

Department of Legislative Services  
Maryland General Assembly  
2017 Session

FISCAL AND POLICY NOTE  
First Reader

House Bill 705 (Delegate Vogt, *et al.*)  
Ways and Means

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Education - PARCC Testing - Children With Disabilities (Ben's Rule)

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This bill authorizes the parent of a child with a disability who is nonverbal to refuse to allow the child to participate in a Partnership for Assessment of Readiness for College and Careers (PARCC) assessment or its equivalent. The refusal of the parent must be documented in the Individualized Education Program (IEP) of the child.

The bill takes effect July 1, 2017.

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Fiscal Summary

**State Effect:** Beginning in FY 2018, the bill's requirements may put the State out of compliance with the federal Individuals with Disabilities Education Act (IDEA) and the Elementary and Secondary Education Act (ESEA), potentially jeopardizing up to \$210 million in federal IDEA Part B revenues and \$219 million in federal ESEA Title I revenues. As long as the State is out of compliance with federal law, federal revenues, which are anticipated to increase in future years, will continue to be in jeopardy.

**Local Effect:** Local school system federal IDEA and Title I revenues may be jeopardized.

**Small Business Effect:** None.

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## Analysis

### **Current Law/Background:**

#### *Individualized Education Program*

IDEA requires that a child with disabilities be provided a free appropriate public education in the least restrictive environment from birth through the end of the school year in which the student turns 21 years old, in accordance with an IEP specific to the individual needs of the student. Local school systems are required to make a free appropriate public education available to students with an IEP. However, the State, under its supervisory authority required by IDEA, has the ultimate responsibility for ensuring that this obligation is met.

An IEP is a written statement for each child with a disability that, among other things, must indicate the present levels of academic achievement and functional performance of a child, measurable academic and functional goals for the child, how the child's progress toward meeting these goals will be measured, and the special education and related services that are to be provided for the child. The parent of a child with a disability is a member of the IEP team that is responsible for developing and reviewing a child's IEP and for revisions to the IEP.

#### *Assessment Requirements*

The most recent reauthorization of ESEA, the Every Student Succeeds Act of 2015 (ESSA), requires annual assessments of all students in grades 3 through 8 and at least once in high school in reading/language arts and mathematics; the law also requires students to be tested in science at least once in grades 3 through 5, 6 through 8, and 9 through 12. Furthermore, State assessments must be the same academic assessments used to measure the achievement of all children and provide for the participation in such assessments of all students. States are required to have 95% of students participate in the assessment, although states may allow parents to have their students opt out of taking the assessment. In Maryland, PARCC is mostly used for these requirements.

In a December 2, 2015 "Dear Colleague" letter, the U.S. Department of Education (ED) reiterated the importance of reaching the 95% participation rate and announced that, "[i]f a State with participation rates below 95% in the 2014-2015 school year fails to assess at least 95% of its students on the statewide assessment in the 2015-2016 school year, ED will take one or more of the following actions: (1) withhold Title I, Part A State administrative funds; (2) place the State's Title I, Part A grant on high-risk status and direct the State to use a portion of its Title I State administrative funds to address low participation rates; or (3) withhold or redirect Title VI State assessment funds."

Under ESSA, states are responsible for establishing their own accountability systems that must be submitted to ED. Plans must be peer reviewed, with the reviewers being made public, and states could have a hearing if their plans are turned down. The State Consolidated Plan includes compliance with federal assessment requirements. Specifically, according to section 1111(b)(3)(C)(i) of ESEA, the assessments must provide for the participation of *all* students, although there should be reasonable adaptations and accommodations for students with disabilities. In addition, limited English proficient students must be assessed in a valid and reliable manner and provided reasonable accommodations on assessments administered to such students. Specifically, under federal ESEA regulations, a state must develop guidelines for appropriate accommodations that do not invalidate the score of the assessment. Under State regulation, IEP teams determine the appropriate participation for each student by selecting either general assessments (with or without accommodations) or alternate assessments (discussed below).

### *Testing Requirements for Students with Disabilities*

Federal regulations issued under IDEA (34 CFR section 300.160(a)) require that each state ensure that all children with disabilities are included in all general state and district-wide assessment programs, including assessments described under section 1111 of ESEA, 20 USC 6311, with appropriate accommodations and alternate assessments, if necessary, as indicated in their respective IEPs.

According to ESEA section 1111, a state may provide for alternate assessments aligned with the challenging state academic standards and alternate academic achievement standards for students with the most significant cognitive disabilities. However, the total number of students assessed using the alternative assessment may not exceed 1% of the total number of all students in the State who are assessed in such a subject. Parents must be clearly informed, as part of the process for developing an IEP, that their child's academic achievement will be based on alternative achievements, and how such participation may delay or otherwise affect the student from completing the requirements for a regular high school diploma.

The Maryland State Department of Education (MSDE), as the State education agency, must make certain assurances, as conditions for receiving ESEA Title I and IDEA federal funds to support the education of students with disabilities, that the State has in effect policies and procedures that:

- establish goals for the performance of students with disabilities in the State that are the same as the State's objectives for progress by children under section 1111(b)(2)(C) of ESEA (20 USC § 6311);

- are consistent, to the extent appropriate, with any other goals and academic standards for children established by the State;
- ensure that assessments shall be the same academic assessments used to measure the achievement of all children under section 1111(b)(3)(C) of ESEA (20 USC § 6311);
- report annually on its State report card for the “all students” group and for each subgroup described in ESEA section 1111(b)(2)(C)(v)(II): information on student achievement at each proficiency level and data comparing actual achievement levels to the State’s annual measurable objectives; and
- report annually to the Secretary of Education and the public on the progress of the State and of children with disabilities in the State toward meeting the goals established under paragraph (a) of this section, which may include elements of the reports required under section 1111(h) of ESEA (34 CFR § 300.157).

**State Revenues:** MSDE advises that Maryland’s participation rate has averaged 98.5% statewide over the past five years. Participation is limited for a number of reasons, including medical excuses, absence, or refusal to participate. By explicitly allowing parents to opt-out of assessments for nonverbal children with disabilities under the bill, Maryland’s participation rate may fall below the federally mandated 95% level. As the number of opt-outs grows, federal funds could be at risk. In addition, ED could find that the State is failing to administer assessments to students with disabilities, as required by IDEA.

Therefore, under the bill the federal government could potentially withhold approximately \$210 million in federal IDEA Part B (sections 611 and 619) revenues and \$219 million in federal ESEA Title I revenues in fiscal 2018. The estimated loss in federal revenues is based on funds authorized but not yet appropriated by the federal government. As long as the State is out of compliance with federal law, federal revenues, which are anticipated to increase in future years, will continue to be in jeopardy.

### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Maryland State Department of Education; Department of Legislative Services

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