

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 366
Ways and Means

(Delegate Vogt, *et al.*)

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

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, 2018.**

Fiscal Summary

State Effect: Beginning in FY 2019, 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 \$224.6 million in federal IDEA Part B revenues and \$243.0 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.

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. Maryland's [plan](#) was approved by ED January 16, 2018. 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 districtwide 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. States may submit a request for a waiver from the 1% cap to ED. 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 specified policies and procedures.

The Multi-State Alternate Assessment

In Maryland, students with significant cognitive disabilities take the Multi-State Alternate Assessment (MSAA) rather than the PARCC assessments. The MSAA is designed to measure academic content that is aligned to and derived from each state's content standards. This test contains many built-in supports that allow students to use materials they are most familiar with and communicate what they know and can do as independently

as possible. It is an alternate assessment based on alternate academic achievement standards. The MSAA is administered in the areas of English/Language Arts and mathematics in grades 3 through 8 and grade 11.

MSDE advises that in order to participate in the MSAA, a student must meet all eligibility criteria, as outlined in the Maryland guidance document, [Maryland Guidance for IEP Teams on Participation Decisions for the Alternate Assessments](#), and must have parental consent to participate in the alternate assessment. In general, to participate in the MSAA a student must (1) have significant cognitive disability; (2) be learning content derived from the Maryland College and Career-Ready Standards in English/language arts and Mathematics, and the Next Generation Science Standards; *and* (3) require extensive, direct, individualized, and repeated instruction and substantial supports to achieve measurable gains in adapted and modified curriculum. According to the guidance document, the IEP team – parents, teachers, administrators, and the student (as appropriate) – make the decision on how a student will participate in the federally required assessments.

Multi-State Alternate Assessment – Early Stopping Rule

For the MSAA, the early stopping rule is applied when a student does not display a consistent, reliable, and observable response. Immediately prior to the MSAA, the proctor must (1) conduct the student response check, which is a standardized method to check a student’s ability to respond; (2) document that the student has no observable response mode; and (3) administer the first four questions of one of the content areas. If no response is observed, the school testing coordinator may stop the test. After stopping the test, steps must be taken to put specific interventions in place that address communicative competence.

Communicative Competence

MSDE advises that there are multiple means of communication, including gestures, eye gaze, pointing, and augmentative communication devices. Thus, “nonverbal” does not necessarily reflect a student’s ability to participate in assessments.

MSDE advises that the majority of students, including students with disabilities, participate in the PARCC assessment in English/language arts and mathematics. Without exception, these students have communication, whether it be verbal, nonverbal (*e.g.*, gesture or eye gaze) or involve the use of a communication device.

According to MSDE, curriculum, instruction *and* assessment is part of every child’s total educational program. The State Board of Education has shared with parents that while they have a fundamental right to choose whether to send their child to a public school, a parent

cannot selectively choose or reject parts of the public education itself, including State assessments.

State Revenues: MSDE advises that Maryland's participation rate has averaged 98.41% 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 \$224.6 million in federal IDEA Part B (Sections 611 and 619) revenues and \$243.0 million in federal ESEA Title I revenues in fiscal 2019. 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: A similar bill, HB 705 of 2017, received a hearing in the House Ways and Means Committee, but no further action was taken. A similar bill, HB 1204 of 2016, received a hearing in the House Ways and Means Committee, but no further action was taken.

Cross File: None.

Information Source(s): Baltimore City; Worcester County; Maryland State Department of Education; U.S. Department of Education; Federal Funds Information for States; Department of Legislative Services

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