COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
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WASHINGTON, DC 20515–6100

March 13, 2020

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Dear Secretary DeVos:

I write to express concern regarding the U.S. Department of Education's (Department's) efforts to monitor State implementation of alternate assessments for students with the most significant cognitive disabilities.

As you know, the Elementary and Secondary Education Act (ESEA), as amended by the Every Student Success Act (ESSA) in 2015, requires States to test students annually in Math, Reading or Language Arts in grades 3 through 8 and once, again, in high school. ESSA also requires testing in Science in grade spans 3 through 5, 6 through 9, and 10 through 12.[1] ESSA amended ESEA to allow States to administer alternative assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities.[2] However, ESSA placed a 1 percent cap on the number of students with the most significant cognitive disabilities who can participate in the alternate assessment.[3] Congress included this provision in ESSA to ensure that States identify the appropriate students for alternate assessments and that all other students are held to the same high standards. After the Committee analyzed the 1 percent waivers, I am concerned that the Department's ongoing use of 1 percent waivers has delayed implementation of a core requirement in ESSA. Accordingly, the

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[1] Elementary and Secondary Education Act of 1965 (ESEA) § 1111(b)(2)(B)(v), 20 U.S.C. § 6311(b)(2)(B)(v) (2018).
[2] ESEA § 1111(b)(2)(D)(i); *see also* 34 C.F.R. § 200.6(c)-(d).
[3] ESEA § 1111(b)(2)(D)(i)(I).

Committee requires information regarding the Department's monitoring and technical assistance to States to ensure their compliance with the law.

Federal regulations allow States that meet the applicable requirements under the law to apply for a waiver for one year to exceed the 1 percent cap.[4] Specifically, ESSA requires a State requesting a waiver to describe how waiving the cap will advance student achievement[5] and to provide a plan and timeline for coming into compliance with the cap.[6] ESSA also requires a State requesting a waiver to submit data on the percentage of students taking the alternate assessments—disaggregated by subgroups—and to show that the state tested the achievement of 95 percent of its students, including those with disabilities.[7] States must ensure that local education agencies (LEAs) can justify exceeding the 1 percent cap.[8] If a State requests an extension of its waiver, it must demonstrate substantial progress for each component of its plan and timeline.[9]

When the 1 percent cap went into effect, 27 States requested a waiver for at least one subject area, the Department approved 23 waivers even though the Department did not publicize compliance information for the 2017-18 school year.[10] For the 2018-19 school year, 36 States exceeded the cap, but the Department only granted waivers to 22 States.[11] The Department determined that the other 14 States were out of compliance.[12] On March 28, 2019, the Department's Office of Elementary and Secondary Education released a memorandum to State Assessment Directors with a framework for classifying consequences for State noncompliance with the 1 percent cap.[13] In June 2019, the Department issued

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[4] 34 C.F.R. § 200.6(c)(4); *see also* ESEA § 8401 (authorizing a State to submit a request to the Secretary to waive a statutory or regulatory requirement of ESEA).
[5] ESEA § 8401(b)(1)(C).
[6] 34 C.F.R. § 200.6(c)(4)(iv).
[7] ESEA §§ 1111(c)(2)(A), 1111(c)(2)(C), 8401(b)(1)(F); *see also* 34 C.F.R. § 200.6(c)(4)(iv)(C).
[8] ESEA § 1111(b)(2)(D)(ii)(II).
[9] States must submit the request to the Department at least 90 days prior to the beginning of the testing window for the alternate assessments. *See* 34 C.F.R. § 200.6(c)(4)(i).
[10] AR, DE, GA, ID, KY, LA, MA, MI, MS, NE, NC, ND, OH, OK, ,SD, TN, TX, WV, WI received waivers for at least one subject: math, English language arts, or science. AZ, HI, IN, and MO received a waiver for English language arts and math but were denied for science. AL, ME, NJ, and PA requested a waiver but were denied because those states either submitted their applications late or did not test the required percentage of students with disabilities. *ESEA Waivers*, U.S. DEP'T OF EDUC., OFFICE OF ELEMENTARY AND SECONDARY EDUC., https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/essa-state-plans-assessment-waivers/ (Apr. 19, 2019).
[11] For the 2018-19 school year, the Department granted AL, AR, DE, DC, GA, HI, ID, IN, KY, LA, MA, MI, MS, NE, NC, OH, OK, RI, SD, TN, TX, and WV waivers. *ESEA Waivers*, U.S. DEP'T OF EDUC. OFFICE OF ELEMENTARY AND SECONDARY EDUC., https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/essa-state-plans-assessment-waivers/ (Apr. 19, 2019).
[12] For the 2018-19 school year, CA, CO, CT, FL, HI, IL, KS, MD, MN, NJ, NY, OR, PA, and VA exceeded the one percent cap without a waiver in place. *Alternate Assessments of Alternate Academic Achievement Standards Participation Rate Letters*, U.S. DEP'T OF EDUC. OFFICE OF ELEMENTARY & SECONDARY EDUC., https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/nclb-policy-letters-to-states (last visited Mar. 9, 2020).
[13] Letter from Patrick Rooney, U.S. Dep't of Educ. Office of Elementary and Secondary Educ., Information Regarding Consequences for States Not Meeting the Requirement to Assess Not More than 1.0 Percent of Students on the Alternate Assessment (Mar. 28, 2019), https://www2.ed.gov/admins/lead/account/saa/state1capconsequences19final.pdf.

warnings to 14 States that exceeded the cap but did not request a waiver.[14] For the 2019-20 school year, the Department has approved 12 State waiver requests, denied three State waiver requests, and was reviewing eight State requests at the time of writing.[15] Out of the 14 States that received warnings from the Department, the Department sent follow-up letters to the nine states that have not requested waivers, and all nine provided plans to reduce participation rates in alternate assessments and assessment participation data.[16] Only two States provided data sufficient to show that the State assessed fewer than 1 percent of all tested students on the alternate assessment.[17] The Department notified the remaining seven States of their continued non-compliance with the 1 percent cap, including three States that had rates "substantially above" the 1 percent threshold and have "not demonstrated any progress."[18]

Federal regulations require States to publish information submitted by LEAs detailing why they are exceeding the cap.[19] A review of State education agency (SEA) websites, however, shows that not all States are making such information readily available.[20] States are also required to provide notice and a reasonable opportunity for the public and LEAs to comment and provide input on the waiver request, but education advocates have raised questions about States' compliance with this requirement.[21] Of the

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[14] CA, CO, CT, FL, HI, IL, KS, MD, MN, NJ, NY, OR, PA, and VA exceeded the one percent cap without a waiver in place. In June 2019, the Department sent those states a letter outlining the consequences of exceeding the cap and requiring the states to submit a plan for how the state would come into compliance. *Alternate Assessments of Alternate Academic Achievement Standards Participation Rate Letters*, U.S. DEP'T OF EDUC. OFFICE OF ELEMENTARY & SECONDARY EDUC., https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/nclb-policy-letters-to-states (last visited Mar. 9, 2020).

[15] At the time of writing, AL, AR, FL, GA, HI, IL, KS, KY, MA, OH, and OK had received waivers from the Department; DE, LA, and TX were denied waivers; and MD, MI, NC, RI, TN, VA, VT, and WV were pending review, according to an analysis that Committee staff conducted using information from the U.S. Department of Education, the Advocacy Institute, and open records requests.

[16] *Alternate Assessments of Alternate Academic Achievement Standards Participation Rate Letters*, U.S. DEP'T OF EDUC. OFFICE OF ELEMENTARY & SECONDARY EDUC., https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/nclb-policy-letters-to-states (last visited Mar. 9, 2020).

[17] CO and HI assessed fewer than 1 percent of all tested students on the alternate assessment in science. *Alternate Assessments of Alternate Academic Achievement Standards Participation Rate Letters*, U.S. DEP'T OF EDUC. OFFICE OF ELEMENTARY & SECONDARY EDUC., https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/nclb-policy-letters-to-states/ (last visited Mar. 9, 2020).

[18] By October 1, 2020, CA, CT, MN, NJ, NY, OR, and PA must provide the Department with assessment participation data in reading/language arts, mathematics, and science; an update on the progress made in implementing their plans; and evidence that they are assessing less than 1 percent of all tested students on an alternate assessment for each subject. The Department warned MN, NJ, and PA that their reading/language arts, mathematics, and/or science participation rates were "substantially above" the 1 percent threshold. *Alternate Assessments of Alternate Academic Achievement Standards Participation Rate Letters*, U.S. DEP'T OF EDUC. OFFICE OF ELEMENTARY & SECONDARY EDUC., https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/nclb-policy-letters-to-states/ (last visited Mar. 9, 2020).

[19] 34 C.F.R. § 200.6(c)(3)(iv); *see also* ESEA § 1111(b)(2)(D)(ii)(II) (requiring a local education agency to submit information to the State justifying the need to exceed the cap).

[20] *See, e.g.*, *Every Student Succeeds Act (ESSA)*, OR. DEP'T OF EDUC., https://www.oregon.gov/ode/rules-and-policies/ESSA/Pages/default.aspx (n.d.); *Every Student Succeeds Act*, ALA. DEP'T OF EDUC., https://www.alsde.edu/dept/essa/Pages/home.aspx?navtext=ESSA (2018).

[21] NAT'L DOWN SYNDROME CONGRESS & THE ADVOCACY INSTITUTE, "Request for Waiver of State-Level Cap on the Percentage of Students who can be Assessed via the State Alternate Assessment on Alternate Academic Achievement

14 States that have received warnings for exceeding the cap, at least seven had assessment participation rates that were less than 95 percent of all students or students with disabilities, in violation of federal law.[22] Additionally, ESSA requires that a State providing for alternate assessments ensures that a child's parents are informed and promotes the involvement of students with the most significant cognitive disabilities in the general education curriculum, in a manner consistent with the Individuals with Disabilities Act (IDEA).[23]

Information about alternate assessment participation—such as waiver plans, letters on participation rates, subgroup participation, or Department communications to States—is distributed across multiple pages of the Department's website, and the Department's main ESSA webpage does not link to the Office of Elementary and Secondary Education webpage with State-level documentation.[24] Further, the Department required the 14 States it determined were out of compliance to submit plans on how the State will meet the 1 percent cap requirement by August 1, 2019, but these plans are not included on the Department's website, and the Department recently asked States still out of compliance to submit updates on their progress toward implementing their plans.[25] This information is vital for ensuring States are taking effective steps to comply with the law, and should be readily available so that parents, teachers, policymakers, and other education stakeholders can assess their State's reliance on these alternate assessment waivers and hold them accountable.

While the Department has granted waivers to give States needed flexibility and has denied some waiver requests, using the waivers year after year allows States to continue to assess a large number of students outside of the standard testing and accountability process required by ESSA. Additional information is

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Standards: Tips for Advocates," http://www.advocacyinstitute.org/ESSA/AA-AAS.Waiver.Request.Tips.for.Advocates.pdf (Nov. 2017).

[22] *See* ESEA § 1111(c)(4)(E); *Alternate Assessments of Alternate Academic Achievement Standards Participation Rate Letters*, U.S. DEP'T OF EDUC. OFFICE OF ELEMENTARY & SECONDARY EDUC., https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/nclb-policy-letters-to-states/ (July 1, 2019).

[23] *See* ESEA § 1111(b)(2)(D)(i)(II)-(III); *see also* 34 C.F.R. § 300.160.

[24] *See, e.g.*, *The Elementary Secondary Education Act (The Every Student Succeeds Act of 2016)*, U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/elsec/leg/essa/index.html (providing resources, regulations, and guidance, but not information on alternate assessments or the status of state waivers); *Alternate Assessments of Alternate Academic Achievement Standards Participation Rate Letters*, U.S. DEP'T OF EDUC. OFFICE OF ELEMENTARY & SECONDARY EDUC., https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/nclb-policy-letters-to-states (last visited Mar. 9, 2020) (featuring a list of the 14 warning letters the Department sent in June 2019); *Standards, Assessments and Accountability*, U.S. DEP'T OF EDUC., https://www2.ed.gov/admins/lead/account/saa.html (listing memos to States on alternate assessments); *ESSA State Plans Assessment Waivers*, U.S. DEP'T OF EDUC. OFFICE OF ELEMENTARY & SECONDARY EDUC., https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/essa-state-plans-assessment-waivers/ (listing correspondence from the Department for each State and some state waiver applications, but not linked from *Policy*, U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/landing.jhtml or *Every Student Succeeds Act*, U.S. DEP'T OF EDUC., https://www.ed.gov/essa).

[25] *See* Letters to CA, CT, MN, NJ, NY, OR, and PA, *Alternate Assessments of Alternate Academic Achievement Standards Participation Rate Letters*, U.S. DEP'T OF EDUC. OFFICE OF ELEMENTARY & SECONDARY EDUC., https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/nclb-policy-letters-to-states (last visited Mar. 9, 2020).

needed to better understand the Department's role in ensuring States are taking concrete steps to come into compliance.

First, the Committee requests that the Department make publicly available and post to its website by March 27, 2020 any and all State plans for reducing the percentage of students assessed with alternate assessments.

Second, the Committee requests the following documentation and responses by March 27, 2020:

1) Documentation on how the Department defines and measures:

    a) A State's description of how waiving the 1 percent cap on alternate assessments will advance student achievement,[26] along with documentation of how the Department informed States publicly about the process; criteria the Department used; and documentation of State responses that were found to be in compliance with this requirement.

    b) A State's demonstration of "substantial progress" towards achieving each component of the prior year's plan and timeline,[27] along with documentation showing each State that received a waiver in the 2018-19 school year met that standard of "substantial progress."

2) Documentation on the process the Department uses to monitor States' compliance with waiver requirements, which should include:

    a) Documentation to show how the Department assesses whether an SEA's notice and comment process complies with the statutory requirement;[28] and,

    b) Documentation to show how the Department has ensured States publish a local educational agency's justification for exceeding the 1 percent cap.[29]

3) Documentation to show how the Department determines whether and how State plans and timelines will lead States to comply with the 1 percent cap in future years.

4) Documentation showing what communications the Department had after June 2019 with States found to be out of compliance that did not submit a waiver request.

Third, by March 27, 2020, we would also like the Department to brief Committee staff, particularly on the following:

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[26] ESEA § 8401(b)(1)(C).
[27] 34 C.F.R. § 200.6(c)(4)(v).
[28] ESEA § 8401(b)(3)(A)(iii).
[29] ESEA § 1111(b)(2)(D)(i)(I); *see also* 34 C.F.R. § 200.6(c).

1) Which offices within the Department are involved in evaluating waiver requests; when such offices become involved; and, how the offices interact with each other with respect to the waiver/extension review process.

2) How the Department has factored States' criteria for determining student eligibility for alternate assessments into the waiver approval process, given States' varying definitions of cognitive disabilities[30] and requirements under ESSA.[31]

3) What forms of technical assistance regarding alternate assessment waivers the Department has made available to States, including:

    a) What contact the Department has made to States to inform them about available technical assistance;

    b) Which States have received technical assistance to date and what forms of assistance they received;

    c) What forms of technical assistance are planned; and,

    d) Where States can find information about relevant technical assistance efforts.

4) How the Department plans to follow up with States it required in February 2020 to submit assessment participation data, an update on the progress made in implementing their plans, and evidence that they are assessing less than 1 percent of all tested students on an alternate assessment for each subject.

5) How the Department has enforced the requirement that State plans and timelines address disproportionalities in the percentage of students from different subgroups taking the alternate assessments, and what common characteristics the Department identified in State responses it approved and State responses it denied.[32]

Finally, Committee staff has attempted to fill out the charts contained in Appendix A using information already available to the Committee. Due to limitations with the source material, however, the Committee is unable to verify all of the charts' components.[33] Accordingly, I request the Department

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[30] Martha L. Thurlow, Sheryl S. Lazarus, Deb A. Albus, Erik D. Larson & Kristin K. Liu, *2018-19 Participation Guidelines and Definitions for Alternate Assessments based on Alternate Academic Achievement Standards*, NAT'L CTR. ON EDUC. OUTCOMES, https://nceo.umn.edu/docs/OnlinePubs/NCEOReport415.pdf.
[31] ESSA §§ 1111(b)(2)(D)(i)(II)-(III), 1111(b)(2)(D)(ii)(I).
[32] 34 C.F.R. § 200.6(c)(4)(iv)(C).
[33] Committee staff prepared this chart by first referring to waiver documents the Department provided to the Committee, then consulting the Department's public facing website (found at https://oese.ed.gov/offices/office-of-formula-grants/school-

verify the information contained in Chart A and provide additional information where the Committee was unable to obtain data, and fill out Charts B, C, and D.

Please coordinate the requested briefing and provided the requested documents and responses to Benjamin Sinoff at Benjamin.Sinoff@mail.house.gov. Please direct all official correspondence to the Committee's Chief Clerk, Tylease Alli, at Tylease.Fitzgerald@mail.house.gov.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Cc: The Honorable Virginia Foxx, Ranking Member

Enclosures: Chart A, Chart B, Chart C, Chart D, Framework for Classifying Consequences for State Noncompliance with the 1.0 Percent Cap

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support-and-accountability/essa-state-plans-assessment-waivers), and finally reviewing waiver documents compiled by The Advocacy Institute (available at https://www.advocacyinstitute.org/ESSA/ESSA-OnePercentCapByState.shtml).