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Massachusetts Department of Elementary and Secondary Education
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To whom it may concern:

The Center for Law and Education (“CLE”) appreciates the opportunity to comment upon the Massachusetts Department of Elementary and Secondary Education’s (“DESE” or “Department”) intent to seek a waiver of the federally imposed 1% cap on student participation in the statewide alternate academic assessment based on alternate achievement standards (“AA-AAAS”). CLE is a non-profit resource, advocacy and support organization that strives to make high quality education a reality for all students and help low-income communities to address their education problems effectively. CLE represents low-income students and their families and submits these comments on behalf of those who are students with disabilities who are participating on alternate assessments aligned to alternate academic achievement standards or who are vulnerable to being found eligible for such participation under DESE's current policy. Signed on to these comments are MetroWest Legal Services¹, the Justice Center of Southeast Massachusetts, and the Children’s Law Center of Massachusetts².

* * * * *

Assigning a student to an AA-AAAS is an intentional decision that, *because of* the student’s disability, the student should receive something “less than” (i.e., lower achievement standards) both their peers with less significant disabilities and those without disabilities. In this case, that “something” is the precious thing that the State has declared all other students must receive: an educational program aimed at achieving the knowledge and skills all students should master. And along with that, the opportunity to obtain a high school diploma. Because of this, every student erroneously assigned to take an AA-AAAS suffers a grievous harm – one that will likely significantly impair their immediate and long-term

¹ MetroWest Legal Services provides free civil legal aid to assist individuals in our service area who cannot afford an attorney to navigate the legal system. Our priority practice areas include: Immigration; Elder Law; Government Benefits; Family Law; School and Student Rights; Housing.

² Consistent with its mission, the Children’s Law Center of Massachusetts (CLCM) aims to secure equal justice and maximize opportunity for low-income children and youth across the state by providing quality, culturally sensitive advocacy and legal services. The CLCM provides a comprehensive array of legal representation in the areas of education, child welfare (abuse & neglect), immigration, juvenile justice, and various other matters such as mental health, insurance access, family-law related issues, and support to victims of crime.

educational trajectory – from which they may never recover. Accordingly, a state that uses AA-AAAS has a paramount civil rights responsibility to ensure that, consistent with the intent and purpose of Title I, the only students from the pool of students with the “most significant cognitive disabilities” who may even be considered to take AA-AAAS are those students for whom solely because of their disability it is *impossible* for them to learn to grade-level achievement standards even with the best educational supports and interventions. Failing to properly reach certainty about that impossibility is what we mean by erroneous assignment.

That meaning is obvious and inherent in Section 504, along with Title I. When the state identifies the knowledge and skills that all students should master and tasks schools to enable them to do so, but then exempts schools from that task for certain students explicitly because of their disabilities as that one exception for whom that will not be expected (rather than seeking to address their needs so that they may benefit from that mandate like other students), that is on its face grievous discrimination on the basis of disability. What then could possibly make such denial permissible? Only an air-tight, error-free determination that a student is truly and permanently incapable.

Many students, both with and without disabilities, fail to attain the knowledge and skills expected for all, for a variety of reasons (albeit disproportionately students of color and students from economically disadvantaged families). And once students have fallen significantly behind grade level, the likelihood of that failure goes up. A variety of factors go into that failure. But schools do not, and cannot, remove other students from the assessments and curricula tied to those grade-level standards. It is essential to recognize that those other factors affect students with disabilities no less than students without, and to ensure that those factors play no role in the decision to remove them from the assessment and program standards expected for all.

The harm is exacerbated by the one-size-fits all nature of the alternate achievement standards of AA-AAAS in Massachusetts, as in other states. Individual students dropped from the grade-level achievement standards are dropped into a single set of alternate achievement standards, which can be set extremely low, regardless of the variation among such students of the extent of their cognitive impairment and in what they may be able to achieve.

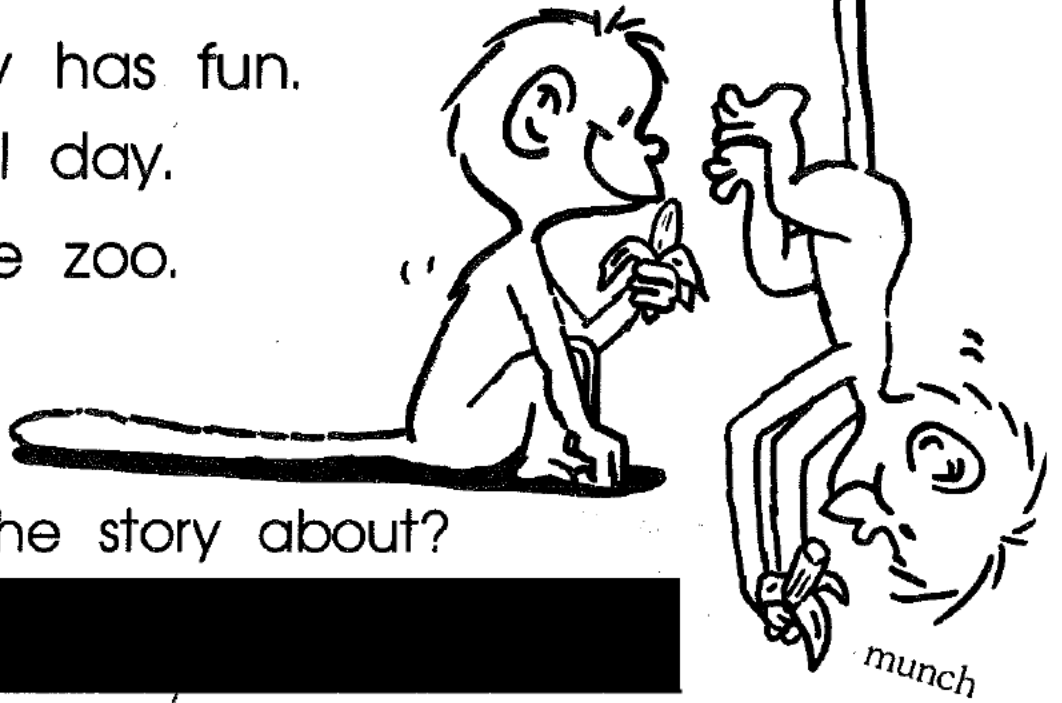
With all this in mind, it is also essential to understand and act upon the recognition that the underlying goal and legal mandate is to eliminate any student’s wrongful individual assignment to the AA-AAAS, and that the 1% cap is merely a tool to help achieve that goal and comply with that mandate. Meeting the cap cannot be a substitute for it. (And at the same time, the best and most effective way to bring the rates down is to reform the processes by which students are placed in order to eliminate the errors.) A state with an average below 1% will still have many districts above it. But more importantly, even in a district below it, that overall rate does not mean that students are not being erroneously placed in the Alt. And for those students and their families, there is no solace in the fact that the number of other such students has gone down. The “Individuals” in the title of IDEA is no accident.

For those who may feel comforted by the federal requirement that students assigned to AA-AAAS and not assessed on and taught to grade-level *achievement* standards must nevertheless be assessed on and taught to grade-level *content* standards, we urge you to look at an example of what that actually looks like for a fifth grader in one of the Commonwealth’s schools – on the next page.

Name _____

The Monkey

The monkey has fun.
He plays all day.
He is in the zoo.



1. Who is the story about?

2. Does the monkey have fun?

3. Does the monkey play?

4. When does the monkey play?

5. Where is the monkey?



Unfortunately, Massachusetts has a long history of failing to ensure that local educational agencies (“LEAs”) do not erroneously assign students to AA-AAAS, and the damage that failure has wrought cannot be understated. These students, sometimes as early as grade 3, are steered off the diploma track, often educated in segregated classrooms, and are without access to grade-level curriculum and higher-order thinking. Deemed unable to learn at the level expected for all other students in the state, they are relegated to years of practicing “life skills,” held to lower expectations, and taught and tested based on lower standards. Little consideration is given to whether some or all of these students labeled as such could nevertheless learn to grade-level achievement standards given appropriate interventions.

Massachusetts’s failure to ensure “LEAs” do not erroneously assign students to AA-AAAS has fallen most heavily on students already more likely to face systemic barriers to realizing their right to a high-quality education. Multilingual learners, African American students, Hispanic/Latinx students, and students from low-income families are all – and have been for years – disproportionately identified in Massachusetts for this non-grade-level track. And parents, particularly those with limited English proficiency, are often unaware that the quality of their child’s education has cratered, denying them meaningful opportunities for academic achievement and a real diploma. Many are also unaware that with appropriate interventions, their children could reclaim those opportunities and stay on the diploma track.

It is CLE’s position that the United States Department of Education (“USED”) *should not grant Massachusetts a waiver extension*. The 1% cap is in place to “ensur[e] that all students, including children with disabilities, are held to the highest standards of academic achievement, and to protect against the inappropriate use of the alternate assessment.”³ A waiver extension for a state that has continuously failed to meet the 1% cap and ensure students are not inappropriately placed on AA-AAAS “[vitiat[e]s]...the statutory restriction on a State’s use of an AA-AAAS....”⁴ We ask USED to act with the urgency this issue demands and respectfully request that USED deny Massachusetts’ request for a waiver extension and hold the Commonwealth accountable for failing to ensure that students are not erroneously assigned to take AA-AAAS.

Sincerely,

Paul Weckstein

Sky Kochenour

Chris Yarrell

³ Every Child Achieves Act of 2015, Report of the Committee on Health, Education, Labor, and Pensions Together with Additional Views to Accompany S.1177 (Mar. 17, 2016), at 18.

⁴ 81 Fed. Reg. 88909.

Contents

I. Whether a state is using AA-AAAS appropriately turns not on that state’s compliance (or noncompliance) with the 1% threshold, but rather on the state ensuring that LEAs do not erroneously assign students to take AA-AAAS	6
II. Despite having already received five (5) waivers from USED, Massachusetts has neither met the 1% cap on students assessed using AA-AAAS, ensured students are not inappropriately placed on AA-AAAS, nor improved student achievement	7
A. Previous waivers were not effective in enabling Massachusetts to reduce the number and percentage of students taking AA-AAAS in English language arts, Mathematics, or Science and Technology/Engineering and meet the 1% cap. 20 U.S.C. § 7861(d)(2)	8
B. Massachusetts has failed to demonstrate that it ensures students are not erroneously assigned to take AA-AAAS	11
C. Massachusetts’ failures to meet the 1% cap and to ensure students are not erroneously assigned to take AA-AAAS demonstrate that previous waivers did not contribute to Massachusetts improving student achievement	12
III. DESE has not demonstrated that Massachusetts made substantial progress toward achieving critical components of its 2022-23 plan and timeline. 34 C.F.R. § 200.6(c)(4)(v)	13
A. DESE has not sufficiently improved the implementation of its guidelines under 34 C.F.R. § 200.6(d) so that Massachusetts meets the 1% cap and students are not inappropriately assigned to take AA-AAAS. 34 C.F.R. § 200.6(c)(4)(iv)(A).	13
B. DESE has not provided effective support and oversight to each LEA that Massachusetts anticipates will assess more than 1.0 percent of its assessed students in a given subject in a school year using an AA-AAAS. 34 C.F.R. § 200.6(c)(4)(iv)(B)	15
C. DESE’s failure to have a plan and timeline to address any disproportionality in the percentage of students taking an AA-AAAS has resulted in students in protected classes consistently and increasingly having been assigned to take AA-AAAS. 34 C.F.R. § 200.6(c)(4)(iv)(C).	18
IV. DESE is out of compliance with various other legal requirements contained in 20 U.S.C. §6311 and 34 C.F.R. § 200.6 independent of the criteria for receiving a waiver extension	20
A. DESE has not made publicly available LEA submissions justifying the need of the LEA to assess more than 1.0 percent of its assessed students in any such subject with AA-AAAS. 34 C.F.R. § 200.6(c)(3)(iv)	20
B. Students assigned to take the MCAS-Alt are not “on track” for further education or employment. 20 U.S.C. § 6311(b)(2)(D)(i)(VII)	21
C. DESE has failed to ensure Parents receive proper notice of placement on the MCAS-Alt and the ramifications for its learning as required by 20 U.S.C. 6311(b)(1)(D)(i)(II)	22
V. By failing to ensure LEAs appropriately use AA-AAAS Massachusetts has violated/is violating its affirmative obligations under the civil rights laws as well as provisions of Title I of the ESEA	22
VI. Granting Massachusetts a waiver extension is not in the public interest	23
Appendix A: Tables and Charts	24

Note on data sources

Unless otherwise specified, data is drawn from publicly available sources on the Massachusetts Department of Education “School and District Profiles” (<https://profiles.doe.mass.edu/>), “Attachment 3: 2017 – 2023 MCAS-Alt Percent of Participants by District” (<https://www.doe.mass.edu/mcas/alt/essa/>), and DESE’s prior requests for a waiver.

Note on data analysis

Given the significant impact that rounding can have when working with the incremental changes present in this context, we believe it appropriate to display calculations rounded to the thousandths. Compare, for example, data DESE submitted to USED for its waiver request for the 2022-23 school year stating that Massachusetts had reduced the rate of students assessed with AA-AAAS in English language arts (“ELA”) and Math from 1.3 in the 2020-21 school year to 1.2 in the 2021-22 school year.⁵ Rounding to the thousandths place shows that the percentages for the 2020-21 school year were actually 1.290 in ELA and 1.296 in Math. Similarly, the percentages for the 2021-22 school year were actually 1.241 in ELA and 1.247 in Math. DESE’s choice to round to the tenths place overrepresented the reduction in students assigned to take AA-AAAS between the 2020-21 and 2021-22 school year by a magnitude of 2, with the actual reduction in both ELA and Math at 0.049 percentage points as opposed to the reported .1 percentage points.

I. Whether a state is using AA-AAAS appropriately turns not on that state’s compliance (or noncompliance) with the 1% threshold, but rather on the state ensuring that LEAs do not erroneously assign students to take AA-AAAS

All states must “adopt[] challenging academic content standards and aligned academic achievement standards”⁶ that “shall apply to all public schools and public school students in the State; and with respect to academic achievement standards, include the same knowledge, skills, and levels of achievement expected of all public school students in the State.”⁷ States must also “implement[] a set of high-quality student academic assessments in mathematics, reading or language arts, and science” that “shall...be the same academic assessments used to measure the achievement of all public elementary school and secondary school students in the State;...administered to all public elementary school and secondary school students in the State;...be aligned with the challenging State academic standards, and provide coherent and timely information about student attainment of such standards and whether the

⁵ Massachusetts Department of Elementary and Secondary Education, *Massachusetts “One Percent” ESSA Waiver Extension Request* (Nov. 29, 2022), at 1 (“On the 2022 assessments, the following statistics show how MCAS-Alt participation was reduced in the three content areas assessed: 1.2 percent of assessed students took the English Language Arts MCAS-Alt (reduced from the 2021 rate of 1.3 percent); 1.2 percent of assessed students took the Mathematics MCAS-Alt (reduced from the 2021 rate of 1.3 percent)...”).

⁶ 20 U.S.C. § 6311(b)(1)(A).

⁷ 20 U.S.C. § 6311(b)(1)(B).

student is performing at the student's grade level.”⁸

Together, 20 U.S.C. § 6311(b)(1)(E) and (b)(2)(D) provide an extremely narrow exception to the requirement that all students be assessed using the same academic assessments aligned to the same aligned academic achievement standards, allowing the use of “alternate assessments aligned with the challenging State academic standards and alternate academic achievement standards...for students with the most significant cognitive disabilities.”⁹ A state’s use of AA-AAAS is cabined by 20 U.S.C. § 6311(b)(2)(D)(i)(I), which provides that states choosing to use AA-AAAS must also “ensure[] that, for each subject, the total number of students assessed in such subject using the alternate assessments does not exceed 1 percent of the total number of all students in the State who are assessed in such subject.” The 1% cap is intended to “ensur[e] that all students, including children with disabilities, are held to the highest standards of academic achievement, and to protect against the inappropriate use of the alternate assessment.”¹⁰

It is clear, then, that whether a state is using AA-AAAS appropriately turns not on that state’s compliance (or noncompliance) with the 1% threshold, but rather on the state ensuring that LEAs do not erroneously assign students to take AA-AAAS. The 1% cap is a useful statutory tool to help states meet this end, as it is likely that a state that ensures LEAs are appropriately using AA-AAAS will fall below the 1% threshold almost by definition given, among other factors, the incidence rate of students with cognitive disabilities severe enough to even warrant *consideration*, let alone placement, on AA-AAAS. That being said, it is also important to note that the fact that a state falls below the 1% threshold, by itself, is not proof that the state *is* ensuring that LEAs do not erroneously assign students to take AA-AAAS. A state that is below the 1% threshold will typically have a number (perhaps even a large number) of LEAs that assess students using AA-AAAS above 1% of their total assessed population. And even LEAs assessing students with AA-AAAS below the 1% threshold may be erroneously assigning significant numbers of students to take AA-AAAS. The focus remains on the individual decisions being made about students and whether the state has ensured that LEAs are not erroneously assigning students to take AA-AAAS.

II. Despite having already received five (5) waivers from USED, Massachusetts has neither met the 1% cap on students assessed using AA-AAAS, ensured students are not inappropriately placed on AA-AAAS, nor improved student achievement

To receive an extension of a waiver under 20 U.S.C. § 7861 a state must “demonstrate” that the waiver “has been effective in enabling the State...to carry out the activities for which the waiver was requested and the waiver has contributed to improved student achievement.”¹¹ Read in connection with the purpose of the 1% cap¹² and the more particular waiver requirements of 34 C.F.R. § 200.6, it is clear then that for a prior waiver to have been “effective” the state must demonstrate that the waiver enabled

⁸ 20 U.S.C. § 6311(b)(2)(A), (B).

⁹ 20 U.S.C. § 6311(b)(2)(D)(i).

¹⁰ Every Child Achieves Act of 2015, Report of the Committee on Health, Education, Labor, and Pensions Together with Additional Views to Accompany S.1177 (Mar. 17, 2016), at 18.

¹¹ 20 U.S.C. § 7861(d)(2).

¹² See *supra* HELP Report at 18 (the purpose of the 1% cap is to “ensur[e] that all students, including children with disabilities, are held to the highest standards of academic achievement, and to protect against the inappropriate use of the alternate assessment”).

the state to meet the 1% cap in the content areas for which the waiver was granted *and* ensure that LEAs do not inappropriately assign students to take AA-AAAS. Independently, the waiver must have also enabled the state to improve academic achievement. For the reasons discussed below, Massachusetts has not met the criteria for a waiver extension defined in 20 U.S.C. § 7861.¹³

A. Previous waivers were not effective in enabling Massachusetts to reduce the number and percentage of students taking AA-AAAS in English language arts, Mathematics, or Science and Technology/Engineering and meet the 1% cap. 20 U.S.C. § 7861(d)(2)

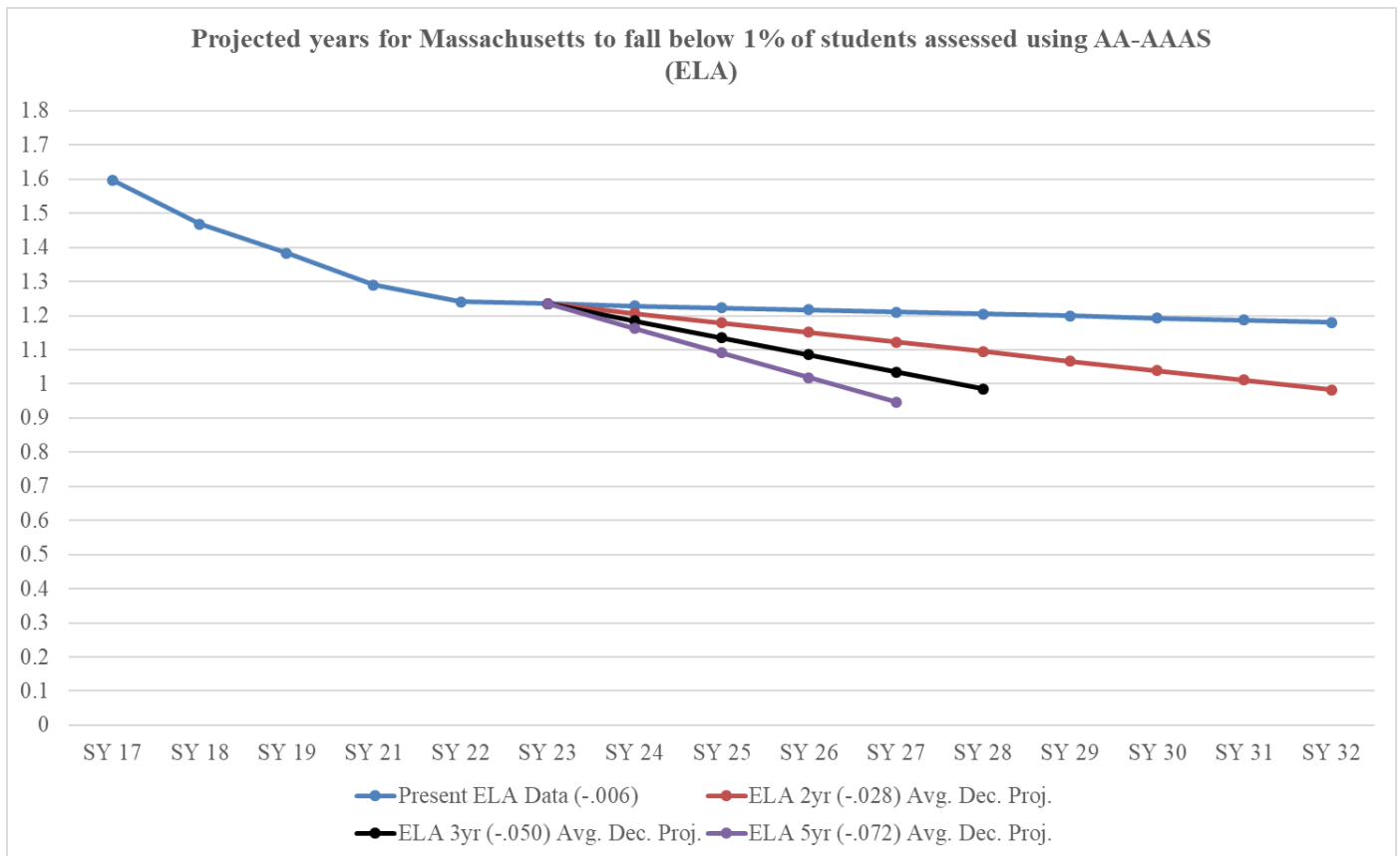
For the 2022-23 school year, Massachusetts assessed students using AA-AAAS at virtually identical rates in all three subject areas compared to the 2021-22 school year (ELA: 1.235% v. 1.241%; Math: 1.238% v. 1.247%; STE: 1.143% v. 1.162%), with an overall reduction of merely .006 percentage points in ELA, .009 in math, and .019 in STE. In fact, since the 2018-19 school year, Massachusetts has reduced the percentage of students taking AA-AAAS by only .149 percentage points in ELA, .156 percentage points in math, and .164 percentage points in STE.

AA-AAAS Number and Percent of Participants Statewide

Admin Year	ELA # AA-AAAS	ELA Total	ELA & AA-AAAS	Math # AA-AAAS	Math Total	Math % AA-AAAS	STE # AA-AAAS	STE Total	STE % AA-AAAS
2023	5822	471310	1.235%	5,889	475569	1.238%	2,382	208473	1.143%
2022	5,837	470,393	1.241%	5,929	475,552	1.247%	2,458	211,483	1.162%
2021	5963	462141	1.290%	5981	461450	1.296%	1654	167193	0.989%
2019	6887	497500	1.384%	6983	501017	1.394%	2854	218436	1.307%
2018	7298	496887	1.469%	7360	496731	1.482%	-	-	-
2017	7917	495617	1.597%	7980	495751	1.610%	-	-	-

Were Massachusetts to continue at its respective current rate of progress in ELA and Math averaged over the past three years – an overly generous assumption given Massachusetts’ consistently diminishing returns every year and in every subject in reducing the percentage of students taking AA-AAAS – Massachusetts would continue to assess students above the 1% cap in both subject areas until the 2027-28 school year. An average of progress over the more recent and thus more relevant prior two years will *not get either rate below the 1% cap until the 2031-32 school year*. And if Massachusetts maintained the rate of reduction during the most recent school year (2022-23), the Commonwealth will not get below the 1% cap in Math until the *2049-50 school year* and in ELA until the *2062-63 school year*.

¹³ To the extent the requirements for receiving a waiver extension under 20 U.S.C. § 7861 overlap with those of 34 C.F.R. § 200.6, those overlapping requirements will be further discussed in the context of Massachusetts’ failure to make substantial progress toward achieving critical components of its 2022-23 plan and timeline as required by 34 C.F.R. § 200.6(c)(4)(V). *See infra* Section (III).



Similarly problematic to Massachusetts failure to reduce the percentage of students assigned to take AA-AAAS and meet the 1% cap is that the Commonwealth has hardly moved the needle on the total *number* of students taking AA-AAAS. Between the 2021-22 school year and 2022-23 school year only 15 fewer students were assigned took AA-AAAS in ELA, 40 fewer in math, and 76 fewer in STE. The failure to reduce the number of students taking AA-AAAS calls into significant question Massachusetts commitment to ensuring that LEAs are not erroneously assigning students to take AA-AAAS.

It is clear from the data that DESE cannot demonstrate that past waivers were effective in enabling Massachusetts to reduce the number and percentage of students taking AA-AAAS in English language arts, Mathematics, or Science and Technology/Engineering and meet the 1% cap. 20 U.S.C. § 7861(d)(2). There is also little reason to believe that the interventions DESE has proposed in its 2023-24 request for a waiver extension will have any real effect in allowing Massachusetts to meet the 1% cap.

When explaining its “Progress on the state’s plan and timeline to reduce the number of students taking the AA-AAS” DESE relies heavily on the fact that it has created a “new definition” for students with the most significant cognitive disabilities and that “[a]s a new step, Massachusetts now requires that LEAs review specific cognitive and adaptive behavior functioning levels of all students designated for an alternate assessment. The definition reads in full as follows: “Massachusetts defines ‘students with the most significant cognitive disabilities’ as those who meet **all** of the following criteria:

- have cognitive disabilities evidenced by significant delays in attaining age-level academic achievement standards, even with systematic, extensive individually designed instruction, related services, and modifications

- have cognitive disabilities that significantly impact their educational performance and ability to apply learning from one setting to another
- require extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled
- perform significantly below average in general cognitive functioning and adaptive behavior. Note: “Significantly below average” is defined as a student functioning two or more standard deviations below the mean on commonly accepted norm-referenced assessments in both cognitive functioning and adaptive behavior (e.g., two or more adaptive skill areas such as daily living skills, communication, self-care, social skills, and academic skills).¹⁴ (emphasis in original)

DESE frames this new definition as “a substantial change” and states that “ongoing guidance and training will be necessary to support this transition in evaluating whether current students would meet the new eligibility definition required to participate [in] alternate assessments.” DESE even preemptively hedges its rate of progress for the 2023-24 school year, stating that “[w]e anticipate initial progress this year (2023-2024) as LEAs disseminate and apply the new guidance, with more substantial progress next school year (2024–2025)”.

It should be noted at the outset that the only reason DESE could describe this definition as a “substantial change” is the fact that Massachusetts has never had a definition of “students with the most significant cognitive disabilities” and has therefore been *flagrantly out of compliance* with the requirements of 34 C.F.R. § 200.6(d)(1) since it began using AA-AAAS in the 2017-18 school year.¹⁵ It is also clear that there is no component of the definition that will have any real effect in allowing Massachusetts to meet the 1% cap at an accelerated rate as the definition does not ask IEP teams to accumulate new knowledge or engage in a different process than they already have (or should have) been doing when developing an individualized education program that will provide a student with a free appropriate public education.¹⁶

As to the first point in the definition, whenever an IEP Team drafts an IEP it engages in a consideration

¹⁴ Massachusetts Department of Elementary and Secondary Education, Accessibility and Accommodations Manual for the 2023–24 MCAS: Including Participation Requirements for Students with Disabilities and English Learners

(Aug. 2023), at 33.

¹⁵ 34 C.F.R. § 200.6(d)(1) provides that “If a State adopts alternate academic achievement standards for students with the most significant cognitive disabilities and administers an alternate assessment aligned with those standards, the State must— (1) Establish, consistent with section 612(a)(16)(C) of the IDEA, and monitor implementation of clear and appropriate guidelines for IEP teams to apply in determining, on a case-by-case basis, which students with the most significant cognitive disabilities will be assessed based on alternate academic achievement standards. Such guidelines must include a State definition of “students with the most significant cognitive disabilities” that addresses factors related to cognitive functioning and adaptive behavior, such that— (i) The identification of a student as having a particular disability as defined in the IDEA or as an English learner does not determine whether a student is a student with the most significant cognitive disabilities; (ii) A student with the most significant cognitive disabilities is not identified solely on the basis of the student’s previous low academic achievement, or the student’s previous need for accommodations to participate in general State or districtwide assessments; and (iii) A student is identified as having the most significant cognitive disabilities because the student requires extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled”.

¹⁶ For an analysis of new and continuing deficiencies in Massachusetts’ guidance to LEAs, including issues with Massachusetts’ “new” definition for “students with the most significant cognitive disabilities”, please see Section (III)(A) *infra*.

of whether a student has delays caused by the student’s disability, significant or otherwise, “in attaining age-level academic achievement standards” and, if so, the Team then determines the level of specially designed instruction and related services necessary for the student to meet age-level achievement standards. An IEP Team must also examine, as necessary, whether and to what extent a student’s disability “impact[s] their educational performance and ability to apply learning from one setting to another”. As FAPE is consistent with state education agency standards, to provide a student with FAPE an IEP Team must also determine the type of instruction and level of need for a student “to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled”. And IEP Teams routinely evaluate and interpret the results of testing batteries to assess intellectual functioning and adaptive behavior skills.

In other words, all four components of Massachusetts’ new definition of “students with the most significant cognitive disabilities” are areas in which IEP Teams should already be well-practiced. To the extent IEP Teams are either not well practiced in these areas or DESE claims that these four points are truly new subject matter on which IEP Teams have not previously been well trained, then that points not to DESE’s need for a continuing waiver but rather to the need for USED to investigate – beyond the AA-AAAS context – whether DESE is fulfilling its obligations under the IDEA to ensure that “[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive...”.¹⁷

B. Massachusetts has failed to demonstrate that it ensures students are not erroneously assigned to take AA-AAAS

Massachusetts has affirmative obligations under Title I and the civil rights laws to ensure that the only students from the pool of students with the “most significant cognitive disabilities” who may even be considered to take AA-AAAS are those students for whom solely because of their disability it is impossible for them to learn to grade-level achievement standards even with the best educational supports and interventions. Meeting these obligations requires Massachusetts to have robust mechanisms and clear and transparent procedures to prevent erroneous assignments and. reliability and fairness in the assessment process¹⁸ Unfortunately, Massachusetts has consistently failed to ensure that LEAs do not erroneously assign students to AA-AAAS, and the damage that failure has wrought cannot be understated.

Massachusetts’ failure to safeguard the opportunity for these students to receive an educational program aimed at achieving the knowledge and skills all students should master, and along with that, the opportunity to obtain a high school diploma, works grievous harm. Every student erroneously assigned to take an AA-AAAS suffers immediate and long-term harm to their educational trajectory: harm from which they may never recover. These students, sometimes as early as grade 3, are steered off the diploma track, often educated in segregated classrooms, and are without access to grade-level curriculum and higher-order thinking. Deemed unable to learn, they are relegated to years of practicing “life skills,” held to lower expectations, and taught and tested based on lower standards. Little

¹⁷ 20 U.S.C. § 1412(a)(1)(A). Indeed, the United States Department of Education’s Office of Special Education Programs recently requested a host of information concerning DESE’s compliance with various provisions of the IDEA including the state complaint process, child find at the LEA level, and oversight and monitoring of publicly placed students at private schools to ensure those students receive FAPE. *See* Letter from Valerie C. Williams to Russell D. Johnston dated September 29, 2023.

¹⁸ *See* Section (III)(A) *infra*.

consideration is given to whether some or all of these students labeled as such could nevertheless learn to grade-level achievement standards given appropriate interventions.

The Commonwealth's failure to demonstrate a consistent and effective reduction in the percentage of students taking the AA-AAAS over the past several years, as detailed in Section (II)(A) above¹⁹, further underscores the inadequacy of Massachusetts' efforts. And Massachusetts' inability to meet the 1% cap after five consecutive waivers raises questions about the Commonwealth's commitment to refining its practices and ensuring that students are not erroneously assigned to take AA-AAAS. The onus is on Massachusetts to establish a rigorous and transparent system that actively prevents erroneous assignments, aligning with the overarching goals of fair and accurate assessment and providing all students access to the same high-quality content standards and, with the *narrowest* of exceptions, grade-level achievement standards.

Additionally troubling is that the students that bear the brunt of Massachusetts' longstanding failure to ensure LEAs do not erroneously assign students to AA-AAAS are those students already more likely to face systemic barriers to realizing their right to a high-quality education.²⁰ Multilingual learners, African American students, Hispanic/Latinx students, and students from low-income families are all – and have been for years – disproportionately identified in Massachusetts for this non-grade-level track. And parents, particularly those with limited English proficiency, are often unaware that the quality of their child's education has cratered, denying them meaningful opportunities for academic achievement and a real diploma. Many are also unaware that with appropriate interventions, their children could reclaim those opportunities and stay on the diploma track.

The 1% cap is in place to “ensur[e] that all students, including children with disabilities, are held to the highest standards of academic achievement, and to protect against the inappropriate use of the alternate assessment.”²¹ Massachusetts' persistent failure to ensure that students are not erroneously assigned to take AA-AAAS cannot be allowed to continue at the expense of the futures of some of the Commonwealth's most vulnerable children.

C. Massachusetts' failures to meet the 1% cap and to ensure students are not erroneously assigned to take AA-AAAS demonstrate that previous waivers did not contribute to Massachusetts improving student achievement

Massachusetts is one of only a handful of states that require students to pass a high-stakes test in addition to meeting local graduation requirements to receive a regular high school diploma. The assessment component is referred to as attaining a “competency determination”. Students who are assigned to and receive a passing score on an AA-AAAS, however, are categorically ineligible to receive a high school diploma because passing an AA-AAAS does not confer a competency determination. By continually failing to meet the 1% cap and ensure students are not erroneously assigned to take AA-AAAS, Massachusetts has denied students who should not take AA-AAAS the opportunity to complete the requirements for a regular high school diploma thereby failing to improve student achievement.

Massachusetts has also failed to improve student achievement by restricting the use of its portfolio

¹⁹ See also Section (III)(B) *infra*.

²⁰ See Section (III)(C) *infra*.

²¹ Every Child Achieves Act of 2015, Report of the Committee on Health, Education, Labor, and Pensions Together with Additional Views to Accompany S.1177 (Mar. 17, 2016), at 18.

assessment aligned to grade-level achievement standards (“Grade-Level Portfolio”), passage of which can confer the competency determination necessary for graduation. A Grade-Level Portfolio assessment is available to students where “the nature and complexity of a student’s disability present significant barriers or challenges to standardized computer- or paper-based testing, even with the use of accommodations, *and the student is working at or close to grade-level expectations....*”²² Massachusetts requiring a student to be “working at or close to grade-level expectations” to access the Grade-Level Portfolio is problematic because a student’s not working at or near grade-level may very well be the result of ineffective instruction, instruction by unqualified teachers, and/or a lack of appropriate special education and supportive services that would have allowed the student to access the general education curriculum and learn to the same challenging academic standards as students without disabilities.²³ This is especially true for multi-lingual students with disabilities (“MLSWDs”) (a group particularly vulnerable to misidentification, generally, and assignment to AA-AAAS), who must overcome the dearth of qualified bilingual evaluators, valid and reliable assessment instruments normed on their respective population groups, limited bilingual teachers and service providers, and the lack of native language support that may be necessary for them to access curricula, materials and instruction.

III. DESE has not demonstrated that Massachusetts made substantial progress toward achieving critical components of its 2022-23 plan and timeline. 34 C.F.R. § 200.6(c)(4)(v)

34 C.F.R. § 200.6(c)(4)(v) provides that “[i]f [a] State is requesting to extend a waiver for an additional year, [such request must] meet the requirements in paragraph (c)(4)(i) through (iv) of this section and demonstrate substantial progress towards achieving each component of the prior year’s plan and timeline required under paragraph (c)(4)(iv) of this section.” While undefined in regulation, it is clear that “the use of the word ‘substantial’ is intentional and represents more than simply any measurable amount of progress towards achieving the plan and timeline.”²⁴

A. DESE has not sufficiently improved the implementation of its guidelines under 34 C.F.R. § 200.6(d) so that Massachusetts meets the 1% cap and students are not inappropriately assigned to take AA-AAAS. 34 C.F.R. § 200.6(c)(4)(iv)(A).

DESE has not set forth definitive and valid guidelines for IEP teams, including the criteria and process for AA-AAAS assignment, such that Massachusetts meets the 1% cap and ensures that students are not erroneously assigned to take AA-AAAS.

First, DESE’s “new” definition of who qualifies as a “student with the most significant cognitive disability” contains factors that are largely insufficient (or even irrelevant) when trying to differentiate

²² Massachusetts Department of Elementary and Secondary Education, *2024 MCAS Grade-Level and Competency Portfolio Manual* (Aug. 2023), at 8.

²³ Massachusetts’ restrictive use of the Grade-Level Portfolio also calls into question its compliance with 20 U.S.C. § 6311(b)(2)(D)(i)(VI) and 34 C.F.R. 200.6(d)(7), which require states that choose to use AA-AAAS to “develop[], disseminate[] information on, and promote[] the use of appropriate accommodations to increase the number of students with significant cognitive disabilities--participating in academic instruction and assessments for the grade level in which the student is enrolled; and who are tested based on challenging State academic standards for the grade level in which the student is enrolled.”

²⁴ 81 Fed. Reg. 88915 (declining to adopt a commenter’s suggestion that “any measurable amount of progress towards achieving the plan and timeline be considered sufficient to receive a waiver in a future year”).

between students who qualify as having “cognitive disabilities” as opposed to those with the “most significant cognitive disabilities”.²⁵ For instance, whether a student has “significant delays in attaining age-level academic achievement standards, even with systematic, extensive individually designed instruction, related services, and modifications” or significant difficulty with “educational performance and [their] ability to apply learning from one setting to another” may both (1) have nothing to do with a student having a cognitive disability or (2) even for students with cognitive disabilities, be caused by something other than disability-related factors [e.g., ineffective instruction, instruction by unqualified teachers, and/or a lack of appropriate special education and supportive services that would have allowed the student to access the general education curriculum and learn to the same challenging academic standards as students without disabilities].

Second, DESE has provided neither the process nor the criteria for IEP Teams to use when trying to validly differentiate between students “with the most significant cognitive disabilities” generally and those who may be eligible to take an AA-AAAS. For example, within their newly-introduced *Training for District IEP Teams (PowerPoint)*, DESE correctly notes that being a student with one of the most significant cognitive disabilities alone does *not* automatically authorize an IEP team to administer an AA-AAAS.²⁶ Despite this distinction, however, DESE fails to offer further guidance concerning how and on what basis IEP teams are expected to make the decision to actually assign a student to take an AA-AAAS.²⁷ DESE's communication becomes even more convoluted on their AA-AAAS webpage, where a prominent header declares, *Determining Which Students Should Be Alternately Assessed*²⁸ immediately followed by the new definition that, given the surrounding text, suggests that if a student fits the listed criteria then that student be assigned to take an AA-AAAS—a notion that directly contradicts DESE's own earlier guidance and the individualized determination required by law. To that end, nowhere does DESE make clear that the

²⁵ While previously stated in full, for reference, “Massachusetts defines ‘students with the most significant cognitive disabilities’ as those who meet **all** of the following criteria:

- have cognitive disabilities evidenced by significant delays in attaining age-level academic achievement standards, even with systematic, extensive individually designed instruction, related services, and modifications
- have cognitive disabilities that significantly impact their educational performance and ability to apply learning from one setting to another
- require extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled
- perform significantly below average in general cognitive functioning and adaptive behavior.
Note: “Significantly below average” is defined as a student functioning two or more standard deviations below the mean on commonly accepted norm-referenced assessments in both cognitive functioning and adaptive behavior (e.g., two or more adaptive skill areas such as daily living skills, communication, self-care, social skills, and academic skills).”²⁵ (emphasis in original)

²⁶ MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, MCAS-ALT: ESSA RESOURCES, MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, TRAINING FOR DISTRICT IEP TEAMS (POWERPOINT) 7, <https://www.doe.mass.edu/mcas/alt/essa/> (“Simply because the student is eligible does not warrant the Team recommending participation in the MCAS-Alt.”).

²⁷ MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, MCAS-ALT: ESSA RESOURCES, MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, SAMPLE MCAS-ALT PARTICIPATION TOOL, <https://www.doe.mass.edu/mcas/alt/essa/>.

²⁸ MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, MCAS-ALT: ESSA RESOURCES, MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, <https://www.doe.mass.edu/mcas/alt/essa/>.

only students within the pool of students with the most significant cognitive disabilities who should even be considered for AA-AAAS are those whom solely because of their disability it is impossible for them to learn to grade-level achievement standards even with the best educational supports and interventions. All of this is seriously problematic and undermines the integrity of the assessment process.

Moreover, DESE's guidance appears to incorrectly imply that if a student participates in an AA-AAAS for one subject the student must do so for all academic subject areas.²⁹ The lack of specificity here raises concerns about, among other things, the uniform application of such an approach across discrete and varied academic subjects in relation to individual abilities. In addition, DESE's guidance still allows IEP teams to consider factors that are irrelevant to the existence or severity of a cognitive disability when assigning students to take AA-AAAS so long as those factors are not the "sole" reason for doing so. These factors include "a particular disability or placement; lack of standards-based instruction participation in [AA-AAAS] the previous year (since this is an annual decision); English learner (EL) status; low income, child in foster care, or interrupted formal education; potential impact on a school's accountability rating; previous low achievement on MCAS".³⁰

B. DESE has not provided effective support and oversight to each LEA that Massachusetts anticipates will assess more than 1.0 percent of its assessed students in a given subject in a school year using an AA-AAAS. 34 C.F.R. § 200.6(c)(4)(iv)(B)

34 C.F.R. §200.6(c)(4)(iv)(B) requires, among other things, that the state's plan and timeline include "additional steps" the State "will take...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 [AA-AAAS] to ensure that only students with the most significant cognitive disabilities take an alternate assessment aligned with alternate academic achievement standards." To demonstrate that Massachusetts is addressing this requirement, beginning with at least its request for a waiver for the 2018-19 school year³¹, and with the exception of its 2023-24 waiver request, DESE has reported to USED data related to the number and percentage of LEAs in Massachusetts assessing 500 or more total students and exceeding more than 1% of all students assessed on AA-AAAS.³² In addition,

²⁹ See Massachusetts Department of Elementary and Secondary Education, MCAS-Alt: ESSA Resources, Massachusetts Department of Elementary and Secondary Education, Training for District IEP Teams (PowerPoint) 9, <https://www.doe.mass.edu/mcas/alt/essa/> ("Participation in the alternate assessment indicates that all content areas will be assessed. (ELA, Math, Science)."); Massachusetts Department of Elementary and Secondary Education, MCAS-Alt: ESSA Resources, Massachusetts Department of Elementary and Secondary Education, Companion Document: Alternate Assessment Participation Tool, <https://www.doe.mass.edu/mcas/alt/essa/> ("Participation in the alternate assessment indicates that all content areas will be assessed. (ELA, Math, Science)."); Massachusetts Department of Elementary and Secondary Education, MCAS-Alt: ESSA Resources, Massachusetts Department of Elementary and Secondary Education, Sample MCAS-Alt Participation Tool, <https://www.doe.mass.edu/mcas/alt/essa/> ("Participation in the alternate assessment indicates that all content areas will be assessed. (ELA, Math, Science).").

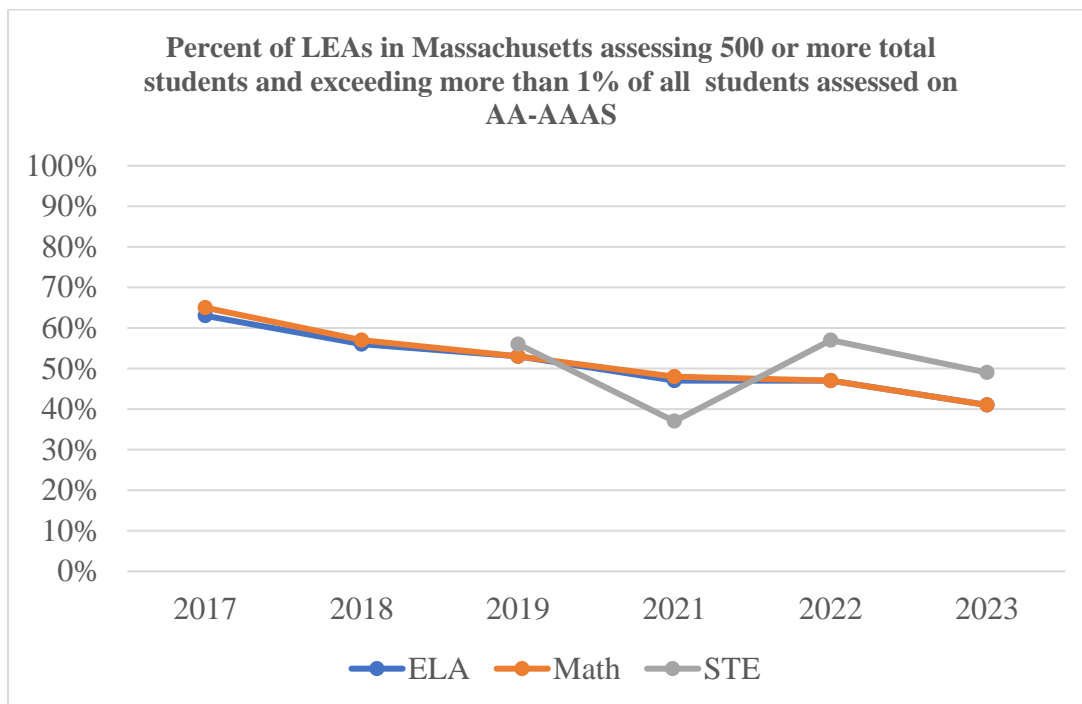
³⁰ Massachusetts Department of Elementary and Secondary Education, *Training for District IEP Teams (PowerPoint)*, Slide 10, available at <https://www.doe.mass.edu/mcas/alt/essa/>.

³¹ CLE is not in possession of DESE's request for a waiver for the 2017-18 school year and the request does not appear to be posted on DESE's website.

³² Massachusetts Department of Elementary and Secondary Education, *Massachusetts "One Percent" ESSA Waiver Extension Request* dated Nov. 29, 2022, at 7; dated Nov. 29, 2021, at 8; dated Aug. 24, 2020, at 6; dated Nov. 9, 2018, at 4. DESE has stated that "[u]sing '500 or more tested students' as a criterion ensures that an increase or decrease in the number of students taking the MCAS-Alt in smaller districts will not skew the district percentage disproportionately." *ESSA Waiver Extension Request* dated Nov. 29, 2022, at 7.

DESE has repeatedly highlighted, again with the exception of its current request for the 2023-24 school year, the “intensive, in-person technical assistance” it has been providing since 2017 to 22 “urban and suburban districts whose [AA-AAAS] participation was well above the state average (i.e., between 2.1 and 3.5 percent)”.³³ However, current and longitudinal data in both areas clearly demonstrate that DESE has not provided effective support and oversight to each LEA that the Commonwealth anticipates will assess more than 1.0 percent of its assessed students in a given subject in a school year using an AA-AAAS.

Consider first data related to the number and percentage of LEAs in Massachusetts assessing 500 or more total students and exceeding more than 1% of all students assessed on AA-AAAS. For the 2022-23 school year, 41 percent of districts in Massachusetts that assessed more than 500 students exceeded 1% of all students assessed using AA-AAAS in English language arts (94/232) and Math (95/232). This represents a reduction of only 13 and 15 districts compared to the 2021-22 school year. As was the case with overall state assessment rates discussed in Section (II)(A), the assessment rates of these particular districts have also largely remained stagnant, with the percent assessing more than 1% of students in ELA and Math decreasing by only 12 percentage points (and STE by only 6 percentage points) over the past 4 years.



Examination of the effects of DESE’s support and oversight to the 22 “urban and large suburban districts whose MCAS-Alt participation was well above the state average (i.e., between 2.1 and 3.5

³³ Massachusetts Department of Elementary and Secondary Education, *Massachusetts “One Percent” ESSA Waiver Extension Request* dated Nov. 29, 2022, at 6, 9-10. Also mentioned with varying degrees of specificity in Massachusetts’ *ESSA Waiver Extension Request* dated Nov. 29, 2021, at 8-10; dated Aug. 24, 2020, at 5-6; dated Nov. 9, 2018, at 4. Those districts are: Boston, Brockton, Chelsea, Chicopee, Everett, Fall River, Fitchburg, Framingham, Haverhill, Holyoke, Lawrence, Lowell, Lynn, Methuen, New Bedford, Pittsfield, Randolph, Saugus, Springfield, Ware, Wareham, and Worcester. See 2023 waiver request.

percent)” that DESE began “providing intensive, in-person technical assistance to staff in 2017” (“Focus Districts”) is similarly troubling. For the 2022-23 school year, more than half of the Focus Districts (14/22 in ELA; 12/22 in math; 12/22 in STE) increased the rate at which they assigned students to AA-AAAS compared to the 2021-22 school year, and most of the Focus Districts did so in more than one tested subject area. [Red cell shade denotes an increase compared to the prior year]

**Focus Districts - Percent of Students Assessed Using AA-AAAS
(ELA)**

District	2023	2022	2021	2019	2018	2017
Boston	2.322%	2.314%	2.569%	2.788%	2.835%	3.006%
Brockton	2.285%	2.048%	2.480%	2.780%	2.637%	2.288%
Chelsea	1.974%	1.392%	2.132%	2.626%	2.711%	3.053%
Chicopee	2.280%	2.678%	2.511%	2.320%	2.239%	2.320%
Everett	1.978%	1.928%	2.295%	1.909%	2.141%	2.051%
Fall River	2.103%	1.948%	2.124%	2.107%	2.587%	2.821%
Fitchburg	2.274%	2.426%	2.549%	2.644%	2.820%	3.460%
Framingham	2.267%	2.296%	1.943%	2.352%	2.791%	2.827%
Haverhill	1.533%	1.530%	1.669%	1.988%	3.115%	3.678%
Holyoke	2.363%	2.311%	2.759%	1.999%	3.699%	3.748%
Lawrence	1.420%	1.361%	1.649%	2.124%	2.076%	2.796%
Lowell	2.410%	2.097%	2.451%	2.215%	2.394%	2.287%
Lynn	2.252%	2.380%	2.614%	3.259%	3.436%	4.055%
Methuen	1.361%	1.349%	1.522%	2.117%	2.128%	2.293%
New Bedford	1.688%	1.776%	1.858%	1.633%	2.027%	2.268%
Pittsfield	1.955%	1.380%	2.038%	2.144%	2.664%	3.521%
Randolph	3.535%	3.030%	2.409%	3.569%	4.000%	3.810%
Saugus	1.586%	1.287%	1.628%	2.415%	2.199%	2.605%
Springfield	3.395%	3.136%	3.070%	3.240%	2.980%	3.039%
Ware	0.488%	1.830%	1.490%	1.955%	1.335%	1.312%
Wareham	3.004%	3.247%	3.114%	3.325%	2.776%	3.629%
Worcester	1.939%	1.901%	2.091%	2.100%	2.168%	2.414%

Additionally, 11 of the 22 districts have made virtually no progress when comparing their 2022-23 rates to those of the 2018-19 school year (or earlier in some cases) with 5 Focus Districts currently assessing students with AA-AAAS around or above 2016-17 rates in ELA, 4 in Math, and 7 in STE.

**Focus Districts Current AA-AAAS Rate Higher than 2017, 2018, or
2019**

ELA	2023	2022	2021	2019	2018	2017

Boston	2.322%	2.314%	2.569%	2.788%	2.835%	3.006%
Brockton	2.285%	2.048%	2.480%	2.780%	2.637%	2.288%
Chelsea	1.974%	1.392%	2.132%	2.626%	2.711%	3.053%
Chicopee	2.280%	2.678%	2.511%	2.320%	2.239%	2.320%
Everett	1.978%	1.928%	2.295%	1.909%	2.141%	2.051%
Fall River	2.103%	1.948%	2.124%	2.107%	2.587%	2.821%
Fitchburg	2.274%	2.426%	2.549%	2.644%	2.820%	3.460%
Framingham	2.267%	2.296%	1.943%	2.352%	2.791%	2.827%
Haverhill	1.533%	1.530%	1.669%	1.988%	3.115%	3.678%
Holyoke	2.363%	2.311%	2.759%	1.999%	3.699%	3.748%
Lawrence	1.420%	1.361%	1.649%	2.124%	2.076%	2.796%
Lowell	2.410%	2.097%	2.451%	2.215%	2.394%	2.287%
Lynn	2.252%	2.380%	2.614%	3.259%	3.436%	4.055%
Methuen	1.361%	1.349%	1.522%	2.117%	2.128%	2.293%
New Bedford	1.688%	1.776%	1.858%	1.633%	2.027%	2.268%
Pittsfield	1.955%	1.380%	2.038%	2.144%	2.664%	3.521%
Randolph	3.535%	3.030%	2.409%	3.569%	4.000%	3.810%
Saugus	1.586%	1.287%	1.628%	2.415%	2.199%	2.605%
Springfield	3.395%	3.136%	3.070%	3.240%	2.980%	3.039%
Ware	0.488%	1.830%	1.490%	1.955%	1.335%	1.312%
Wareham	3.004%	3.247%	3.114%	3.325%	2.776%	3.629%
Worcester	1.939%	1.901%	2.091%	2.100%	2.168%	2.414%

The impact of DESE’s failure to provide effective support and oversight to each LEA that Massachusetts anticipates will assess more than 1.0 percent of its assessed students in a given subject in a school year using an AA-AAAS cannot be understated. The LEAs that assessed more than 500 total students and exceeded 1% for AA-AAAS for the 2022-23 school year accounted for approximately 52% of all students assessed in ELA and Math (and 46% in STE) but ***approximately 75% of all students assessed using AA-AAAS*** (69% for STE). Even more staggering is the fact that during that same school year the 22 Focus Districts made up approximately 26% of all students assessed statewide in each of ELA, Math, and STE but ***approximately 46 percent of all students assessed using AA-AAAS***. The data clearly demonstrates that after 5 years of waivers, DESE’s support and oversight to the LEAs it has specifically targeted for interventions as “high assessing” (both as it relates to the 500+ districts and the Focus Districts) has resulted in an unacceptable lack of progress and the continuance of students being erroneously assigned to take AA-AAAS.

- C. DESE’s failure to have a plan and timeline to address any disproportionality in the percentage of students taking an AA-AAAS has resulted in students in protected classes consistently and increasingly having been assigned to take AA-AAAS. 34 C.F.R. § 200.6(c)(4)(iv)(C).

In each of Massachusetts’ four previous requests for an extension of waiver (2018-19; 2020-21; 2021-22; 2022-23) the Commonwealth has failed to include a plan and timeline to “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 [34 C.F.R. § 200.6]”. Each previous waiver request addressed disproportionality in the context of Massachusetts *verifying* that each LEA will address any disproportionality in students taking AA-AAAS as required by 34 C.F.R. § 200.6(c)(4)(iii) but not as it relates to the ***Commonwealth’s own obligation*** as a state to have a plan and timeline by which Massachusetts will address any disproportionality in the percentage of students taking AA-AAAS in accordance with 34 C.F.R. § 200.6(c)(4)(iv)(C).³⁴ Massachusetts’ noncompliance with 34 C.F.R. § 200.6(c)(4)(iii) is particularly egregious given DESE’s repeated acknowledgement that students of color, English learners, and students from low-income families are disproportionately likely to be assessed using AA-AAAS compared to white students, students who are not English learners, and students not from low-income families.³⁵

The failure by Massachusetts over the past 6 school years to have a plan to address, and actually address, any disproportionality in the percentage of students taking AA-AAAS has naturally led to persistent, and in most cases increasing, gaps in the likelihood that students in protected populations are assigned to take AA-AAAS. For instance, African American students (2.15x compared to 2.01x), Hispanic/Latinx students (1.23x compared to 0.57x), Asian students (1.23x compared to 1.07x), multilingual learners (1.65x compared to 1.60x), and students from low-income families (2.96x compared to 2.81x) were all more likely in the 2022-23 than their comparison peers to be assigned to AA-AAAS in ELA than for the 2017-18 school year.³⁶

Disproportionality (ELA)	2023	2022	2021	2019	2018
African American/Black	2.15	2.02	2.16	2.21	2.01
Hispanic/Latino	1.23 ³⁷	1.55	1.74	1.79	0.57

³⁴ DESE proposes such a plan for the first time in Massachusetts’ request for a waiver extension for the 2023-24 school year. There are serious questions about the adequacy (and urgency) of DESE’s proposed plan given the persistence and severity of the disproportionality that exists for students in protected classes assigned to take AA-AAAS. The proposal of a plan for the *current school year* is also irrelevant to the question of whether Massachusetts has demonstrated “substantial progress” on the prior year’s plan (which, as discussed above, Massachusetts cannot do because no plan to address disproportionality even existed).

³⁵ See, e.g., Massachusetts Department of Elementary and Secondary Education, *Massachusetts “One Percent” ESSA Waiver Extension Request* dated Nov. 29, 2022, at 8 (“The statement of assurances also focuses on whether the district is aware of any disproportionate designation of students in the following subgroups taking the MCAS-Alt and if so, what steps the district will take (or has already taken) to reduce the disproportionate representation of: English learners, who are 1.6 times more likely statewide to take the MCAS-Alt than non-ELs; African American students, who are 1.6 times more likely to take the MCAS-Alt than non-African American students; Hispanic/Latino students, who are about twice as likely to take the MCAS-Alt than non-Hispanic/Latino students; male students, who are about twice as likely to take the MCAS-Alt than female students; low-income students, who are 2.5 times as likely to take the MCAS-Alt than students who are not low income.”). See also *ESSA Waiver Extension Request* dated Nov. 29, 2021, at 9; dated Aug. 24, 2020, at 7.

³⁶ We discuss disproportionality in student assignment rate to AA-AAAS disaggregated by protected class and subject area. Massachusetts has reported in its previous requests for waiver the raw numbers from which we draw, but it has not produced the accompanying analysis which we now calculate here.

³⁷ CLE believes there is an error in the data in Table 2 of DESE’s 2023-24 waiver request. The number of Hispanic/Latinx students listed in Table 2 in the second and third columns is significantly below both what is listed in Table 3 (the most relevant comparison as ELA and Math assessment numbers are typically very close in value) and Table 4 as well as historical reporting numbers. It would appear that the data for Asian students in the second and third columns of Table 2 was also

Asian	1.23	1.18	1.10	1.06	1.07
English learners	1.65	1.79	2.04	1.67	1.60
Low-income students	2.96	2.97	3.04	3.21	2.81

Similar disproportionalities exist across Mathematics and Science and Technology/Engineering.³⁸

USED has been clear that “a waiver of the 1.0 percent cap is only warranted if a State is not disproportionately including in the AA–AAAS students who are poor, English learners, or students from a major racial or ethnic group, thereby raising concerns that the State’s guidelines for identifying students with the most significant cognitive disabilities are not being carried out responsibly.”³⁹ The data lays plain that Massachusetts cannot meet this standard.

IV. DESE is out of compliance with various other legal requirements contained in 20 U.S.C. §6311 and 34 C.F.R. § 200.6 independent of the criteria for receiving a waiver extension

A. DESE has not made publicly available LEA submissions justifying the need of the LEA to assess more than 1.0 percent of its assessed students in any such subject with AA-AAAS. 34 C.F.R. § 200.6(c)(3)(iv)

34 C.F.R. § 200.6(c)(3)(iv) requires states to make publicly available information submitted by LEAs “justifying the need of the LEA to assess more than 1.0 percent of its assessed students in any such subject with such an alternate assessment.” The Commonwealth did not include as part of its waiver request the required showing as to “where these justifications are available and that they are easily accessible”⁴⁰ and CLE has been unable to independently locate this information on DESE’s website or elsewhere. Despite USED having reminded DESE of the public availability requirement on multiple occasions, it does not appear that DESE is currently in compliance with 34 C.F.R. § 200.6(c)(3)(iv).⁴¹

entered (with one numerical difference in the second column) in the respective Hispanic/Latinx columns (compare Hispanic/Latinx: 35545 and 418 with Asian: 35535 and 418). This error also makes it impossible to verify the percentage DESE reported in the fourth column of Table 2 for Hispanic/Latinx students assigned to take AA-AAAS.

³⁸ See Appendix A: Tables and Charts.

³⁹ 81 Fed. Reg. 88913.

⁴⁰ United States Department of Education, *Requirements to Request a Waiver/Waiver Extension for the 2023-24 School Year from the 1.0 Percent Cap on the Percentage of Students with the Most Significant Cognitive Disabilities Who May Be Assessed with an Alternate Assessment Aligned with Alternate Academic Achievement Standards (AAAAAS)*, dated Sept. 20, 2023, at 5.

⁴¹ In an e-mail dated December 30, 2021, Kathleen Banks asked DESE employee Michol Stapel, “[a]re the justifications for exceeding the 1% cap posted on the DESE website?” See Letter from Ian Rosenblum to Jeffrey C. Riley dated Jan. 27, 2022 at 35 [the “Letter” from Ian Rosenblum is in reference to USED’s approval of DESE’s waiver request for the 2021-22 school year that also contains the waiver request itself including attachments (of which the e-mail from Kathleen Banks is one)]. Another DESE employee, Dan Wiener, responded to the e-mail from Kathleen Banks stating that “[w]e have not posted district justifications on the Department’s website but recently added the following highlighted language to our ‘MCAS-Alt and ESSA’ web page: ‘If you wish to review a district’s justification and statement of assurances, or have additional questions about the MCAS-Alt or about statewide assessment for students with disabilities, please contact Student Assessment by email or phone at 781-338-3625.’” *Id.* at 34. Such a statement still appears on DESE’s website to this day.

USED appears to have already found DESE’s practice of posting an e-mail address and phone number on their website (as opposed to the LEA justifications themselves) as not in compliance with the requirements of 34 C.F.R. § 200.6(c)(3)(iv) and has twice reminded DESE of the need to make the LEA justifications publicly available *after* having received DESE’s response as to how the public can access the justifications. See Letter from James F. Lane to Commissioner Jeffrey C. Riley

B. Students assigned to take the MCAS-Alt are not “on track” for further education or employment. 20 U.S.C. § 6311(b)(2)(D)(i)(VII)

As a condition to adopting alternate academic achievement standards for students with the most significant cognitive disabilities, Title I requires that states ensure that “those standards...are aligned to ensure that a student who meets the alternate academic achievement standards is on track to pursue postsecondary education or employment...”⁴² Rather than acting as an entry point to post-secondary success, DESE’s use of AA-AAAS presents an active barrier, both in terms of present-day learning and the long-term effects on student attainment of a competency determination, to students seeking employment or further educational opportunities after high school. Students placed on the AA-AAAS track are often relegated to segregated classrooms and taught a diluted curriculum that imparts limited academic achievement skills. And AA-AAAS placement decisions carry significant implications for future a student’s academic and non-academic success.

Academically, all students—regardless of the assessment they take—are required to have instruction based on state academic content standards for the grade in which they are enrolled. The difference for students who take an alternate assessment is that the expectations for achievement are modified with respect to the grade-level content they are taught. The lack of effective access to the same level of academic skills expected of all other students serves as a distinct harm with long-lasting implications. In addition, as discussed earlier in these comments, all students in Massachusetts must attain a specific competency determination score on the state’s general assessment as a condition of receiving a regular high school diploma. Absent the opportunity to learn to the same challenging academic standards as students without disabilities (and those with less severe disabilities), then, students who are placed on the AA-AAAS track—often as early as third grade—are effectively denied the skills they need to pass the general assessment, which in turn precludes those participating in AA-AAAS from earning a regular high school diploma in Massachusetts.

Non-academically, the long-term harms of failing to earn a regular high school diploma in the twenty-first century are well-documented. Indeed, the lack of a high school diploma also has significant ramifications for post-secondary employment. For instance, the 2021 unemployment rate for individuals without a high school diploma was 1.3 times greater than that of individuals with a high school diploma, 1.8 time greater than that of individuals with an associate’s degree and 2.4 times greater than that of individuals with a bachelor’s degree.⁴³ Similarly, the median usual weekly earnings for individuals without a high school diploma is 0.77 that compared to individuals with a high school diploma, 0.65 that

dated Mar. 1, 2023 (“As a reminder, 34 CFR § 200.6(c)(3)(iv) requires a State to make publicly available the information submitted by an LEA justifying the need to assess more than 1.0 percent of its students on the AA-AAAS, provided such information does not reveal personally identifiable information about a student.”); Letter from Ian Rosenblum to Jeffrey C. Riley dated Jan. 27, 2022 (“I want to remind you of the requirement in 34 CFR § 200.6(c)(3)(iv) that the State must make publicly available the information submitted by an LEA justifying the need of the LEA to assess more than 1.0 percent of its students on the AA-AAAS, provided that such information does not reveal personally identifiable information about an individual student.”). *See also* Letter from Frank T. Brogan to Jeffrey C. Riley dated Sept. 8, 2020 (same); Letter from Frank T. Brogan to Jeffrey C. Riley dated Feb. 5, 2019 (same).

⁴² 20 U.S.C. § 6311(E)(i)(V).

⁴³ United States Bureau of Labor Statistics, Table 5.1 Unemployment rates and earnings by educational attainment, 2021, available at <https://www.bls.gov/emp/tables/unemployment-earnings-education.htm>.

compared to individuals with an associate’s degree and .47 that of individuals with a bachelor’s degree.⁴⁴

Possession of at least a high school diploma for employment is particularly critical in light of the Commonwealth’s ongoing recovery from the COVID-19 pandemic. As highlighted by the Massachusetts Executive Office of Labor and Workforce Development Department of Economic Research in its 2021 Annual Economic Analysis Report, “[t]he state average unemployment rate trends lower for higher levels of educational attainment. Although the 2021 average rates have dropped for all levels of education compared to the 2020 annual averages, only those with a bachelor’s degree and higher saw anything close to a full recovery compared to 2019 annual averages.”

C. DESE has failed to ensure Parents receive proper notice of placement on the MCAS-Alt and the ramifications for its learning as required by 20 U.S.C. 6311(b)(1)(D)(i)(II)

Under 20 U.S.C. 6311(b)(1)(D)(i)(II), each state using AA-AAAS must “ensure[] that the parents of such students [proposed to be placed on AA-AAAS] are clearly informed, as part of the process for developing the individualized education program...that their child's academic achievement will be measured based on such alternate standards; and how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma”. Accordingly, DESE has a legal obligation to ensure that parents of students placed on the MCAS-Alt are provided with clear and timely notice that outlines the reasons for the placement and the potential impact on their child’s learning. This notice should enable parents to make informed decisions about their child’s education and participate meaningfully in the Individualized Education Program (“IEP”) and assessment planning process, a proactive approach that aligns with the spirit of ESEA/ESSA and promotes transparency and collaboration between educators and parents to support the educational success of students with disabilities.

Yet, despite this clear legal requirement, through our experience providing backup support to education attorneys at regional legal aid organizations throughout the state of Massachusetts as well as CLE’s representing individual clients – including English learners with disabilities – we have found all too often that IEP teams assign students to take AA-AAAS without the informed consent of the parent. There typically is no discussion at IEP meetings concerning the student’s being assigned to participate in alternate assessments aligned to alternate academic achievement standards unless such questions are raised by the parent. We have also found that written notice rarely precedes or accompanies such decisions. Consider as well the challenges faced by multilingual parents who are still learning English as a second language or have limited English proficiency.

V. By failing to ensure LEAs appropriately use AA-AAAS Massachusetts has violated/is violating its affirmative obligations under the civil rights laws as well as provisions of Title I of the ESEA

Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 prevent recipients from discriminating on the basis of disability. As is true with all civil rights laws, these statutes require SEAs and LEAs, as recipients of federal funding, to affirmatively eliminate discrimination, prevent its reoccurrence, and address its effects. A recipient that fails to do so discriminates on the basis of disability.

⁴⁴ *Id.*

The decision of an LEA to assign a student to take an AA-AAAS raise heightened disability discrimination concerns because that decision is explicitly based on the student’s disability. Assigning a student to an AA-AAAS is an intentional decision that, *because of* the student’s disability, the student should receive something “less than” (i.e., lower achievement standards) both their peers with less significant disabilities and those without disabilities. And in this case, that “something” is the precious thing that the State has declared all other students must receive: an educational program aimed at achieving the knowledge and skills all students should master. And along with that, the opportunity to obtain a high-school diploma. The State therefore has a clear and paramount civil rights responsibility to ensure LEAs do not make these intentional, disability-based decisions erroneously. The state also has affirmative obligations under Title I to ensure that all students learn to the same content standards and are assessed against (with the narrowest of exceptions) the same achievement standards.

For the reasons discussed thoroughly throughout this comment, Massachusetts is permitting LEAs to discriminate on the basis of disability by failing to ensure that students are not erroneously assigned to take AA-AAAS. Accordingly, Massachusetts is in violation of Section 504, the ADA, and Title I of the ESEA.

VI. Granting Massachusetts a waiver extension is not in the public interest

20 U.S.C. § 7861(d)(2)(B) provides as a final requirement for receiving a waiver extension that a state must “demonstrate” that the waiver “the extension is in the public interest”. Massachusetts has been unable to meet the 1% cap and ensure students are not erroneously assigned to take AA-AAAS despite having already received five (5) waivers from USED. In fact, progress on both fronts has stagnated and, in some cases, even regressed comparatively to previous years. USED has been clear that States should not have an expectation “to perpetually receive a waiver of the requirement”⁴⁵ and that a waiver extension for a state that has continuously failed to meet the 1% cap and ensure students are not inappropriately placed on AA-AAAS “[vitiat]e[s]...the statutory restriction on a State’s use of an AA-AAAS....”⁴⁶ The need to ensure strict compliance with the civil rights statutes and Title I is paramount, as each and every student that is erroneously steered onto the AA-AAAS track suffers potentially irreparable and long-lasting harm. Accordingly, for the reasons discussed throughout these comments, granting Massachusetts a waiver extension is not in the public interest.

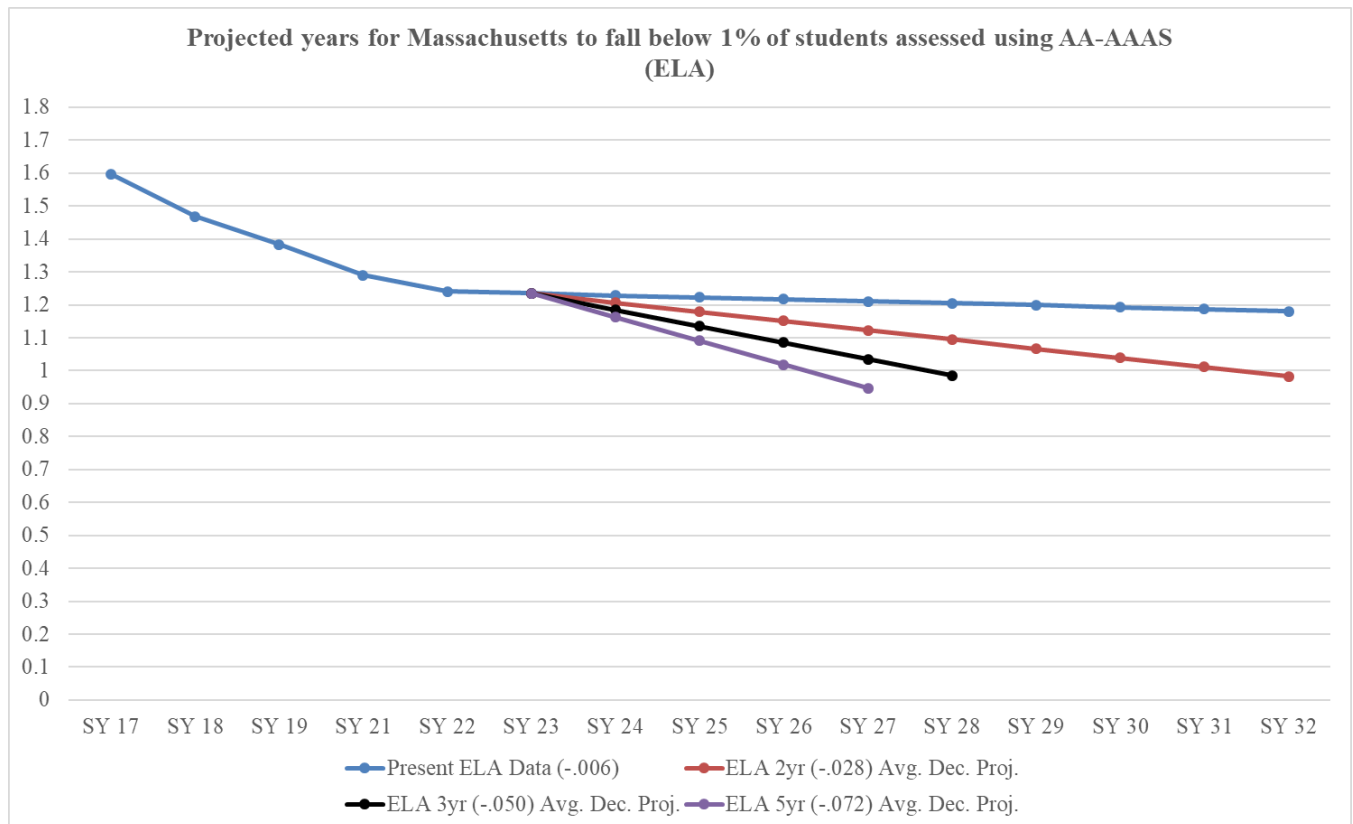
⁴⁵ 81 Fed. Reg. 88915.

⁴⁶ 81 Fed. Reg. 88909.

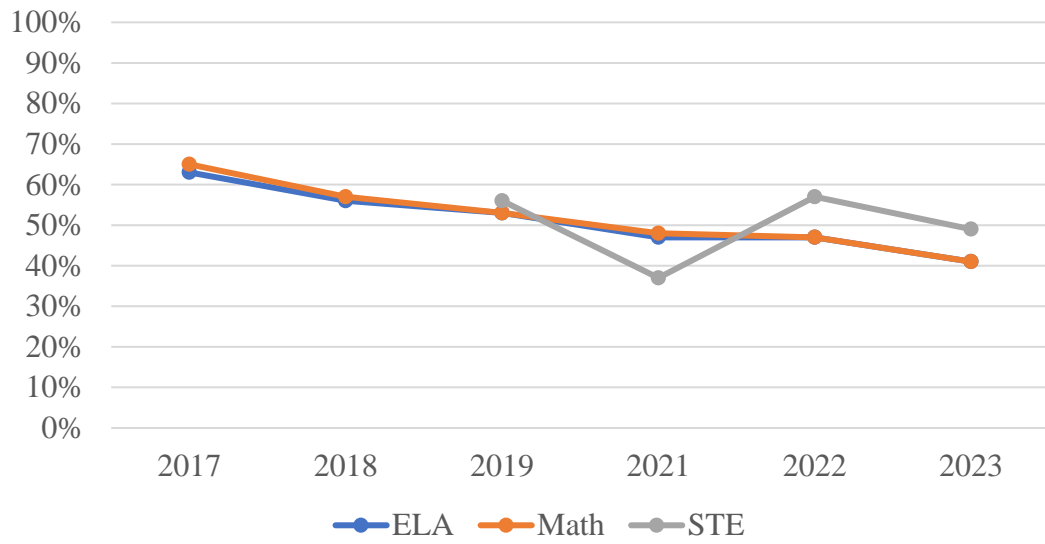
Appendix A: Tables and Charts

AA-AAAS Number and Percent of Participants Statewide

Admin Year	ELA # AA-AAAS	ELA Total	ELA & AA-AAAS	Math # AA-AAAS	Math Total	Math % AA-AAAS	STE # AA-AAAS	STE Total	STE % AA-AAAS
2023	5822	471310	1.235%	5,889	475569	1.238%	2,382	208473	1.143%
2022	5,837	470,393	1.241%	5,929	475,552	1.247%	2,458	211,483	1.162%
2021	5963	462141	1.290%	5981	461450	1.296%	1654	167193	0.989%
2019	6887	497500	1.384%	6983	501017	1.394%	2854	218436	1.307%
2018	7298	496887	1.469%	7360	496731	1.482%	-	-	-
2017	7917	495617	1.597%	7980	495751	1.610%	-	-	-



Percent of LEAs in Massachusetts assessing 500 or more total students and exceeding more than 1% of all students assessed on AA-AAAS



**Focus Districts - Percent of Students Assessed Using AA-AAAS
(ELA)**

District	2023	2022	2021	2019	2018	2017
Boston	2.322%	2.314%	2.569%	2.788%	2.835%	3.006%
Brockton	2.285%	2.048%	2.480%	2.780%	2.637%	2.288%
Chelsea	1.974%	1.392%	2.132%	2.626%	2.711%	3.053%
Chicopee	2.280%	2.678%	2.511%	2.320%	2.239%	2.320%
Everett	1.978%	1.928%	2.295%	1.909%	2.141%	2.051%
Fall River	2.103%	1.948%	2.124%	2.107%	2.587%	2.821%
Fitchburg	2.274%	2.426%	2.549%	2.644%	2.820%	3.460%
Framingham	2.267%	2.296%	1.943%	2.352%	2.791%	2.827%
Haverhill	1.533%	1.530%	1.669%	1.988%	3.115%	3.678%
Holyoke	2.363%	2.311%	2.759%	1.999%	3.699%	3.748%
Lawrence	1.420%	1.361%	1.649%	2.124%	2.076%	2.796%
Lowell	2.410%	2.097%	2.451%	2.215%	2.394%	2.287%
Lynn	2.252%	2.380%	2.614%	3.259%	3.436%	4.055%
Methuen	1.361%	1.349%	1.522%	2.117%	2.128%	2.293%
New Bedford	1.688%	1.776%	1.858%	1.633%	2.027%	2.268%
Pittsfield	1.955%	1.380%	2.038%	2.144%	2.664%	3.521%
Randolph	3.535%	3.030%	2.409%	3.569%	4.000%	3.810%
Saugus	1.586%	1.287%	1.628%	2.415%	2.199%	2.605%
Springfield	3.395%	3.136%	3.070%	3.240%	2.980%	3.039%
Ware	0.488%	1.830%	1.490%	1.955%	1.335%	1.312%
Wareham	3.004%	3.247%	3.114%	3.325%	2.776%	3.629%
Worcester	1.939%	1.901%	2.091%	2.100%	2.168%	2.414%

**Focus Districts Percent of Students Assessed Using AA-AAAS
(Math)**

District	2023	2022	2021	2019	2018	2017
Boston	2.324%	2.382%	2.584%	2.846%	2.830%	2.988%
Brockton	2.260%	2.003%	2.479%	2.790%	2.658%	2.276%
Chelsea	1.988%	1.691%	2.217%	2.360%	2.398%	2.776%
Chicopee	2.264%	2.607%	2.480%	2.239%	2.190%	2.307%
Everett	1.845%	1.841%	2.151%	1.834%	2.202%	2.165%
Fall River	2.074%	1.872%	2.135%	2.121%	2.591%	2.839%
Fitchburg	2.265%	2.520%	2.610%	2.830%	2.814%	3.456%
Framingham	2.092%	2.108%	1.838%	2.207%	2.723%	2.772%
Haverhill	1.568%	1.503%	1.661%	2.002%	3.216%	3.819%
Holyoke	2.490%	2.601%	2.774%	1.979%	3.713%	3.791%
Lawrence	1.451%	1.398%	1.649%	2.167%	2.080%	2.765%
Lowell	2.329%	1.950%	2.337%	2.175%	2.382%	2.244%
Lynn	2.268%	2.339%	2.616%	3.071%	3.397%	4.021%
Methuen	1.358%	1.373%	1.495%	2.243%	2.154%	2.263%
New Bedford	1.653%	1.744%	1.777%	1.641%	2.025%	2.285%
Pittsfield	2.147%	1.553%	2.096%	2.140%	2.652%	3.278%
Randolph	3.226%	2.926%	2.415%	3.408%	3.960%	3.805%
Saugus	1.578%	1.351%	1.563%	2.541%	2.188%	2.608%
Springfield	3.367%	2.955%	3.179%	3.237%	2.993%	3.035%
Ware	0.485%	1.809%	1.498%	1.940%	1.490%	1.310%
Wareham	3.010%	3.166%	3.303%	3.407%	2.778%	3.810%
Worcester	1.986%	1.974%	2.103%	2.107%	2.192%	2.418%

Focus Districts Percent of Students Assessed Using AA-AAAS (STE)

District	2023	2022	2021	2019
Boston	2.354%	1.970%	2.028%	2.579%
Brockton	2.471%	2.111%	2.679%	3.253%
Chelsea	1.426%	1.664%	3.059%	1.953%
Chicopee	1.936%	2.286%	2.889%	2.487%
Everett	1.091%	0.873%	0.799%	0.952%
Fall River	1.596%	2.330%	1.759%	2.737%
Fitchburg	2.532%	2.731%	1.354%	3.286%
Framingham	1.576%	2.216%	1.377%	1.964%
Haverhill	1.217%	1.504%	0.971%	2.208%
Holyoke	2.305%	2.281%	3.396%	1.977%
Lawrence	1.259%	1.068%	2.074%	2.071%
Lowell	2.262%	1.971%	3.325%	2.076%
Lynn	1.737%	1.911%	1.716%	2.651%
Methuen	1.006%	1.197%	1.201%	2.048%
New Bedford	1.735%	1.807%	2.130%	1.875%
Pittsfield	1.692%	1.022%	1.413%	1.753%
Randolph	3.130%	1.081%	2.376%	2.614%
Saugus	1.629%	1.333%	0.952%	2.791%
Springfield	3.294%	2.895%	2.675%	3.392%
Ware	1.500%	3.524%	0.000%	2.752%
Wareham	3.712%	3.661%	2.479%	2.240%
Worcester	1.868%	1.590%	1.484%	2.100%

Focus Districts Current AA-AAAS Rate Higher than 2017, 2018, or 2019

ELA	2023	2022	2021	2019	2018	2017
Boston	2.322%	2.314%	2.569%	2.788%	2.835%	3.006%
Brockton	2.285%	2.048%	2.480%	2.780%	2.637%	2.288%
Chelsea	1.974%	1.392%	2.132%	2.626%	2.711%	3.053%
Chicopee	2.280%	2.678%	2.511%	2.320%	2.239%	2.320%
Everett	1.978%	1.928%	2.295%	1.909%	2.141%	2.051%
Fall River	2.103%	1.948%	2.124%	2.107%	2.587%	2.821%
Fitchburg	2.274%	2.426%	2.549%	2.644%	2.820%	3.460%
Framingham	2.267%	2.296%	1.943%	2.352%	2.791%	2.827%
Haverhill	1.533%	1.530%	1.669%	1.988%	3.115%	3.678%
Holyoke	2.363%	2.311%	2.759%	1.999%	3.699%	3.748%
Lawrence	1.420%	1.361%	1.649%	2.124%	2.076%	2.796%
Lowell	2.410%	2.097%	2.451%	2.215%	2.394%	2.287%
Lynn	2.252%	2.380%	2.614%	3.259%	3.436%	4.055%
Methuen	1.361%	1.349%	1.522%	2.117%	2.128%	2.293%
New Bedford	1.688%	1.776%	1.858%	1.633%	2.027%	2.268%
Pittsfield	1.955%	1.380%	2.038%	2.144%	2.664%	3.521%
Randolph	3.535%	3.030%	2.409%	3.569%	4.000%	3.810%
Saugus	1.586%	1.287%	1.628%	2.415%	2.199%	2.605%
Springfield	3.395%	3.136%	3.070%	3.240%	2.980%	3.039%
Ware	0.488%	1.830%	1.490%	1.955%	1.335%	1.312%
Wareham	3.004%	3.247%	3.114%	3.325%	2.776%	3.629%
Worcester	1.939%	1.901%	2.091%	2.100%	2.168%	2.414%

Focus Districts Current AA-AAAS Rate Higher than 2017, 2018, or 2019

Math	2023	2022	2021	2019	2018	2017
Boston	2.32%	2.38%	2.58%	2.85%	2.83%	2.99%
Brockton	2.26%	2.00%	2.48%	2.79%	2.66%	2.28%
Chelsea	1.99%	1.69%	2.22%	2.36%	2.40%	2.78%
Chicopee	2.26%	2.61%	2.48%	2.24%	2.19%	2.31%
Everett	1.85%	1.84%	2.15%	1.83%	2.20%	2.16%
Fall River	2.07%	1.87%	2.14%	2.12%	2.59%	2.84%
Fitchburg	2.26%	2.52%	2.61%	2.83%	2.81%	3.46%
Framingham	2.09%	2.11%	1.84%	2.21%	2.72%	2.77%
Haverhill	1.57%	1.50%	1.66%	2.00%	3.22%	3.82%
Holyoke	2.49%	2.60%	2.77%	1.98%	3.71%	3.79%
Lawrence	1.45%	1.40%	1.65%	2.17%	2.08%	2.77%
Lowell	2.33%	1.95%	2.34%	2.18%	2.38%	2.24%
Lynn	2.27%	2.34%	2.62%	3.07%	3.40%	4.02%
Methuen	1.36%	1.37%	1.50%	2.24%	2.15%	2.26%
New Bedford	1.65%	1.74%	1.78%	1.64%	2.03%	2.28%
Pittsfield	2.15%	1.55%	2.10%	2.14%	2.65%	3.28%
Randolph	3.23%	2.93%	2.42%	3.41%	3.96%	3.81%
Saugus	1.58%	1.35%	1.56%	2.54%	2.19%	2.61%
Springfield	3.37%	2.96%	3.18%	3.24%	2.99%	3.03%
Ware	0.49%	1.81%	1.50%	1.94%	1.49%	1.31%
Wareham	3.01%	3.17%	3.30%	3.41%	2.78%	3.81%
Worcester	1.99%	1.97%	2.10%	2.11%	2.19%	2.42%

**Focus Districts Current AA-AAAS Rate Higher
than 2019**

STE	2023	2022	2021	2019
Boston	2.35%	1.97%	2.03%	2.58%
Brockton	2.47%	2.11%	2.68%	3.25%
Chelsea	1.43%	1.66%	3.06%	1.95%
Chicopee	1.94%	2.29%	2.89%	2.49%
Everett	1.09%	0.87%	0.80%	0.95%
Fall River	1.60%	2.33%	1.76%	2.74%
Fitchburg	2.53%	2.73%	1.35%	3.29%
Framingham	1.58%	2.22%	1.38%	1.96%
Haverhill	1.22%	1.50%	0.97%	2.21%
Holyoke	2.31%	2.28%	3.40%	1.98%
Lawrence	1.26%	1.07%	2.07%	2.07%
Lowell	2.26%	1.97%	3.33%	2.08%
Lynn	1.74%	1.91%	1.72%	2.65%
Methuen	1.01%	1.20%	1.20%	2.05%
New Bedford	1.74%	1.81%	2.13%	1.87%
Pittsfield	1.69%	1.02%	1.41%	1.75%
Randolph	3.13%	1.08%	2.38%	2.61%
Saugus	1.63%	1.33%	0.95%	2.79%
Springfield	3.29%	2.90%	2.68%	3.39%
Ware	1.50%	3.52%	0.00%	2.75%
Wareham	3.71%	3.66%	2.48%	2.24%
Worcester	1.87%	1.59%	1.48%	2.10%