in a state’s request. As noted above, this is particularly important to ensuring future requests address all requirements. Since reviewing and responding to waiver requests has been and continues to be an evolving process, as noted in the recent [Office of Inspector General’s report](#), this recommendation can be incorporated into the process going forward.

- Apply significant consequences to states that have been denied a waiver. Such consequences should relate directly to the amount the state is over the cap and the length of time the state has exceeded the cap, escalating in severity.
- Revise the current policy regarding the consequences for exceeding the cap without a waiver. Specifically, advise such states in a more timely manner, require states to submit a plan to achieve compliance that closely resembles the elements required in a waiver request, make such plans publicly available and apply consequences for states that consistently exceed the cap without a waiver.
- Integrate state compliance with the one percent cap into the process used by OSEP to arrive at the annual determinations. Additionally, increase enforcement and corrective actions of states that fail to include all students with disabilities in state assessments (Indicator 3A of the state performance plan). Many states are not eligible for a waiver due to test participation rates of less than 95 percent, which also puts them out of compliance with the IDEA requirement to assess all students with disabilities on state and district assessments.

How We Got Here

- 1997** Individuals with Disabilities Education Act (IDEA) amended, adding new requirements for including **all students with disabilities** (100 percent) in all state and district assessments and requiring states to develop a state alternate assessment by 2000.
- 2000** No Child Left Behind (NCLB) enacted, including state assessment requirements and a state accountability system (Adequate Yearly Progress) including a 95 percent test participation requirement for all students and all student groups including students with disabilities.
- 2003** NCLB regulation on alternate assessments promulgated, including cap on proficient scores that can count toward Adequate Yearly Progress (AYP).
- 2015** Every Student Succeeds Act (ESSA) enacted, including new provisions on alternate assessments and cap on number of students with disabilities who may take alternate assessments and prohibition on any other



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