

NEBRASKA DEPARTMENT OF EDUCATION
PUBLIC NOTICE AND COMMENT PERIOD
WAIVER REQUEST PURSUANT TO 34 C.F.R. §200.6(c)(4)
DECEMBER 2021

Pursuant to 34 C.F.R. §200.6(c)(4), the Nebraska Department of Education (“NDE”) will seek a waiver extension for the 2021-2022 school year from the Secretary for the United States Department of Education. The regulation in question, found at 34 C.F.R. 200.6(c)(2), requires State Education Agencies such as the NDE to limit the total number of students assessed in a subject area using an alternate assessment. The limit on the percentage of students assessed by the alternate assessment is set by the federal regulation, stating there shall be no more than one (1) percent of the total number of students taking the alternate assessment assessed in each subject area.

Specifically, 34 C.F.R. 200.6(c)(2) provides:

For each subject for which assessments are administered under § 200.2(a)(1), the total number of students assessed in that subject using an alternate assessment with alternate academic achievement standards under paragraph (c)(1) of this section may not exceed 1.0 percent of the total number of students in the State who are assessed in that subject.

NOTICE OF PUBLIC COMMENT PERIOD: Any individual or organization may submit written comments on the proposed waiver pursuant to 34 C.F.R. §200.6(c)(4). Written comments shall be accepted through Monday, December 20, 2021.

You may submit comments by Google Form, [Alternate Waiver Comment Form 2021](#). Additionally, you may send written comments on the proposed waiver to Dr. Jeremy Heneger, Director of Statewide Assessment, Nebraska Department of Education, P.O. Box 94987 Lincoln, NE 68509-4987. Comments may be sent by fax at 402- 742-2319 or through email at jeremy.heneger@nebraska.gov.

The requirements for a State Education Agency to seek a waiver are set forth at 34 C.F.R §200.6(c)(4) and reproduced below. The NDE is requesting a waiver in response to the requirements set forth at 34 C.F.R. §200.6(c)(4) because its most recent data on the percentage of students taking Nebraska’s alternate assessments in all subject areas stands at 1.14%.

The waiver requirements are in **bold** lettering below.

If a State anticipates that it will exceed the cap under paragraph (c)(2) of this section with respect to any subject for which assessments are administered under § 200.2(a)(1) in any school year, the State may request that the Secretary waive the cap for the relevant subject, pursuant to section 8401 of the Act, for one year. Such request must—

(i) Be submitted at least 90 days prior to the start of the State's testing window for the relevant subject;

The NDE will submit a waiver request to the U.S. Department of Education 90 days prior to the start of Nebraska's testing window for its alternate assessment. The subject areas are: English Language Arts, Mathematics, and Science. The start date for each subject will be March 21, 2022.

(ii) Provide State-level data, from the current or previous school year, to show—

(A) The number and percentage of students in each subgroup of students defined in section 1111(c)(2)(A), (B), and (D) of the Act who took the alternate assessment aligned with alternate academic achievement standards; and

The NDE will gather district data on the current and previous years' participation rates in each subject of the alternate assessment. It is important for the NDE to identify whether students taking Nebraska's alternate assessment are students clustered in "subgroups," such as category of disability under the Individuals with Disabilities Education Act (IDEA); racial/ethnic groups; gender; English Learners; or eligible for free or reduced price school meals.

These data will help NDE understand whether there are:

- Districts in which the numbers of students participating in alternate assessments are higher than expected;
- Certain grades in which participation in the alternate assessment is higher than expected; and
- Potential disproportionality in specific subgroups and grade levels of students taking alternate assessments.

The NDE will gather data on the characteristics of students participating in the alternate assessment to provide a standard for determining whether students are participating who do not have significant cognitive disabilities.

Districts or schools with unusual patterns or higher rates than other districts may require additional investigation to determine if there are unique reasons for higher percentages of students participating in the alternate assessment. The NDE will share the data collected with districts. This will allow districts to compare the percentage of their students participating in the alternate assessment with students in other districts in the state participating in the same assessment. After sharing the data, the NDE will provide training to the districts that exceed the one percent cap set forth at 34 C.F.R. §200.6(c)(2).

(B) The State has measured the achievement of at least 95 percent of all students and 95 percent of students in the children with disabilities subgroup under section 1111(c)(2)(C) of the Act who are enrolled in grades for which the assessment is required under § 200.5(a);

Nebraska requires all students enrolled in public K-12 schools be assessed with accommodations, without accommodations or with an alternate assessment. The only exception to participation for *any* student is for students who receive a medical or extraordinary circumstances non-participation waiver. Nebraska follows the federal participation requirement and, to date has met or exceeded the federal guidelines set at 95% participation.

(iii) Include assurances from the State that it has verified each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in any subject for which assessments are administered under § 200.2(a)(1) in that school year using an alternate assessment aligned with alternate academic achievement standards—

(A) Followed each of the State's guidelines under paragraph (d) of this section, except paragraph (d)(6); and

The NDE Assessment and Special Education Offices had an internal review of the definition and guidelines and determined that they did not need any revisions at this time.

The NDE will request justification from districts which exceed the one percent cap. The NDE will continue to provide professional learning opportunities for IEP team members and other educators, particularly on the nature of the alternate assessment and the students who are eligible to participate under the Participation Guidelines.

(B) Will address any disproportionality in the percentage of students in any subgroup under section 1111(c)(2)(A), (B), or (D) of the Act taking an alternate assessment aligned with alternate academic achievement standards;

The NDE will address any disproportionality in the percentage of students taking the alternate assessment by undertaking the following activities. The NDE will:

- monitor alternate assessment data
- require justification from districts that exceed the one percent cap
- provide guidance to districts on Participation Guidelines for student alternate assessments
- gather district data on current and previous years' alternate assessment participation rates in each subject area tested
- analyze the data by subgroup, such as race/ethnicity, gender, English learner and students eligible for free or reduced price school meals, to determine whether disproportionality exists for students participating in the alternate assessment
- gather district data on current and previous year alternate assessment participation rates by disability in each subject area
- address disproportionality with districts through training on the Participation Guidelines

(iv) Include a plan and timeline by which—

(A) The State will improve the implementation of its guidelines under paragraph (d) of this section, including by reviewing and, if necessary, revising its definition under paragraph (d)(1), so that the State meets the cap in paragraph (c)(2) of this section in each subject for which assessments are administered under § 200.2(a)(1) in future school years;

The NDE Assessment and Special Education Offices had an internal review of the definition and guidelines and determined that they did not need any revisions at this time.

The NDE will monitor alternate assessment data and request justification from districts which exceed the one percent cap. The NDE will continue to provide professional learning opportunities for IEP team members and other educators, particularly on the nature of the alternate assessment and the students who are eligible to participate under the Alternate Assessment Participation Guidelines.

(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 in a given subject in a school year using an alternate assessment aligned with alternate academic achievement standards to ensure that only students with the most significant cognitive disabilities take an alternate assessment aligned with alternate academic achievement standards. 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 under paragraph (d) of this section so that all students are appropriately assessed; and

The NDE will continue to provide professional learning opportunities for IEP team members and other educators. The training will be on the purpose of the alternate assessment and the characteristics of students who are eligible to participate in the alternate assessment, based on the Alternate Assessment Participation Guidelines and IEP Team Decision Making Flow Chart Nebraska Statewide Alternate Assessment for Students with the Most Significant Cognitive Disabilities.

All educators, including those who are not members of IEP teams, must have a solid understanding of how to make appropriate instruction and assessment decisions for all students, including students who may be candidates to participate in alternate assessment. The NDE will provide technical assistance on the accessibility features and accommodations available for the general assessment, as those features and accommodations enable most students with disabilities to participate meaningfully in the general assessment.

Technical Assistance will include:

- Using the Participation Guidelines to make assessment participation decisions; piloting case studies to help districts understand which assessment should be administered to students and give examples of characteristics of learners
- Selecting, implementing and evaluating accessibility features and accommodations for instruction and assessments;
- Differentiating instruction and providing better access to academic content; and
- Having high expectations for all students regardless of the category of their disability.

The NDE will make informational resources available to parents of students with disabilities so parents can contribute in the IEP decision making process

regarding the assessment in which their child participates. Parent informational resources will include:

- Explanation of the Alternate Assessment Participation Guidelines;
- Requirements of the alternate assessment; and
- Accommodations that enable students to participate in the general assessment.
- NSCAS Alternate Assessment Frequently Asked Questions

(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;

The NDE will gather district data on current and previous years' alternate assessment participation rates in each subject area and will analyze the data by subgroup to determine whether disproportionality exists for students participating in the alternate assessment.

In the event the data reveal any disproportionality in the percentage of students taking the alternate assessment, the NDE will address the issue as follows:

- The NDE will provide technical assistance on Participation Guidelines to districts and schools with disproportionality.
- In districts whose data indicate disproportionality in the percentage of students taking the alternate assessment, the NDE will monitor districts with the highest rates of disproportionality. The NDE will achieve this by reviewing individual student files of students in the affected subgroup, to determine whether decisions to place students in the alternate assessment were made according to law.
- In the event the decision to place the student on the alternate assessment was not made pursuant to the applicable regulations and the Participation Guidelines, the NDE will direct the district to reconsider the student's eligibility for the alternate assessment.