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HB 3426: Prescribes Administration of Statewide Assessments by Schools
House Education Committee
Jan McComb & Brad Lenhardt
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Good afternoon Chair Gelser and members of the House Education Committee. For the record, I am Jan McComb speaking on behalf of the Oregon Education Department. With me today is Brad Lenhardt, our expert on alternate assessments. I am here today to provide you information about the possible effects of HB 3426.

Background

Oregon law requires all students be assessed. The Oregon Statewide Assessments are “summative” assessments, which are assessments generally carried out at the end of an instructional period. Such assessments are typically used for program accountability and to assign achievement level scores to students. These assessments are administered in a secure environment by district or school personnel.

Section 612(a)(16)(A) of IDEA requires that: "children with disabilities are included in all general State and district-wide assessment programs...with appropriate accommodations and alternate assessments where necessary."

Federal law also directs the states to test all students. Under NCLB, schools that failed to test at least 90% of all students failed to “make adequate progress.” This was to avoid the situation where schools could ignore the needs of some students and still be deemed adequate. This requirement includes students who had an individualized education program-- including students with a significant cognitive disability (who, per IEP team decision, can participate in Oregon’s alternate (“Extended”) assessment based on alternate achievement standards. While the *state* is precluded from exempting students from testing based on disability, administrative rules 581-022-0612 and 581-022-1910 allow *parents* to request that their child be exempted from state testing on the basis of disability or religion.

To comply with the terms of both ESEA and IDEA, Oregon’s state assessment system currently offers several accommodations and accessibility features to ensure access for students. In addition, Oregon’s Extended Assessment is available as an alternate assessment for those students with the most significant cognitive disabilities if determined necessary by the student’s IEP team.

Legislation

As proposed, Section 1(2) of HB 3426 would exclude all students on an Individualized Education Program (IEP) from state testing unless the student’s parent requests that the student take the assessment. This would require districts to obtain parental consent before administering a state assessment to any student on an IEP. Proposed Section 1(3) of HB 3426 would allow parents of all students to exempt their student from testing, regardless of disability or religion.

Unintended Consequences

The effect of HB 3426 would be to discriminate against students with disabilities, in violation of state and federal laws.

Federal Law

At the federal level, the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, and the Individuals with Disabilities Education Act of 2004 (IDEA) require that individuals with disabilities be given equal opportunity to participate in and benefit from any program or activity customarily granted to all individuals with appropriate adaptations, including state assessment programs. As described in the fiscal impact statement below, violating federal anti-discrimination laws could jeopardize billions of dollars in federal funding for Oregon schools.

State Law

Current state law also prohibits public agencies, including the Department of Education, from exempting a student from participation in the state assessment system on the basis of the student's disability (ORS 659.850; OAR 581-022-0612).

Impact on Federal Accountability Requirements

In addition to violating anti-discrimination laws at both the federal and state level, Section 1(2) of HB 3426 would exclude students with disabilities from state testing in explicit violation of federal accountability laws, which require inclusion of "all students." Section 1(3) of HB 3426 would pose the further risk of decreasing participation in the state assessment system, jeopardizing Oregon's ability to comply with federal accountability laws, and thereby jeopardizing federal funding tied to those accountability requirements. Specifically, excluding students from state testing on the basis of their disability would violate requirements from the Elementary and Secondary Education Act (ESEA) and the Individuals with Disabilities Education Act (IDEA).

ESEA, Title I

Federal accountability laws under the Elementary and Secondary Education Act (ESEA) require states to test all students, including students with disabilities. Title I of ESEA specifically requires that all students with disabilities in schools receiving Title I funds must be included in the state assessment system, and the scores of students with disabilities must be included in the assessment system for purposes of public reporting and school and district accountability.

ESEA Flexibility Waiver

In addition, Oregon's ESEA Flexibility Waiver which was approved by the U.S. Department of Education in 2012 contains an assurance that Oregon will report annually on its state report card, and will ensure that its LEAs annually report on their local report cards, on the performance of "all students" on the state assessments; this includes students on IEPs.

IDEA

To ensure access to state assessment programs for students on IEPs, IDEA requires that a student's IEP identify appropriate accommodations necessary to measure the academic achievement and functional performance of the student on state assessments or justifies the student's participation in an alternate assessment if the student cannot participate in the regular assessment (34 CFR 300.320, Section (a)(6)).

Oregon Diploma

Finally, excluding students with disabilities from state testing without an explicit opt-in by the student's parent would place a significant road block in front of these students in terms of obtaining either a regular or modified high school diploma. At the high school level, the state assessments are the primary vehicle for

students to satisfy the Essential Skills graduation requirement. Excluding students on IEPs from state testing, even with a parental opt-in option, would put students on IEPs at a disadvantage compared to their peers.

Fiscal Impact

HB 3426, which would go into effect July 1, 2013, would cause Oregon to be in violation of IDEA, which would jeopardize up to \$128 million of federal funding under IDEA annually, representing a potential risk to a total of \$256 million across the 2013-15 biennium. In addition to the loss of IDEA funds, HB 3426 may also result in the loss of all federal funds. HB3426 would likely have an additional fiscal impact at the local school district level.

Under the terms of HB 3426, districts would need to obtain parental consent before administering a state assessment to a student on an Individualized Education Program (IEP). Each year, Oregon has an average of 43,689 students on IEPs in the state in tested grades, with a median number of 66 students per district. In order to include these students in state testing, districts would need to allocate resources to communicating this change to parents and provide a way to collect and manage parent requests.

Additionally, districts would need to devote staff time to training staff on the new requirement to ensure that staff did not test students on IEPs without first receiving a parent request. Furthermore, districts would need to allocate additional staff FTE to provide services for students on IEPs while their peers were engaged in state testing. This could present a resource burden for many districts. Finally, the discrimination that would result from HB 3426 and the confusion of implementing state laws which differ from federal requirements could result at lawsuits and legal fees for both the state and districts, which would add an additional unquantifiable statewide fiscal impact.