



U.S. Department of Education
Office of Inspector General

The Department's Approval of Alternate Assessment Waivers and Extensions

November 29, 2023
ED-OIG/I23DC0112

Inspection Report

NOTICE

Statements that managerial practices need improvements, as well as other conclusions and recommendations in this report, represent the opinions of the Office of Inspector General. The appropriate Department of Education officials will determine what corrective actions should be taken.

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF INSPECTOR GENERAL

Audit Services

November 29, 2023

TO: Adam Schott
Delegated the Authority to Perform the Functions
and Duties of the Assistant Secretary
Office of Elementary and Secondary Education

FROM: Bryon S. Gordon /s/
Assistant Inspector General for Audit

SUBJECT: Final Inspection Report, "The Department's Approval of Alternate Assessment Waivers
and Extensions," Control Number ED-OIG/I23DC0112

Attached is the subject final inspection report that consolidates the results of our review of the Department's approval of alternate assessment waivers and extensions. We have provided an electronic copy to your audit liaison officers. We received your comments in response to our draft report.

U.S. Department of Education policy requires that you submit a corrective action plan within 30 days of the issuance of this report. The corrective action plan should set forth the specific action items and targeted completion dates necessary to implement final corrective actions on the finding and recommendations contained in this final report. Corrective actions that your office proposes and implements will be monitored and tracked through the Department's Audit Accountability and Resolution Tracking System.

In accordance with the Inspector General Act of 1978, as amended, the Office of Inspector General is required to report to Congress twice a year on recommendations that have not been completed after 6 months from the date of issuance.

We appreciate your cooperation during this review. If you have any questions, please contact Michele Weaver-Dugan at (202) 360-8454 or Michele.Weaver-Dugan@ed.gov.

Attachment

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Results in Brief

What We Did

The objective of our inspection was to determine whether the U.S. Department of Education (Department) appropriately approved requests for alternate assessment waivers and waiver extensions for School Year (SY) 2021–2022.

To accomplish our objective, we reviewed alternate assessment waiver and waiver extension requests approved by the Office of Elementary and Secondary Education’s (OESE) Office of School Support and Accountability (SSA) for SY 2021–2022 as well as the corresponding internal memos provided by SSA to support its review and approval of the requests. We also held discussions with SSA officials and staff who were involved with reviewing and approving alternate assessment waiver and waiver extension requests.

What We Found

We found that the Department generally appropriately approved 21 of 22 requests for alternate assessment waivers and waiver extensions for SY 2021–2022. One request should only have been partially approved because it included a subject for which a waiver should not have been granted since prior year assessment participation rates were not met. While we noted that some requests did not fully meet all applicable requirements, we found that the related deviations were minor, the Department's rationale for concluding requirements were met, when provided, was reasonable, or we did not believe the deviations rose to a level that would warrant disapproval of the requests. We identified areas where the Department could strengthen its process, to include providing sufficient clarification and guidance to SSA staff performing the reviews on what constitutes acceptable State responses to certain requirements and how to adequately document determinations when exercising professional judgment so that a clear basis for the determination is provided. This would provide for greater consistency and less subjectivity in its treatment of State waiver requests.

What We Recommend

We recommend that the Assistant Secretary for OESE ensure that SSA develops, finalizes, and implements written guidance and review procedures for staff involved in reviewing and approving alternate assessment waiver and waiver extension requests to strengthen its process and provide for greater consistency and less subjectivity.

OESE Comments and Our Response

We provided a draft of this report to OESE for comment. We summarize OESE's comments at the end of the finding and provide the full text of the comments at the end of the report (see [OESE Comments](#)). OESE also provided technical comments that we considered and addressed, as appropriate.

OESE agreed that the Department can continuously review and approve its processes and noted that it has already taken several steps to strengthen its process. OESE stated, however, that it takes issue with the implication that its process does not provide consistent responses to States. It also noted that Department staff use their professional judgement, not subjectivity, to evaluate each State request to determine whether it meets the statutory and regulatory requirements.

OESE stated that the Department has taken steps to improve its process and supports to States in the past few months, including its release of the SY 2023–2024 memorandum to States on September 20, 2023. OESE stated that its memo included two points that address issues noted in our draft report specific to data verification of assessment participation rates and evidence of substantial progress. OESE also stated that for SY 2022–2023, the Department created a deliberative memo template for use by staff that contained internal notes that highlighted the salient points for each of the requirements and provided guidance to staff on how to document their evaluation review.

In technical comments provided by OESE specific to Recommendation 1.2, OESE stated that the memorandum to States issued on September 20, 2023, includes language that matches the regulations with respect to the State assurance regarding local educational agency (LEA) verifications and requested that the report note this change has already been implemented.

Regarding OESE's concern that the finding implies that its process does not provide consistent responses to States, we note that the finding focuses on inconsistencies related to the waiver review process itself, not in OESE's responses to States, that could be addressed through additional guidance and clarification from Department management to SSA staff. While we recognize that the use of professional judgment has a role in the review process, not providing sufficient documented guidance for staff to apply when performing initial reviews of requests provides more room for subjectivity, especially for requirements that are not as straightforward, such as substantial progress and State assurances of LEA verifications.

While we acknowledge the steps OESE has indicated it has taken that should assist in addressing some areas for improvement noted in our report, OESE's September 20, 2023, memorandum to States for SY 2023–2024 was issued subsequent to the completion of our review and its planned content was not noted during discussion of

preliminary findings with OESE management in August 2023 or in its written comments provided afterwards. Similarly, the deliberative memo template that OESE stated it updated for use during SY 2022–2023 was also not mentioned or provided to us during our review, including during related discussions concerning lack of review guidance, during the meeting where we presented our preliminary findings, or in written comments provided afterwards, even though the updated template would have been in use during that time. Therefore, we are unable to determine whether OESE’s stated improvements are responsive, at least in part, to Recommendation 1.1.

Regarding OESE’s actions concerning Recommendation 1.2, we noted that while the memorandum does include language pertaining to State assurances that matches the regulatory language in the section that applies to waiver extension requests, the applicable language in the section pertaining to States applying for a new waiver still does not.

Introduction

Under the Elementary and Secondary Education Act (ESEA) section 1111(c)(4)(E), as amended by the Every Student Succeeds Act (ESSA), each State educational agency is required to annually measure the achievement of not less than 95 percent of all students and 95 percent of all students in each subgroup of students¹ on its annual statewide assessments in reading and language arts, mathematics, and science. ESEA section 1111(b)(2)(D)(i)(I) provides that only students with the most significant cognitive disabilities may take an alternate assessment aligned with alternate academic achievement standards (alternate assessment) and limits the number of students that a State may assess with an alternate assessment to no more than 1 percent of the total number of students in the State who are assessed in that subject. The ESEA permits the U.S. Department of Education (Department) to grant a waiver to a State, if it meets certain statutory and regulatory requirements, to assess more than 1 percent of students with an alternate assessment.

On December 8, 2016, the Department published final regulations related to academic assessment under Title I, part A of the ESEA, including the requirements for State waiver requests if a State anticipates it will exceed the cap² in any subject for which assessments are administered in any school year, beginning with school year (SY) 2017–2018. In May 2017, the Department issued a memo to States regarding the procedures for a State to apply for such a waiver. In August 2018, the Department published additional information for States that may wish to apply to extend their existing 1-year waiver for an additional year. The Department has continued to publish information for States related to alternate assessment waiver and waiver extension requests for each subsequent school year.

¹ The ESEA defines the term “subgroup of students” as economically disadvantaged students; students from major racial and ethnic groups; children with disabilities; and English learners.

² If a State did not receive a waiver and assessed more than 1 percent of its students with an alternate assessment, the State is out of compliance with ESSA and the Department will consider actions including notifying the State and requiring it to submit a plan to come into compliance with the 1 percent cap, placing a condition on the State’s Title I Part A grant award, imposing high risk status on the State’s Title I Part A grant award, or withholding Title I Part A State administrative funds.

Finding. The Department Generally Appropriately Approved Alternate Assessment Waiver and Waiver Extension Requests for SY 2021–2022 But Could Strengthen Its Processes to Ensure Consistency and Lessen Subjectivity

We found that the Department generally appropriately approved 21 of 22 requests for alternate assessment waivers and waiver extensions for SY 2021–2022. One request should only have been partially approved because it included a subject for which a waiver should not have been granted since prior-year assessment participation rates were not met. While we noted that some requests did not fully meet all applicable requirements, we found that the related deviations were minor, the Department's rationale for concluding requirements were met, when provided, was reasonable, or we did not believe the deviations rose to a level that would warrant disapproval of the requests. In addition, we found that the Department could strengthen its processes to provide for greater consistency and less subjectivity in its treatment of State waiver requests. We noted that the Department did not always clearly document its analysis and basis for conclusions regarding how States met certain requirements, especially requirements where staff exercised professional judgment, did not have formal documented guidance or procedures for staff to use when reviewing waiver or waiver extension requests, and relied on information submitted by States in the waiver and waiver extension requests with minimal independent verification or analysis.

Approval Process for Alternate Assessment Waiver and Waiver Extension Requests

The Department's process for reviewing alternate assessment waiver requests is fundamentally the same as its process for reviewing waiver extension requests. Staff on the Office of Elementary and Secondary Education's (OESE) Office of School Support and Accountability (SSA) Assessment Team refer to the requirements in the ESEA and related regulations to assess both waiver and waiver extension requests. For waiver extension requests, States must also demonstrate substantial progress towards achieving each component of the prior year's plan and timeline. The Assessment Team does not have any formal guidance or procedures for reviewing requests. It relies upon what is specified in the ESEA, applicable regulations, and the Department's annual guidance to States.

Upon receipt of a waiver or waiver extension request, SSA's Assessment Team Lead assigns the request to Assessment Team staff.³ Staff document their review of the request in an internal memo (a template listing each of the ESEA requirements without any additional clarification or guidance, the staff analysis related to each of the requirements, and their overall recommendation for approval or denial of the request). The internal memo and proposed decision letter to the State are reviewed by the Assessment Team Lead and SSA Director. The SSA Director stated that he looks for consistency in terms of how the team reviews the information and the language in the letters that go back to the States and noted that SSA's goal is to make the information understandable to a cold reader. SSA officials stated that the memo and decision letter are also reviewed by other OESE senior officials and ultimately approved by the Assistant Secretary. The Department has 120 days to provide a State with a response on its waiver or waiver extension request.⁴

For SY 2021–2022, the Department received 25 waiver and waiver extension requests. The Department approved 18 waiver extension requests and 4 new waiver requests and denied 3 new waiver requests.⁵

Requirements for Alternate Assessment Waiver and Waiver Extension Requests

The specific requirements to be addressed in each waiver and waiver extension request are below, along with our analysis of the Department's review of the requirements for each of the 22 waiver and waiver extension requests approved for SY 2021–2022, as documented in the internal memos prepared by SSA staff and reviewed by SSA management and OESE senior officials.

³ The Assessment Team Lead also performs initial reviews of waiver and waiver extension requests. For SY 2021–2022, requests were divided equally for review between the Assessment Team Lead and one staff member.

⁴ Section 8401 of the ESEA does not indicate what happens if the Department does not respond to a waiver request within 120 days.

⁵ Although we did not review waiver denials as part of this inspection, we did note that the denial letters for each of the three States clearly outlined the Department's reasoning for denying each request. Denial reasons included failure to timely submit the waiver request, failure to meet required participation rates, lack of request for public comment, and not requiring local educational agency justifications.

Timeliness

We found that all but a few of the approved waiver and waiver extension requests were submitted within the required timeframe and that the Department provided reasonable explanations regarding its consideration of requests that were not submitted within the required timeframe.

According to 34 Code of Federal Regulations (C.F.R.) 200.6(c)(4)(i), requests must be submitted at least 90 days prior to the start of the State's testing window for the relevant subject(s). In its October 29, 2021, memo to States for SY 2021–2022, the Department added that it encouraged States to submit their request as soon as possible, even if there were fewer than 90 days before the beginning of the State's testing window. If the State could not provide all of the required information (such as all of the required data), the Department encouraged the State to explain in its request any missing information and to provide a clear timeline for when the data would become available.

We found that 14 of the 18 (78 percent) waiver extension requests for SY 2021–2022 were submitted at least 90 days prior to the start of the State's testing window. Of the four States that did not meet this requirement, two States missed the timeframe by only 1 or 2 days, one State submitted its extension request 56 days prior to the start of its testing window, and one State did not provide a specific testing window in its request. This State noted that its testing window informally begins on the first day of school.

During its review of the request submitted 56 days prior to testing, the Department noted that because the entire waiver request was posted for public comment prior to the 90-day deadline, the State made a good faith effort to make the deadline and gather public feedback on the request. For the State that did not provide a specific testing window in its request, the applicable internal memo stated that the Department should consider the waiver extension because even though it had not technically met the 90-day requirement, the State did provide complete data with its waiver extension request. We found the Department's rationale for these requests to be reasonable.

We found that two of the four (50 percent) new waiver requests were submitted at least 90 days prior to the start of the State's testing window. Of the two States that did not meet this requirement, one State missed the timeframe by only 8 days while another State submitted its waiver request 122 days after the testing window opened. The applicable internal memo indicated that this State noted that its request was late because the Department did not provide guidance on 1 percent waivers for SY 2021–2022 until it published the October 29, 2021, memo—after the State's testing window started. The internal memo recommended that the Department continue to consider the request given the extenuating circumstances of the late guidance from the Department. We found the Department's rationale for this request to be reasonable.

State-Level Data and Participation Rates

We found that all but one of the approved waiver and waiver extension requests met the required participation rates and that assessment participation rates for all of the requests were proportionate. We noted that the Department does not perform any verification of the participation rate data provided by the States and did not provide any guidance to staff regarding what constitutes proportionality.

According to 34 CFR 200.6(c)(4)(ii), requests must provide State-level data from the current or previous school year that shows the number and percentage of students in each subgroup who took the alternate assessment. The data must also show that the State has assessed at least 95 percent of all students and at least 95 percent of students with disabilities who are enrolled in grades for which the assessment is required.

In its memo to States on information regarding the requirements to request a waiver for SY 2021–2022, dated October 29, 2021, the Department stated that due to testing disruptions caused by the coronavirus pandemic, it was offering flexibility around the 95 percent testing requirement by allowing States to request a waiver to permit the use of the participation rates from SY 2018–2019 in place of the participation rates from SY 2020–2021. According to SSA, if a State did not request this waiver as part of its initial waiver request of the 1 percent alternate assessment cap and appeared to need it, the Department followed up via email communication to ask whether the State intended to ask to waive the participation requirement.

We found that 3 of the 18 (17 percent) waiver extension requests and 1 of the 4 (25 percent) new waiver requests met the 95 percent participation rate for SY 2020–2021. We further found that the remaining 15 out of 18 (83 percent) waiver extension requests and 3 out of 4 (75 percent) new waiver requests had an approved waiver to the 95 percent participation rate requirement for SY 2020–2021 and had met the requirement based on the SY 2018–2019 rates included in the request. However, we noted that four of the States had not specifically requested this waiver and the Department’s follow-up with these States was not documented.

Our review of the Department’s approval process for this requirement noted that the Department generally does not perform any verification of the assessment participation rates provided by States in their waiver and waiver extension requests outside of verifying the mathematical accuracy of any related calculations where applicable. If a State did not provide all of the required data, we noted that the Department would provide the State with a template to fill out with the required data. When asked how SSA verifies the accuracy of assessment participation rates provided on waiver and waiver extension requests, SSA officials stated that there is no formal process; however, SSA was not aware of any instances where a State’s actual participation rate ended up being below 95 percent when it was previously reported to meet the requirement.

For the 18 States with a waiver for the 95 percent participation rate requirement, we compared SY 2018–2019 participation rates provided on the waiver and waiver extension requests to the official data reported in ED Facts⁶ for all students and for students with disabilities related to assessments in math, science, and reading and language arts. We also compared SY 2020–2021 rates to the ED Facts data for the four States that did not need a waiver for the 95 percent participation rate. We found some minor⁷ differences between SY 2018–2019 participation rates provided on the waiver and waiver extension requests and the official data; however, we noted that the assessment participation rates in both the requests and the official data remained higher than the 95 percent requirement for all students and students with disabilities with the exception of one extension request. This request included data that indicated the assessment rate for science was above 95 percent when the ED Facts data indicated it was below 95 percent. When asked about this, SSA officials acknowledged that the official data indicated the participation rate was below 95 percent for the science assessment, that the waiver extension request likely should not have been recommended for approval, and that it was not caught during the multiple rounds of review that occurred.

Additionally, the Department’s October 29, 2021, memo stated that in considering the requests, it would evaluate the extent to which the assessment participation rate for all students in SY 2020–2021 was proportionate to the assessment participation rate for students with disabilities in SY 2020–2021. The Department stated that it expected that these rates would be very similar to each other. If the SY 2020–2021 rate of assessment participation for students with disabilities was demonstrably lower than that for all students, the State was to provide an explanation for this difference in participation. We noted that the Department did not establish any guidance for staff when determining whether the assessment participation rates were proportionate, and that the determination was ultimately based on the professional judgment of the Assessment Team. When determining the proportionality of the assessment participation rate for all students and the participation rate for students with disabilities, SSA staff stated that the rates should be similar and deferred to the Assessment Team Lead for the specific percentage range for rates to be deemed proportional. The SSA staff added that if the Assessment Team Lead approved the determination in the internal memo, they

⁶ ED Facts is a U.S. Department of Education initiative to collect, analyze, and promote the use of high-quality, pre-kindergarten through grade 12 data. ED Facts centralizes performance data supplied by State education agencies with other data assets, such as financial grant information, within the Department to enable better analysis and use in policy development, planning and management.

⁷ The participation rate differences noted were no greater than 3 percent.

probably felt the rates were proportionate. The Assessment Team Lead stated that to be considered proportionate, the assessment participation rate for students with disabilities would have to be roughly close to the assessment participation rate for all students. For example, SSA would not consider a 10 percent difference proportionate, while a 4 percent difference probably would be. The SSA official noted that there were no set criteria.

We compared the SY 2020–2021 assessment participation rates included on the waiver and waiver extension requests for all students for math, science, and reading and language arts to the assessment participation rates for students with disabilities for math, science, and reading and language arts. We found that the assessment participation rates varied by 5 percent or less in all of the waiver extension requests and in all but one of the three new waiver requests, specific to one subject area. In this request, we noted that the SY 2020–2021 assessment participation rate for students with disabilities was 8.3 percent lower than the assessment participation rates for all students. We found the Department’s assessment of proportionality to be reasonable.

State Assurances

We found that all of the approved waiver and waiver extension requests included State assurances. However, we noted inconsistencies in the information submitted by States in response to this requirement and that the Department did not adequately document its use of professional judgment when determining whether assurances were adequate. We also noted an inconsistency between language used in the regulations and the Department’s guidance to States.

According to 34 C.F.R. 200.6(c)(4)(iii), requests must include assurances from the State that it has verified that each local educational agency (LEA) that the State anticipates will exceed the 1 percent cap has followed each of the State’s guidelines for students with the most significant cognitive disabilities and will address any disproportionality in the percentage of students in any subgroup taking an alternate assessment. The Department’s October 29, 2021, memo stated that as part of their waiver or extension request, States needed to provide evidence that they verified that each LEA with more than 1 percent participation in the alternate assessment had followed participation guidelines and would address any disproportionality in participation in the alternate assessment.

In addressing this requirement, we found that some States provided copies of or links to assurance forms that they used for verification purposes while others provided assurance statements that LEAs had followed the State participation guidelines. While some States noted that they had performed LEA verifications, others had not yet done

so but stated that they would perform them.⁸ Furthermore, some States did not provide evidence or assurances of verification that LEAs would address disproportionality, but instead explained how they would address disproportionality. The applicable internal memos did not document why this was considered acceptable as verification that LEAs would address disproportionality.

We do not believe that these deviations rose to the level that would constitute inappropriate approval of the waiver requests. Rather, this is an area in which there is a need for further clarification and guidance from Department management to SSA staff performing the reviews on what constitutes acceptable responses to this requirement and how to adequately document their determinations.

Plan and Timeline

We found that all of the approved waiver and waiver extension requests included a plan and timeline that addressed each of the required items.

According to 34 CFR 200.6(c)(4)(iv) and the Department's October 29, 2021, guidance, requests must include a plan and timeline with clear, actionable steps and milestones that include

- a clear description of how the State will improve the implementation of its guidelines for participation in the alternate assessment, including by reviewing and, if necessary, revising its definition of students with the most significant cognitive disabilities, so that the State meets the 1 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 individualized education program team or other placement team understand and implement the guidelines established by the State for participation in an alternate assessment so that all students are appropriately assessed; and
- a clear description of how a State will address any disproportionality in the percentage of students taking an alternate assessment as identified through the data provided.

⁸ We noted that the Department's guidance to States for SY 2022–2023 was updated to note that verifications should be performed prior to the submission of the waiver requests.

Public Comment

We found that all but one of the approved waiver and waiver extension requests provided the required information related to public comment.

According to ESEA Section 8401(b)(3) and the Department's October 29, 2021, guidance, States submitting a waiver request are required to provide the public and any interested LEA with notice and a reasonable opportunity to comment and provide input on the request. In its waiver requests, States must include

- evidence or a description of the manner in which the State provided such notice to the public and interested LEAs;
- copies of all comments that the State received from LEAs in response to this notice, with a description of how the State addressed the comments; and
- evidence that the State also provided notice and a reasonable opportunity to comment to the public and LEAs in the manner in which the State customarily provides similar notice and opportunity to comment.

We found that all of the approved waiver requests and all but 1 of the 18 approved waiver extension requests included this information. For the State that did not include this information, the applicable internal memo stated that because this request was for an extension to the 2020–2021 waiver, the State was not required to seek and did not collect public comment on its intent to apply for an extension for the 2021–2022 school year. According to SSA officials, public comment is not one of the statutory requirements for waiver extensions, but the Department is asking States to request public comment for waiver extensions beginning with SY 2022–2023. They noted that the Department received feedback that public comment should be required for both waivers and extensions, and even though it is not statutorily required the Department decided that it would be in the public interest. We did not take exception with the Department's interpretation of the statute and note that its recent actions will make this requirement applicable to all future requests.

Evidence of Substantial Progress

We found that 4 of the 18 approved waiver extension requests did not specifically address progress made towards the plan and timeline included in their prior year's plan. Two additional States did not show progress in reducing the alternate assessment rate. Overall, we noted that the Department did not provide clear guidance to staff on what constitutes substantial progress, SSA's internal memos did not adequately document staff use of professional judgment in determining there was evidence of substantial progress, and letters to the States that did not show a reduction in the alternate assessment rate were inconsistent in addressing this issue.

According to 34 CFR 200.6(c)(4)(v), States requesting to extend a waiver for an additional year must meet the four requirements noted above and demonstrate substantial progress towards achieving each component of the prior year's plan and timeline.

We reviewed the SY 2021–2022 requests to determine whether they discussed substantial progress regarding the prior year's plan and timelines. We noted that 14 of the 18 (78 percent) waiver extension requests discussed progress toward the plans and timelines noted in the prior year's plan. For the four remaining waiver extension requests, the States' requests included information pertaining to reductions in alternate assessment participation rates but did not discuss progress towards meeting the prior year's plan and timeline. We noted the internal memos prepared for these four requests copied information that was provided by the State in response to other requirements, with only one memo specifically identifying that the request did not include this information, but that staff believed other information provided in the request would show progress made. We found that overall, the internal memos included limited analysis, consisting primarily of a copy of the information provided by States on their waiver requests with no further analysis of how the information demonstrated progress towards achieving each component of the prior year's plan and timeline.

We do not believe that these deviations rose to the level that would constitute inappropriate approval of the waiver extension requests. Rather, this is an area in which there is a need for further clarification and guidance from Department management to SSA staff performing the reviews on what constitutes substantial progress and how to adequately document their determinations, and to States with regard to how to better respond to this requirement in their requests.

As part of its review, the Department also considers whether the State has made progress in reducing the percentage of students taking the alternate assessment. We reviewed SY 2021–2022 waiver extension requests and the corresponding internal memos to determine whether States made progress in reducing the percentage of students taking the alternate assessment. We compared the alternate assessment participation rates for SY 2018–2019 to SY 2020–2021 and found that 2 out of 18 States (11 percent) did not show a reduction in the rate for at least 1 subject area, but instead showed an increase. According to the applicable internal memos, SSA staff attributed the increase primarily to the overall lower rates of assessment participation for all students and students with disabilities in SY 2020–2021. Because the total number of students tested decreased so dramatically due to the significant impact of the coronavirus pandemic, the alternate assessment participation rate, based on the total numbers of tested students, increased relative to SY 2018–2019. We found the Department's rationale for the increase noted in these two States to be reasonable.

However, we also found that the resulting approval letters issued to these two States were inconsistent in addressing this matter. Although the increases noted in both States were similar, one of the State letters did not mention anything about the increase in rates while the other directly addressed it and stated that the Department will expect to see demonstrated progress in reducing the percentage of students taking the alternate assessment when reviewing future waiver requests. We believe that this is due to the erroneous statement contained in the overall summary section of the applicable State internal memo that indicated the State had reduced the rate when it had not, even though it was correctly identified as an issue earlier in the internal memo. Further, this inconsistency was not noted during the Department's review process.

Principles 12.03 and 12.04 of the Government Accountability Office's "Standards for Internal Control in the Federal Government" state that policies should be documented in the appropriate level of detail to allow management to effectively monitor associated activities. Management should communicate the policies and procedures so that personnel can implement them for their assigned responsibilities. Principle 12.05 states that management should periodically review policies and procedures for continued relevance and effectiveness in achieving objectives or addressing related risks.

Additionally, Principle 13.04 states that

Management obtains relevant data from reliable internal and external sources in a timely manner based on the identified information requirements.... Reliable internal and external sources provide data that are reasonably free from error and bias and faithfully represent what they purport to represent. Management evaluates both internal and external sources of data for reliability... Management obtains data on a timely basis so that they can be used for effective monitoring.

Reasons for Noted Process Weaknesses

Weaknesses noted in SSA's review process, to include a lack of sufficient internal review guidance, lack of verification of State-submitted data, inconsistencies in State assurances of LEA verifications, and inadequate documentation of professional judgment used, can be attributed to several factors, including SSA's belief that no further documented procedures and guidance are necessary, that States have no incentive to fabricate data, and that some requirements can be met in different ways and need to be considered on a case-by-case basis. In addition, ED Facts data are not always available for verification at the time requests are submitted due to timing differences.

No Further Procedures or Guidance are Necessary

SSA officials stated that there are internal review procedures, citing their belief that between the statute and regulations, the available public guidance, the deliberative memo template, and the internal documentation of over 100 alternate assessment waivers that have been reviewed since 2018, there is ample information available for any knowledgeable staff tasked with reviewing future waivers. In written comments provided after the conclusion of our fieldwork, officials stated that they did not believe it was possible to provide additional guidance in the areas noted by the Office of Inspector General (OIG), stating that creating objective markers or clear definitions would likely require rulemaking. They indicated their belief that the existing process is clear and appropriate and that the process is well served in using appropriate professional judgment, which includes determining what constitutes substantial progress on a case-by-case basis. While we recognize that the use of professional judgment has a role in the review process, providing sufficient documented guidance for staff to apply when performing initial reviews of requests, especially for requirements that are not as straightforward, such as substantial progress, would assist staff in having a better understanding of what they should be looking for, lessen subjectivity, and help them to make better informed judgments. In addition, when employing professional judgment, it is even more important to ensure that the analysis is documented in a way that would provide a clear understanding of the rationale employed in reaching applicable conclusions and would better support SSA's accountability for providing consistent treatment of State requests.

States Lack Incentive to Fabricate Data and Data are Not Always Available for Department Verification

According to SSA officials, the reason for not always verifying data is that States have no incentive to fabricate data, knowing that they will eventually report the actual data in EDFacts. SSA officials noted that waiver and waiver extension requests are received in late fall. States usually submit their data from the previous school year to EDFacts in December and the data are not finalized until April. This means the data may not be available in EDFacts for the Department to verify at the time when States submit their requests. When asked whether SSA has done enough to verify that the data submitted in the waiver requests agrees with the actual data reported in EDFacts, one SSA official stated that this is challenging because SSA ideally will provide a response to a waiver request before the State's assessments begin. The testing window for many States is either in progress or completed by the time data are finalized in EDFacts and it would be too late for the State to take another course of action if SSA found that the final data were different than what was submitted. The SSA official added that it's unlikely that the data submitted with the waiver request would be different from the final data submitted because the same people from the State are collecting and aggregating the

data each time and, therefore, there are no incentives for them to provide different data. The SSA official added that for those reasons, SSA has not taken that final step of verifying the data after the fact. SSA officials stated that the Department does check the alternate assessment participation rates in EDFacts when finalized and will issue letters to States if the rates exceeded 1 percent and there was no approved waiver for the applicable subject area, which could result in grant conditions being placed on a State's Title I Part A grant award. We note that this statement would suggest there is incentive for a State to submit erroneous participation rate data when it is aware it would not be approved otherwise, to avoid consequences such as grant conditions if it exceeds the 1 percent participation rate without an approved waiver.

States Can Address LEA Verifications in Multiple Ways

Regarding the inconsistencies noted in evidence provided related to State assurances of LEA verifications, SSA officials did not address the first part of the requirement pertaining to State assurances of verification that LEAs followed State guidelines or related evidence expectations. They also stated that they believed there are multiple ways States could address disproportionality—by taking action to identify it or by having assured that the LEAs said they would address it. SSA officials added that they considered what logical actions the State described when addressing disproportionality. We note that States are already required to describe actions they are taking related to addressing disproportionality as part of another requirement related to State plans and timelines and that the applicable regulations and Department guidance clearly indicate this should be an LEA-level verification.

Interpretation of Substantial Progress

SSA officials stated that they carefully consider both the requirements for plans to address issues (pursuant to 34 CFR 200.6(c)(4)(iv)) in conjunction with the actual rates of alternate assessment participation. In general, they stated that the Department deemed substantial progress was met when a State demonstrated that it carried out logical actions to implement the prior year's plan and timeline that had the potential to reduce alternate assessment rates. They noted that, due to the assessment administration in SY 2021–2022 being more normal with respect to overall participation, when reviewing State waiver requests for SY 2022–2023, the Department evaluated “substantial progress” on a case-by-case basis, taking into consideration the State's circumstances but typically applying the plain language definition of “progress” as requiring a reduction in the percentage, and with the understanding that as a State gets closer to 1 percent, its ability to decrease the percentage of students taking the alternate assessment becomes harder. When asked whether SSA would find it helpful for States to add evidence of progress under each component of their prior year plan, the Assessment Team Lead stated that they didn't know. States are asked to not send a

copy of their prior year plan, and they know that SSA expects to see differences. The SSA Director stated that they could see the value in that, but it also could add too much information to the waiver requests.

When asked whether there is a limit on the number of waiver extensions a State can request before it suggests that it is not making substantial progress, the Assessment Team Lead stated that it is difficult for a State to change the alternate assessment participation rates; it cannot prevent a school or district from assessing more students with an alternate assessment. In addition, the Assessment Team Lead noted that the Department began allowing waivers in SY 2017–2018, with SY 2018–2019 being the second year that waivers were allowed, and that the assessment process was impacted by coronavirus pandemic disruptions during the following 2 years. The Assessment Team Lead added that the previous year was the first year that schools resumed normal attendance and had the 2 years of disruptions not occurred, the Department may have had different expectations regarding substantial progress. We noted that in its most recent guidance to States for SY 2022–2023, the Department has stated that it plans to use public comments on waiver extension requests to help determine whether a State has made substantial progress towards achieving each component of its prior year’s plan and timeline.

Effect of Process Weaknesses

Without documented waiver review procedures, staff lack sufficient guidance on what to look for in waiver requests and how to adequately document their analysis. As a result, the analyses performed and how it is documented may not be consistent between team members and analyses may rely too heavily on reviewer professional judgment, especially regarding what constitutes substantial progress as well as acceptable evidence concerning State assurances of LEA verifications. Because there was not sufficient guidance in these areas and professional judgment used was not adequately documented, it was difficult to clearly determine the basis for decisions made regarding whether the requirements were met. This can increase the potential for reputational risk to the Department if there becomes a perception that States may be treated inconsistently. Confusion may also exist regarding expectations about verification and communication with States if additional information is needed, to include how and where to document those communications. Policies and procedures help create consistency and standards within an organization and are key in training new employees. If current team members were to leave, knowledge about the process would also leave, placing new staff that may be added to the team at a disadvantage. The Department’s response regarding what it considers to be internal procedures do not address these concerns.

Further, by not performing any subsequent verification of submitted data against finalized data, States may realize that there is no risk submitting inaccurate data. While we recognize there are timing differences, checking at least some States' data, even after the fact, would provide notice that inaccuracies are likely to be found. This could be performed while data are being checked to determine whether States without waivers exceeded the 1 percent participation rate. Actions similar to those applicable for States exceeding the 1 percent rate without a waiver should be considered if discrepancies are noted that would have impacted State compliance with the participation rate requirement.

The Department has expressed its commitment to ensuring that all students are held to challenging State academic achievement standards and are appropriately assessed. Because participation in alternate assessments may delay or otherwise affect a student from completing the requirements for a regular high school diploma, it is important that the Department ensures its process for reviewing waivers is consistent and adequately documented, especially for areas that require use of professional judgment, and includes adequate guidance for areas that are not clearly defined, as well as some level of validation of reported data.

Recommendations

We recommend that the Assistant Secretary for OESE—

1.1 Ensure that SSA develops, finalizes, and implements written guidance and review procedures for staff involved in reviewing and approving alternate assessment waiver and waiver extension requests, to include

- Steps for SSA staff to verify assessment participation rates (even if this would need to occur after requests are approved) and actions to be taken if discrepancies are noted;
- expectations for how staff should document communication with States during the review process;
- expectations for how staff should document their review and analysis of requirements in the internal memo to clearly show how a State met or did not meet requirements, especially in areas where professional judgment is exercised; and
- clear guidance related to areas that may lend themselves to subjectivity, to include what constitutes substantial progress and what is an acceptable response to State assurances of LEA verifications.

1.2 Ensure that language in the Department's annual memos to States with regard to LEA verifications aligns with language included in the regulations to eliminate confusion

and clarify expectations regarding what information should be included in requests to ensure compliance with State assurance and substantial progress requirements, to include specifically addressing progress made on each component of their prior year plan and timeline.

OESE Comments

OESE did not state whether it agreed or disagreed with our finding and recommendations. OESE agreed that the Department can continuously review and approve its processes and noted that it has already taken several steps to strengthen its process.

OESE stated, however, that it takes issue with the implication that its process does not provide consistent responses to States and also noted that Department staff use their professional judgement, not subjectivity, to evaluate each State request to determine whether it meets the statutory and regulatory requirements. OESE reiterated its multiple layers of review and stated that it believes that this review system helps create consistency in the Department's decisions. OESE also noted that OIG agreed with the Department's decisions, which is a clear indication that the decisions are consistent and not based on subjectivity. Further, OESE stated that achieving the right result through a thoroughly tested, vetted, reviewed, and consistent process should be sufficient to validate the effectiveness of a process and that there could be multiple ways to accomplish a desired or mandated outcome.

OESE stated that the Department has taken steps to improve its process and supports to States in the past few months, including its release of the SY 2023–2024 memorandum to States on September 20, 2023. OESE stated that its memo included two points that address issues noted in our draft report:

- a. Each State request for a waiver extension must report on the progress of its plan and timeline submitted last year and additional actions the State plans for SY 2023–2024, including milestones previously achieved. The Department expects States to describe the plan for SY 2023–2024, and report on the work performed on the plan that was submitted for SY 2022–2023 to clearly demonstrate and explain how the State's plan has evolved and been improved from the prior year's waiver request.
- b. When preparing the required assessment participation data for waiver or 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 and provide an explanation for any discrepancies as part of the request. OESE stated that to the extent possible, the Department will look at the State's assessment participation data submitted to EDFacts in the

State's request and will request information if there are differences to explain the discrepancy, which will likely delay the response to the waiver request.

In addition, OESE stated that for SY 2022–2023, the Department created a deliberative memo template for use by staff that contained internal notes that highlighted the salient points to be used in the review of each requirement for these waivers and provided guidance to staff on how to document their evaluation review within the analysis portion of the memorandum.

Lastly, in technical comments provided by OESE specific to Recommendation 1.2, OESE stated that the memorandum to States issued on September 20, 2023, includes language that matches the regulations with respect to the State assurance regarding LEA verifications and requested that the OIG report note this change has already been implemented.

OIG Response

Regarding OESE's concern that the finding implies that its process does not provide consistent responses to States, we note that the finding focuses on inconsistencies related to the waiver review process itself, not in OESE's responses to States, that could be addressed through additional guidance and clarification from Department management to SSA staff. While we agree that multiple levels of review can be a good practice to help to create consistency, provided the review process is thorough and substantive, as noted in our finding our review did identify a situation in which approval letters issued to two States that had a similar issue were inconsistent in addressing a matter. Additionally, we identified a waiver extension request that should not have been recommended for approval in one subject that was not caught during the multiple rounds of review that occurred. While we recognize that the use of professional judgment has a role in the review process, not providing sufficient documented guidance for staff to apply when performing initial reviews of requests, especially for requirements that are not as straightforward, such as substantial progress and State assurances, provides more room for subjectivity.

We did agree that OESE's final decisions were correct for 21 of the 22 requests that we reviewed. However, the likelihood of continuing to produce correct results in the future would be increased if weaknesses noted in the methodology were improved.

While we acknowledge the steps OESE has indicated it has taken that should assist in addressing some areas for improvement noted in our report, OESE's September 20, 2023, memorandum to States for SY 2023–2024 was issued subsequent to the completion of our review and its planned contents were not noted during discussion of preliminary findings with OESE management in August 2023 or in its written comments provided afterwards. This would have provided time for us to more fully consider the

impact of the noted actions. However, the planned actions noted, if implemented, would appear to address weaknesses concerning data verification. In addition, the clarification of expectations to States regarding information to be provided in waiver extension requests pertaining to substantial progress should assist in the analysis and documentation of that requirement in the waiver review process, provided such expectations are met. Similarly, the deliberative memo template that OESE stated it updated for use during SY 2022–2023 was also not mentioned or provided to us during our review, including during related discussions concerning lack of review guidance, during the meeting where we presented our preliminary findings, or in written comments provided afterwards, even though the updated template would have been in use during that time. Therefore, we are unable to determine whether OESE’s stated improvements are responsive, at least in part, to our recommendations.

Regarding OESE’s actions concerning Recommendation 1.2, we noted that while the memorandum does include language concerning State assurances that matches the regulatory language in the section pertaining to States applying to extend a waiver, the applicable language in the section pertaining to States applying for a new waiver still does not.

Appendix A. Scope and Methodology

To answer our objective, we reviewed the laws, regulations, and guidance related to the Department’s approval of alternate assessment waiver and waiver extension requests. We also reviewed all alternate assessment waiver and waiver extension requests the Department approved for SY 2021–2022 as well as the corresponding internal memos provided by the Department to support its review and approval of the waiver and waiver extension requests. We held discussions with SSA officials and staff involved in the waiver and waiver extension request review process. We also reviewed EDFacts data to verify State assessment participation rates as reported on waiver and waiver extension requests.

We performed the work for this review from December 2022 through August 2023. We discussed the results of our review with OESE officials on August 21, 2023.

Use of Computer-Processed Data

We relied upon computer-processed data from EDFacts, the Department’s centralized data collection, analysis, and reporting initiative, to compare to the SY 2018–2019 assessment participation rates as reported on waiver requests submitted by States that requested a waiver for the 95 percent participation requirement on their SY 2021–2022 requests to determine whether there were any discrepancies between the data. We also compared the SY 2020–2021 assessment participation rates as reported on waiver requests submitted by States that did not request a waiver for the 95 percent participation requirement to official data reported in EDFacts to determine whether there were any discrepancies. Because EDFacts is the Department’s system of record for such information, we did not assess its reliability, accuracy, or completeness. We concluded that the computer-processed data were sufficiently reliable for the purpose of our review.

Compliance with Standards

We conducted our work in accordance with OIG quality control standards and the Council of the Inspectors General on Integrity and Efficiency (CIGIE) “Quality Standards for Federal Offices of Inspector General,” which require that we conduct our work with integrity, objectivity, and independence. We believe that the information obtained provides a reasonable basis for our conclusions.

Appendix B. Acronyms and Abbreviations

alternate assessment	Alternate Assessment Aligned with Alternate Academic Achievement Standards
CFR	Code of Federal Regulations
Department	U.S. Department of Education
ESEA	Elementary and Secondary Education Act
ESSA	Every Student Succeeds Act
LEA	local educational agency
OESE	Office of Elementary and Secondary Education
OIG	Office of Inspector General
SY	School Year
SSA	Office of School Support and Accountability

OESE Comments



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

October 19, 2023

Michele Weaver-Dugan
Regional Inspector General for Audit
Internal Operations, Philadelphia Audit Team
Office of Inspector General
michele.weaver-dugan@ed.gov

Dear Ms. Weaver-Dugan:

Thank you for the opportunity to review the draft inspection report, “The Department’s Approval of Alternate Assessment Waivers and Extension” (ED-OIG/I23DC0112). Below we provide technical comments and edits for your consideration on the report.

As a general matter, we appreciate your finding that the U.S. Department of Education (Department) appropriately approved waiver requests and waiver extension requests for SY 2021-2022. While you noted that you believed some requests did not fully meet all applicable requirements, you found the deviations minor, our rationale for our conclusions reasonable, and you agreed with our decisions. You provided one recommendation, that we develop, finalize, and implement written guidance and review procedures for staff involved in reviewing and approving alternate assessment waiver and waiver extension requests to strengthen our process and provide for greater consistency and less subjectivity. The Department agrees that we can continuously review and approve our processes and have already taken several steps this year to strengthen our process, which we describe below.

However, the Department takes issue with the implication that our process does not provide consistent responses to States. Each State presents its individual case for a waiver, which the Department reviews individually. We take into account each State’s context, history with respect to alternate assessment participation, and approach to providing guidance, technical assistance, and other supports to districts, schools, and IEP Teams. The Department staff use their professional judgement, not subjectivity, to evaluate each request to determine whether it meets the statutory and regulatory requirements for a waiver of the cap on the percentage of students who may be assessed with an alternate assessment. Each State’s request is reviewed by a staff member. The team reviewing the requests meets regularly and discusses the requests. Each request is then reviewed by the Group Leader for Assessments, the Director of the Office of School Support, the Deputy Assistant Secretary for Formula Grants, and other senior staff before the recommendation is reviewed by the OESE Assistant Secretary for a final decision. This review system, with multiple checks for each State, helps create consistency in the Department’s decisions. As you note in your summary, you agreed with the Department’s decisions; this is a clear indication that the Department’s decisions are consistent and not based on subjectivity. To hold otherwise seems akin to a teacher not accepting a pupil’s math problem answer, not because the result was incorrect, but because the pupil arrived at the answer using a method that was different than what the teacher expected. In our opinion, achieving the right result through a thoroughly tested, vetted, reviewed, and consistent process

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should be sufficient to validate the effectiveness of a process. It is certainly much more than “the end justifying the means”—which is not what we are suggesting—but rather, that there could be multiple ways to accomplish a desired or mandated outcome.

The Department has taken several steps to improve our process and supports to States in the past few months with respect to requests to waive or requests to extend a waiver of the cap on alternate assessment participation. Namely:

1. On September 20, 2023, the Department released a memorandum to the field reminding States of the statutory and regulatory requirements for requesting a waiver of these requirements. You can find the memorandum here: <https://oese.ed.gov/files/2023/09/OnePercentWaiverRequirements20232492023.pdf>. In particular this year, the Department included two points that address comments in this draft report:
 - a. Each State request for a waiver extension must “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.”
 - b. We note that “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.”The Department has released a similar memorandum each year. You can find all of them publicly available here: <https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/standards-and-assessments/>.
2. On September 26-27, 2023, the Department hosted a conference for State educational agencies on statewide assessments. One-third of the agenda of that conference was focused on alternate assessment participations rates. That section of the conference was entitled, “Best Practices for Reducing and Maintaining Appropriate Alternate Assessment based on Alternate Academic Achievement Standards (AA-AAAS) Participation Rates” and featured national experts and State educational agency staff sharing their work to ensure students are appropriately included in the statewide assessments. All of the session materials from the conference are available at: <https://apps1.seiservices.com/2023SSA/Default.aspx>.
3. When reviewing each State’s waiver or waiver extension request, the Department uses a consistently formatted memorandum to summarize and analyze the State’s request. This memorandum template includes each statutory and regulatory requirement. Doing so ensures that each element is properly and consistently considered in our review of the request. In developing

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our review process for waiver requests in the 2022-23 school year, we created a deliberative memo template for use by staff that contained internal notes for each of the requirements for these waivers. The internal notes highlighted the salient points to be used in the review of each requirement and provided guidance to staff on how to document their evaluation review within the analysis portion of the memorandum.

Thank you for your consideration of the Department's feedback to this draft report.

Respectfully,

**MARK
WASHINGTON**

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Mark Washington
Deputy Assistant Secretary
Office of Elementary and Secondary Education