



United States Department of Education

DATE: September 20, 2023

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

FROM: Patrick Rooney
Director, School Support and Accountability
Office of Elementary and Secondary Education

Valerie Williams
Director, Office of Special Education Programs
Office of Special Education and Rehabilitative Services

SUBJECT: Requirements to Request a Waiver/Waiver Extension for the 2023-24 School Year from the 1.0 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)

The U.S. Department of Education (Department) appreciates your continued work to provide a high-quality education for all students. These efforts include regularly examining 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 district-wide 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 district-wide assessment of student achievement, the IEP Team 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)).

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

The vast majority of students with disabilities should be expected to make academic progress measured against grade-level achievement standards. Alternate academic achievement standards are appropriate for only a very small number of students—those with the most significant cognitive disabilities—who comprise no more than 1.0 percent of all students 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 or other placement team (e.g., 504 placement team).

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 the school year (SY) 2023-24 assessment administration. With the passage of the Every Student Succeeds Act (ESSA) of 2015, which amended the Elementary and Secondary Education Act of 1965 (ESEA), a State may not assess more than 1.0 percent of students with an AA-AAAS in the grades assessed.¹

On December 8, 2016, the Department published final regulations,² based on the consensus reached through negotiated rulemaking, related to academic assessments under Title I, Part A of the ESEA. These regulations included the requirements for a State to request a waiver if it anticipates exceeding the 1.0 percent cap (34 CFR § 200.6(c)(4)). This requirement was first in effect for SY 2017-18. The Department may grant a one-year waiver to a State to assess more than 1.0 percent of students with an AA-AAAS, provided the State meets certain statutory and regulatory requirements. The Department previously issued guidance to States on applying for 1.0 percent cap waivers in May 2017,³ August 2018,⁴ June 2020,⁵ October 2021,⁶ and September 2022.⁷ The Department also posted all waiver requests and the Department's responses⁸ for SYs 2017-18 through 2022-23.

This is the sixth year that the Department will be considering new waivers or extensions of existing waivers of the 1.0 percent cap. We note many States are assessing fewer than 1.0 percent of their students with an AA-AAAS. Figure 1 displays the general trend in these rates among all States. In the year before the implementation of the 1.0 percent cap in (2016-17), there were 42 States that exceeded 1.0 percent of students taking an AA-AAAS in mathematics, compared to 30 States in SY 2021-22. In addition, as shown in Figure 2, AA-AAAS participation rates decreased in 33 States in SY 2021-22 compared to 2016-17. We appreciate the progress across the country and look forward to continued gains in reducing AA-AAAS participation this year. The Department recently announced a conference⁹ on State assessments that will focus, in part, on sharing lessons learned from States that have been successful in reducing overall AA-AAAS rates.

¹ See [ESEA section 1111\(b\)\(2\)\(D\)\(i\)](#).

² See [Final Regulations-Title I-Improving the Academic Achievement of the Disadvantaged-Academic Assessments](#).

³ See [Information Regarding Requirements to Request a 1.0 Percent Cap Waiver for SY 2017-2018 \(May 2017\)](#).

⁴ See [Information Regarding Requirements to Request a 1.0 Percent Cap Waiver for SY 2018-2019 \(August 2018\)](#).

⁵ See [Information Regarding Requirements to Request a 1.0 Percent Cap Waiver for SY 2020-2021 \(June 2020\)](#).

⁶ See [Information Regarding Requirements to Request a 1.0 Percent Cap Waiver for SY 2021-2022 \(October 2021\)](#).

⁷ See [Information Regarding Requirements to Request a 1.0 Percent Cap Waiver for SY 2022-2023 \(September 2022\)](#).

⁸ See [State Requests for Waivers of ESEA Provisions for SSA-Administered Programs](#).

⁹ See <https://apps1.seiservices.com/2023SSA/Default.aspx>.

Figure 1: Median AA-AAAS Participation Rates Among All States, 2016-17, 2017-18, 2018-19 & 2021-22 School Years

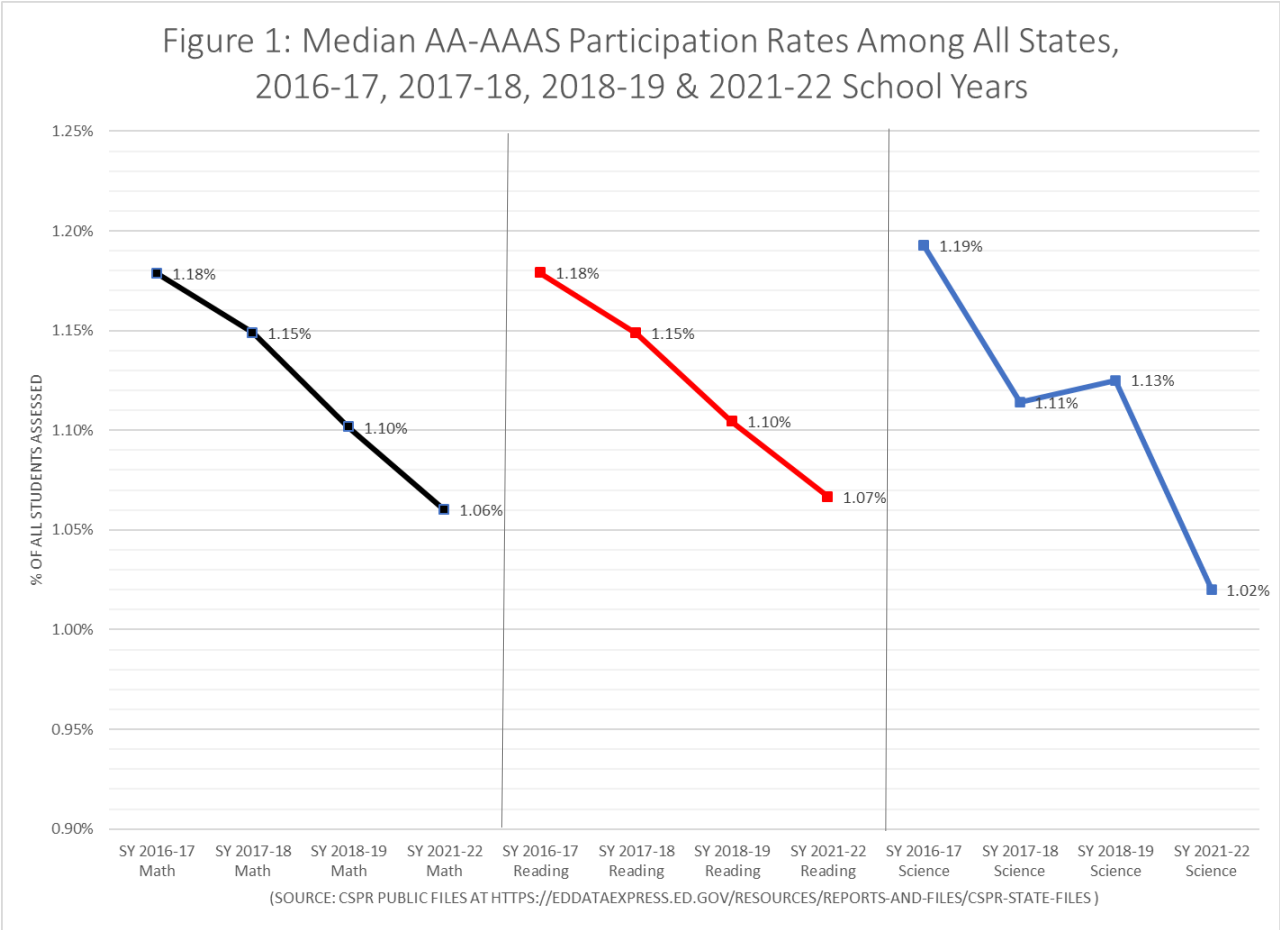
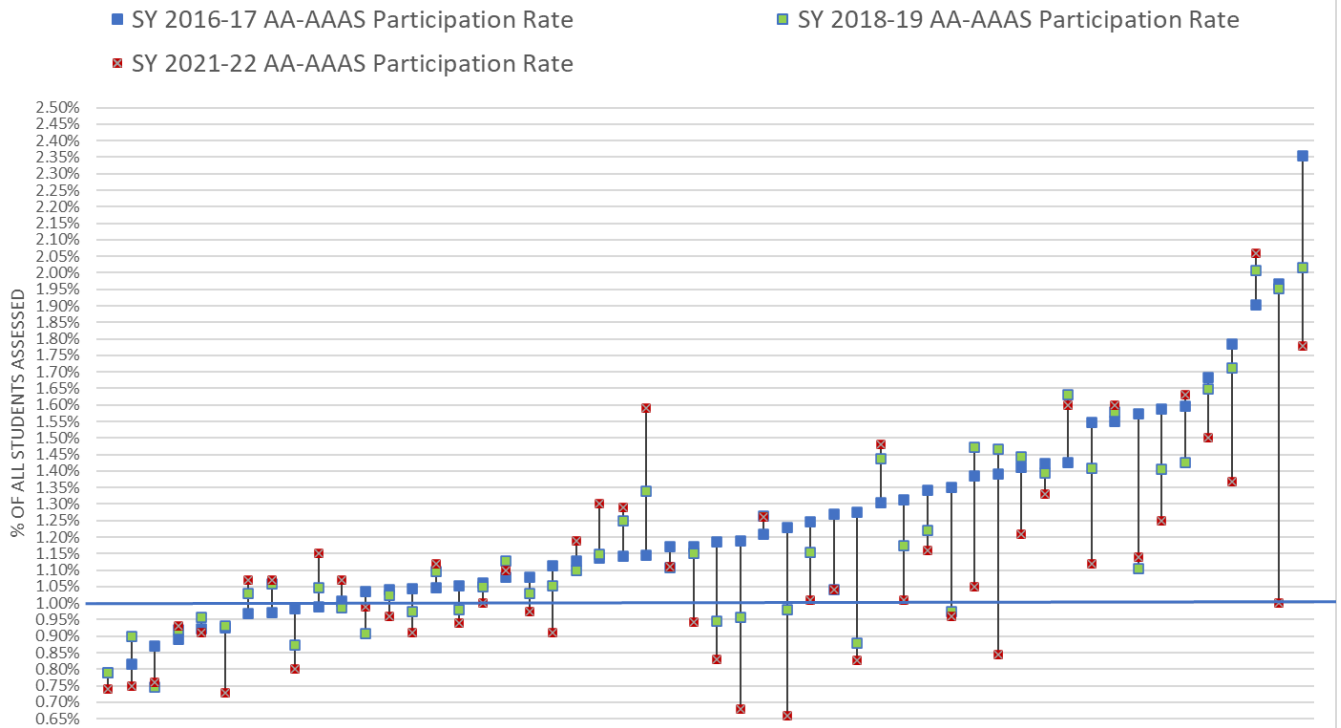


Figure 2: Statewide Mathematics AA-AAAS Participation Rates in SYs 2016-17, 2018-19 & 2021-22

Shown in Ascending Order of SY 2016-2017 Rates



(Source: CSPR Public Files at <https://eddataexpress.ed.gov/resources/reports-and-files/cspr-state-files>)

States Applying for a New Waiver in SY 2023-24

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.¹⁰ As part of its waiver request, a State must submit SY 2022-23 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 2022-23, it is not eligible to receive a waiver from the 1.0 percent cap in AA-AAAS participation for SY 2023-24.

A State must also provide evidence that the State 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 occur in SY 2023-24 but should occur before submission of the waiver request. In addition, the State must require that all LEAs that expect to assess more than 1.0 percent of its students using an AA-AAAS submit information justifying the need of the LEA

¹⁰ See https://www.ecfr.gov/cgi-bin/text-idx?node=pt34.1.200&rgn=div5&se34.1.200_1634 CFR 200.6(c)(4)(ii)(B).

to exceed 1.0 percent. The LEA justifications must **also be made publicly available**.¹¹ 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 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)).
- Fulfillment of requirements in section 8401 of the ESEA related to public comment.

The Department strongly recommends that these complete plans be posted and easily accessible on the State's website and encourages the State to provide the location of the plan in its waiver request submission.

Crucially, for **all 1.0 percent cap waiver requests**, 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 actual comments and input to the Department with a description of how the State addressed the comments and input. **This also applies to all waiver extension requests, as noted in the following section.**

States Applying to Extend a Waiver Granted or Extended in SY 2022-23

A State that wishes to request an extension of the 1.0 percent cap waiver it received in SY 2022-23 must:

1. 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.
2. Demonstrate that it sought and collected public comment on the State's complete waiver extension request.
3. 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 all students with disabilities in the grades assessed for each subject in SY 2022-23.
4. Assure that it verified that each LEA that the State anticipates will assess more than 1.0

¹¹ See [34 CFR 200.6\(c\)\(3\)\(iv\)](#).

percent of its assessed students in any subject for which assessments are administered in SY 2023-24 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.

5. Report on the progress of its plan and timeline submitted last year and additional actions the State plans for SY 2023-24, including milestones previously achieved. The Department expects States to describe the plan for SY 2023-24, and report on the work performed on the plan that was submitted for SY 2022-23. This progress report should clearly demonstrate and explain how the State's plan has evolved and been improved from the prior year's waiver request. The Department strongly recommends that the plan and report of progress be posted on the State's website.
6. Have reduced the percentage of students taking an AA-AAAS in a content area to be eligible to receive an extension of a waiver of the 1.0 percent cap for that content area.

To approve an extension of a waiver of the 1.0 percent cap, the Department must determine that the State 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 demonstrated that the extension is in the public interest. Finally, the Department must determine that the State demonstrated substantial progress toward achieving each component of the prior year's plan and timeline. The Department expects that States with relatively high rates of alternate assessment participation should demonstrate greater reductions in their rates year over year when compared to States near the 1.0 percent cap.

Given that some States have already received multiple extensions and the continued importance of appropriately assessing students with the most significant cognitive disabilities, the Department determined that public comment is 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. This public comment provides critical information on whether the waiver has been effective, has contributed to improved student achievement, and is in the public interest. Public comment also helps 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 continue to 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 2022-23

A State that was denied a 1.0 percent cap waiver in SY 2022-23 must follow the instructions for applying for a **new waiver** for SY 2023-24. See above for the instructions, which can be found in the section on new waiver requests (“States Applying for a New Waiver in SY 2023-24”). 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 2022-23.

States Seeking a Combination New Waiver in SY 2023-24 and an Extension of a Waiver Granted in SY 2022-23

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 2022-23 but were granted a waiver in other subject areas. As in previous years, a request for a 1.0 percent cap waiver in a subject area for which the State did not receive or request a waiver in SY 2022-23, that has been coupled with a request for an extension of a waiver granted in SY 2022-23, 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 2023-2024”) 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 2022-2023”).

Timeline to Apply

A State’s 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 the required information, it should still submit its waiver request 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.

Verification of Assessment Participation Data Required for Waiver Requests

When preparing the required assessment participation data for waiver/waiver extension requests, States should make every effort to ensure that these data match the assessment participation data provided to the Department via the *EDFacts* reporting system. In cases where the State knows the data do not match, the State should provide an explanation for the discrepancy as part of the request. To the extent possible, the Department will look at the State’s assessment participation data submitted to *EDFacts* in the State’s request. If there are differences, the Department will request information to explain the discrepancy, which will likely delay our response to the waiver request.

Resources and Procedures for Completing Waiver/Waiver Extension Requests

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 and all requests for a 1.0 percent cap waiver should be submitted to ESEA.Assessment@ed.gov.

Thank you for your continued commitment to our Nation's students.

Appendix A: Statutory and Regulatory Requirements for Requesting 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 **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. The Department expects States to describe the plan for the SY 2023-2024, and report on the work performed on the plan that was submitted for SY 2022-2023. This progress report **should clearly demonstrate and explain** how the State's plan **evolved and been improved from the prior year's** waiver request. This progress report must address each of the following areas:
 - (A) How the State **improved the implementation of its guidelines for participation** in the AA-AAAS.

- (B) How the State **supported and provided 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) How the State is **addressing any disproportionality** in the percentage of students taking an AA-AAAS.
- In addition, the State **must demonstrate how it reduced the rate of AA-AAAS participation in SY 2022-2023 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 SY 2022-23

(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)

Group	All Students Grades 3-8 and High School R/LA	Students with Disabilities Grades 3-8 and High School R/LA
Students Assessed	288,005	41,004
Students Enrolled	296,099	42,210
Assessment Participation Rate	97.27%	97.14%
Group	All Students Grades 3-8 and High School Math	Students with Disabilities Grades 3-8 and High School Math
Students Assessed	289,003	41,009
Students Enrolled	296,092	42,226
Assessment Participation Rate	97.61%	97.12%
Group	All Students Grades 3-8 and High School Science	Students with Disabilities Grades 3-8 and High School Science
Students Assessed	288,011	41,018
Students Enrolled	296,079	42,230
Assessment Participation Rate	97.28%	97.13%

Table 2: AA-AAAS Participation Rates by Subgroup for SY 2022-23

(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)

Group	Total Number in Grades 3-8 & HS	Num. Taking AA-AAAS in Grades 3-8 & HS	Percent Taking AA-AAAS in Grades 3-8 & HS
R/LA			
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%
Mathematics			
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%
Science			
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	1.10%	1.13%	1.14%
2023-2024 (estimate)			