



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 29, 2024

Senator Michael Dembrow
900 Court Street NE S407
Salem OR 97301

Re: State Board of Education proposed rule under Senate Bill 3 (2023)

Dear Senator Dembrow:

Under the authority of ORS 183.720, you have asked for a review of the State Board of Education's proposed rule that would implement the provisions of Senate Bill 3 (2023). At the board's meeting on April 18, 2024, the board presented two options of draft language for the rule. For the reasons explained below, we conclude that neither option is within the intent and scope of the enabling legislation.

Process of Review

Under ORS 183.720 (2), the Legislative Counsel is required to review a proposed or adopted rule of a state agency upon the written request of any member of the Legislative Assembly. A review conducted under ORS 183.720 is required to include determinations of whether the rule is within the intent and scope of the enabling legislation¹ and whether the rule raises any constitutional issues.²

A determination under ORS 183.720 that a rule is not within the intent and scope of enabling legislation does not invalidate the rule. Instead, the Legislative Counsel is required to send a copy of the determination to the agency.³ The agency then is required to respond whether the agency "intends to repeal, amend or take other action with respect to the rule."⁴ Based on the agency's response, the Legislative Assembly is authorized to take additional actions, including requiring appearances at legislative committees and posting a negative determination on the Legislative Counsel website.⁵ You have requested an analysis of a proposed rule, but similar procedures related to the Legislative Counsel's review, the agency's response, committee appearances and the website posting are allowed if the State Board of Education proceeds to adopt a rule that is determined to be not within the intent and scope of the enabling legislation.⁶

¹ ORS 183.720 (3)(a).

² ORS 183.720 (3)(b).

³ ORS 183.720 (6).

⁴ ORS 183.722 (1)(a).

⁵ ORS 183.722.

⁶ See ORS 183.720 and 183.722.

While the legislative branch may not invalidate a rule, the judicial branch can. Any person may petition the Court of Appeals to review the validity of a rule.⁷ The court may declare a rule invalid if the court finds that the rule exceeded the statutory authority of the agency⁸ by having “the effect of undermining the legislative intent.”⁹ A court only reviews rules that have been adopted, not proposed rules.

Legislative Effect of Senate Bill 3 (2023)

Senate Bill 3 (2023)¹⁰ modified high school diploma requirements, as prescribed by ORS 329.451. Under that statute, a student must complete at least 24 total credits between grades 9 through 12 in order to receive a high school diploma.¹¹ Prior to the enactment of SB 3, the 24 total credits were required to include at least three credits of mathematics, four credits of language arts and one half-credit of civics.¹² Any other subject-matter credit requirements were prescribed by rule of the State Board of Education or by the school district or public charter school awarding the high school diploma.¹³

With the enactment of SB 3, the subject-matter credit requirements were expanded to include one half-credit of higher education and career path skills and one half-credit of personal financial education.¹⁴ The State Board of Education, school districts and public charter schools retained the authority to designate other subject-matter credit requirements,¹⁵ but those requirements would be in addition to the subject-matter credit requirements specified in statute. SB 3 effectively reduced by one credit the total number of subject-matter credit requirements for a high school diploma that the board, districts and schools could prescribe within the 24-credit framework.

State Board of Education’s Proposed Rules

On April 18, 2024, the State Board of Education proposed two options for a rule that would implement the new subject-matter credit requirements prescribed by the enactment of SB 3.¹⁶ The first part of both rule options relates to the qualifications of educators who teach the higher education and career path skills course and the personal financial education course. The educator qualification part is identical in both rule options. The third part of both rule options relates to a one-time, one-year waiver of the new subject-matter credit requirements, as allowed under section 2 of SB 3. The waiver part also is identical in both rule options. The second part of both rule options relates to how the new subject-matter credit is awarded in relation to courses that include multiple content areas. The only difference between the two rule options is the second part.

Under Option A, credit may be awarded for both higher education and career path skills and for personal financial education if a course integrates the content standards for those new

⁷ ORS 183.400.

⁸ ORS 183.400 (4)(b).

⁹ See *Garrison v. Department of Revenue*, 345 Or. 544, 548-549 (2008).

¹⁰ Chapter 564, Oregon Laws 2023.

¹¹ ORS 329.451 (2).

¹² ORS 329.451 (2)(a), as amended by section 1, chapter 175, Oregon Laws 2021.

¹³ See ORS 329.451 (2)(a).

¹⁴ ORS 329.451 (2)(a)(D) and (E), as amended by section 1, chapter 564, Oregon Laws 2023.

¹⁵ See ORS 329.451 (2)(a).

¹⁶ See *7.B. Senate Bill 3 (2023) Implementation*, Attachment: “New Draft Rules Language V5 (SBE Both Options),” State Board of Education, <https://meetings.boardbook.org/Public/Agenda/2146?meeting=629295> (last visited May 23, 2024).

subject matters. In other words, the new subject-matter credit requirements are satisfied when a student successfully completes a course in another subject matter as long as the content standards for the new subject matters are integrated into that course. A stand-alone course is not required for higher education and career path skills or for personal financial education under Option A.

Option B is a slight variation on Option A. Option B takes the same approach as Option A in relation to higher education and career path skills; however, Option B does not make the same allowance for personal financial education. Instead, Option B requires personal financial education instruction to be delivered through a stand-alone course. In that course, credit may be awarded for another subject matter if the content standards for that subject matter are integrated into the personal financial education course but personal financial education may not be integrated into the course for another subject matter. Under Option B, a stand-alone course is not required for higher education and career path skills but is required for personal financial education.

Analysis

A. Credit Requirements for a High School Diploma

The Legislative Assembly has recognized the importance of many subject matters as part of a quality education. For some subject matters, school districts are required to provide instruction.¹⁷ For subject matters identified as core academic subjects, the State Board of Education is directed to adopt rigorous academic content standards¹⁸ and school districts are required to provide instruction in those subject matters.¹⁹ For subject matters for which a student must complete coursework, the Legislative Assembly has exercised significant restraint.

The only instance in which the Legislative Assembly has identified specific subject matters for which a student must complete coursework is in relation to high school diplomas. In 2005, the Legislative Assembly established statewide requirements for a high school diploma.²⁰ For more than 15 years after the enactment of that statute, the only statutory subject-matter credit requirements for a high school diploma were three years of mathematics and four years of language arts.²¹ In 2021, the Legislative Assembly modified the subject-matter credit requirements by adding one half-credit of civics.²² In 2023, the Legislative Assembly once again modified the subject-matter credit requirements by adding one half-credit of higher education and career path skills and one half-credit of personal financial education.²³

¹⁷ See e.g., ORS 329.494 (required instruction about the Holocaust and genocide), 336.057 (required instruction in the Constitution of the United States and the history of the United States), 336.455 (human sexuality education courses as an integral part of the health education curriculum), 336.059 (child sexual abuse prevention instructional program), 336.472 (cardiopulmonary resuscitation and uses of automated external defibrillators as an integral part of the health education curriculum), 336.473 (oral health as an integral part of the health education curriculum) and 336.474 (instruction on organ and tissue donation and education as an integral part of the health education curriculum).

¹⁸ ORS 329.045 (1)(b)(A) (directing the State Board of Education to adopt academic content standards in mathematics, science, language arts, history, geography, economics, civics, higher education and career path skills, personal financial education, physical education, health, the arts and world languages).

¹⁹ Compare ORS 329.045 (1)(b)(A) and (3)(a).

²⁰ Chapter 827, Oregon Laws 2005.

²¹ ORS 329.451 (2005 Edition) (the term “English” was changed to “language arts” with the enactment of chapter 178, Oregon Laws 2021).

²² Chapter 175, Oregon Laws 2021.

²³ Chapter 564, Oregon Laws 2023.

The Legislative Assembly has made a distinction between subject matters for which academic content standards are adopted and subject matters for which a student must complete a credit requirement. While students must be provided access to all subject matters for which academic content standards are adopted,²⁴ students are not statutorily required to complete coursework in all of those subject matters. In contrast, students are required to complete coursework in all of the subject matters listed in statute as requirements for a high school diploma.

Other distinctions between academic content standard requirements and high school diploma requirements are quality and quantity. Academic content standards refer to the quality of instruction,²⁵ which necessarily may require a quantity of time but that quantity of time is not specified. In contrast, high school diploma subject-matter credit requirements refer to the depth of instruction by tying the amount of instruction to one-half school year or one full school year. The placement of a subject matter in the list of subject-matter credit requirements for a high school diploma indicates that the Legislative Assembly expects students to receive specific and significant instruction in those subject matters.

Allowing the new subject-matter credit requirements to be satisfied by courses that integrate the new content standards with other content standards does not advance the legislative intent of SB 3 because the integration would cause the legislation to be ineffective. As the Senate Committee on Education was informed by the Department of Education, financial literacy standards already are an existing component of social science standards.²⁶ That integration has caused “many social science teachers [to] report that they do not have the expertise or time to address the 10 high school financial literacy standards within a history or civics course.”²⁷ Based on reports from social science teachers, the department concluded that “it is clear that financial literacy courses are most successful when offered as stand-alone courses.”²⁸ If higher education and career path skills requirements and personal financial education requirements may be satisfied by instruction integrated in other content areas, as proposed by both rule options, then current practices could continue and the enactment of SB 3 would have not caused any change.

We believe that, by adding the requirements for higher education and career path skills and for personal financial education to the statute prescribing subject-matter credit requirements for a high school diploma, the Legislative Assembly did not intend the content standards of those subject matters to be integrated into other subject matters, as proposed by both options of the rule. By adding the subject-matter credit requirements to the requirements for a high school diploma, the Legislative Assembly indicated that receiving instruction that complies with academic content standards was not, in itself, enough. Instead, a stand-alone course would be expected.

B. Rulemaking Authority for Courses

While the addition of credit requirements for higher education and career path skills and for personal financial education to the list of subject-matter credit requirements in ORS 329.451 (2)(a) indicates the Legislative Assembly expected stand-alone courses for those requirements,

²⁴ Compare ORS 329.045 (1)(b)(A) and (3)(a).

²⁵ ORS 329.007 (1) (defining the term “academic content standards” to mean “expectations of student knowledge and skills”).

²⁶ Letter from Zoe Larmer, Government Relations Director of the Department of Education, to Chair Dembrow and Members of the Senate Education Committee, March 7, 2023, <https://olis.oregonlegislature.gov/liz/2023R1/Downloads/CommitteeMeetingDocument/263837> (last visited May 23, 2024).

²⁷ *Id.*

²⁸ *Id.*

the rulemaking authority for those subject matters under ORS 329.451 (2)(d) presents possible conflicting interpretations.

Under ORS 329.451 (2)(d), the State Board of Education is authorized to adopt rules that “allow [higher education and career path skills and personal financial education] courses to satisfy multiple credit requirements for a high school diploma, including mathematics.” As discussed above, we believe that the addition of the subject matter requirements to ORS 329.451 (2)(a), with a minimum designated credit amount dedicated to the subject matters, indicates that the Legislative Assembly intended the subject matters to be provided as stand-alone courses. Interpreting ORS 329.451 (2)(d) as allowing a course to satisfy a credit requirement under, for example, both ORS 329.451 (2)(a)(A) for mathematics and ORS 329.451 (2)(a)(E) for personal financial education would be contrary to historical interpretations and practices related to the awarding of credits for high school diplomas. The question then arises as to what is intended by the language of ORS 329.451 (2)(d).

When the meaning of a statute is ambiguous after the text and context of the statute have been analyzed, the legislative history for the statute shall be considered. The language of ORS 329.451 (2)(d) was introduced with the A-engrossed version of SB 3. In comparison to the introduced version, the A-engrossed version provided school districts with increased flexibility and time to prepare for providing students with instruction in higher education and career path skills and in personal financial education. Those changes remained in later versions of the bill and are present in the enrolled version of the bill.

Flexibility was provided in the A-engrossed version of the bill in relation to the credit requirement. Whereas the introduced version required one credit of future planning,²⁹ the A-engrossed version divided that requirement into one half-credit of higher education and career path skills and one half-credit of personal financial education.³⁰ The change in credit requirements allows greater flexibility in how the content standards are delivered to students as the two contained half-credits can more easily be moved around in a student’s schedule. Additionally, the change in credit requirements allows greater flexibility in determining which teachers will provide the instruction of the content standards. Whereas school districts may have been challenged to identify one or more teachers to provide a yearlong course in elements of instruction that ranged from resume-writing to planning for retirement, the changes in the A-engrossed version opened a pathway for school districts to more easily designate one teacher to provide instruction on higher education and career path skills and another teacher to provide instruction on personal financial education.³¹

A longer timeline for implementation also was provided in the A-engrossed version of the bill. Whereas the introduced version applied the new subject-matter credit requirements to high school diplomas awarded on or after July 1, 2025,³² the A-engrossed version delayed implementation to high school diplomas awarded on or after January 1, 2027.³³ Additionally, in recognition of demands on school districts to identify teachers who could provide the new content

²⁹ ORS 329.451 (2)(a)(D) (Introduced Senate Bill 3). The term “future planning” was defined to include both financial literacy standards and guidance on post-secondary education and career-related skills (Section 4 (6) of Introduced SB 3).

³⁰ ORS 329.451 (2)(a)(D) and (E).

³¹ Public hearing on Senate Bill 3, Senate Committee on Education at 54:38, February 28, 2023, <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2023021312> (last visited May 23, 2024).

³² Section 3 (2) of Introduced SB 3.

³³ Section 2 (2) of SB 3.

standards, the A-engrossed version provided for a one-time, one-year waiver for school districts that could demonstrate that the school district “is unable to provide courses necessary for students to satisfy the credit requirements . . . due to a lack of educators qualified to provide the courses.”³⁴

The changes described above, and the language of ORS 329.451 (2)(d), reflect a fundamental challenge and opportunity with the new subject-matter credit requirements—that these subject matters are new creations of statute, for which extensive statutory definitions are necessary to describe which elements are part of the new subject matters.³⁵ Neither subject matter is available as an endorsement³⁶ or specialization³⁷ for a teaching license by the Teacher Standards and Practices Commission. As new subject matters, the elements of the subject matters could be presented from various perspectives. The Senate Committee on Education was informed that current practices were to deliver financial literacy standards as part of a social science course,³⁸ but the committee also heard testimony about how math teachers taught financial literacy courses³⁹ when the material was presented as a stand-alone class. In a presentation before the State Board of Education, recommendations were made to combine personal financial literacy with career and technical education standards or with economics standards.⁴⁰ Most likely, the language of ORS 329.451 (2)(d) was a nudge by the Legislative Assembly to the State Board of Education to adopt standards for the two subject matters in a manner that allowed flexibility in perspectives by which the new subject matters were taught, including the qualifications of the teachers for the new subject matters.

The language of ORS 329.451 (2)(d) does not allow for the content of the new subject matters to be combined with the content of other subject matters at the expense of the new subject matters. The materials presented to the State Board of Education for the proposed rule options, however, indicate that the importance of the new subject matters could be equal, or even secondary, to other subject matters. According to materials presented at the board meeting, both rule options would allow the higher education and career path skills and the personal financial education standards to be integrated into other subject matter courses.⁴¹ We do not believe this approach is consistent with the legislative intent to require significant instruction in the new subject matters. Potentially, the rule options would perpetuate the current practice of rushed or incomplete instruction as teachers are not given enough time or training to provide instruction in the new subject matters within the confines of the other subject matters. Allowing the new subject matters to be integrated into other subject matter courses “and vice versa,”⁴² indicates that the importance of the subject matters is interchangeable when the Legislative Assembly has made clear they are not.

³⁴ Section 2 (3) of SB 3.

³⁵ See ORS 329.007 (6) and (7).

³⁶ OAR chapter 584, division 220.

³⁷ OAR chapter 584, division 225.

³⁸ Letter from Zoe Larmer, Government Relations Director of the Department of Education, to Chair Dembrow and Members of the Senate Education Committee, March 7, 2023, <https://olis.oregonlegislature.gov/liz/2023R1/Downloads/CommitteeMeetingDocument/263837> (last visited May 23, 2024).

³⁹ Public hearing on Senate Bill 3, Senate Committee on Education at 56:13, February 28, 2023, <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2023021312> (last visited May 23, 2024).

⁴⁰ Regular meeting of the State Board of Education at 3:12:44, April 18, 2024, <https://www.youtube.com/watch?v=fn6xvNJCjA> (last visited May 23, 2024).

⁴¹ *7.B. Senate Bill 3 (2023) Implementation*, Attachment: “SB 3 First-Read Rules Docket April 2024,” State Board of Education, <https://meetings.boardbook.org/Public/Agenda/2146?meeting=629295> (last visited May 23, 2024).

⁴² *Id.*

As discussed above, the language in ORS 329.451 (2)(d) authorizing dual satisfaction of subject-matter credit requirements was introduced with the A-engrossed version of SB 3. At no time, in a committee meeting or on a chamber floor, did a member indicate that this language reduced the importance of the new subject matters. You and Representative Susan McClain both discussed the new subject matters in terms of stand-alone classes that would eliminate one elective credit option for students.⁴³ In the same committee meeting, Representative Emily McIntire expressed concerns that the higher education and career path skills requirements would be duplicative of other college preparation programs.⁴⁴ At no point were these interpretations clarified or corrected and at no point was the legislation accordingly amended. Representative Emily McIntire again expressed her concerns on the House Floor,⁴⁵ along with Representative Kim Wallan,⁴⁶ as both representatives voted against SB 3 out of concern of duplication of courses and burdens on school districts. The discussions by these members in committee meetings and on the House Floor indicate an understanding by the members that the new subject-matter credit requirements would require new stand-alone classes.

The Department of Education has recommended to the State Board of Education that the board adopt Option A of the proposed rule for the purpose of “allowing for flexibility to meet local district needs.”⁴⁷ The Legislative Assembly also heard many of the concerns that have been expressed to the department and the board and that have resulted in Option A and Option B. The Legislative Assembly responded to those concerns with amendments that became the A-engrossed version of SB 3. The Legislative Assembly, however, remained committed to the importance of higher education and career path skills and to personal financial education, and at no time gave any indication that those new subject matters could be integrated into other subject matters.

As a result of our analysis of the text and context of ORS 329.451 and the legislative history of SB 3, we conclude that the State Board of Education lacks the statutory authority to integrate the new subject matter requirements into other subject matter courses. Whereas both Option A and Option B authorize that approach to various degrees, both options exceed the statutory authority granted by the enabling legislation. Accordingly, we find that both Option A and Option B do not comply with the statutory authority of SB 3.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel’s office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel’s office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or

⁴³ Work session on Senate Bill 3 at 15:12, Joint Subcommittee on Education, May 30, 2023, <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2023051276> (last visited May 23, 2024),

⁴⁴ *Id.* at 14:18.

⁴⁵ Floor session at 2:44:30, House, June 21, 2023 (statement of Representative Emily McIntire), <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2023061067> (last visited May 23, 2024).


⁴⁶ Floor session at 2:45:22, House, June 21, 2023 (statement of Representative Kim Wallan), <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2023061067> (last visited May 23, 2024).

⁴⁷ See 7.B. *Senate Bill 3 (2023) Implementation*, Attachment: “SB 3 First-Read Rules Docket April 2024,” State Board of Education, <https://meetings.boardbook.org/Public/Agenda/2146?meeting=629295> (last visited May 23, 2024).

other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

A handwritten signature in black ink that reads "Hannah Lai". The signature is written in a cursive, flowing style.

By
Hannah Lai
Senior Deputy Legislative Counsel

c: Haedon Brunelle
Rules Coordinator, State Board of Education