



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

September 7, 2010

The Honorable Mary Nolan
Representative, District 36
Oregon House of Representatives
P.O. Box 1686
Portland, OR 97207

Ed Dennis, Deputy Superintendent
Office of the Superintendent
Oregon Department of Education
255 Capitol Street NE
Salem, OR 97310

Re: Opinion Request OP-2010-5

Dear Representative Nolan and Mr. Dennis:

This advice concerns the interpretation of ORS 329.488, which requires the Oregon Department of Education (department) to contract with a qualified vendor to administer a nationally normed test to all tenth-grade public school students, and of Oregon Laws 2009, chapter 824, section 1 (chapter 824), which requires the department to grant waivers to eligible school districts to use their own qualified vendors to administer such a test.

FIRST QUESTION PRESENTED

Is the department prohibited from issuing a waiver pursuant to chapter 824 to a school district if the district's contractor does not meet all of the criteria established in ORS 329.488(2)?

SHORT ANSWER

Yes.

SECOND QUESTION PRESENTED

If the contractor being used by a district that seeks a waiver is administering a test pursuant to a district contract in only 13 of 197 school districts statewide, is it possible for that contractor to meet the requirement in ORS 329.488(2)(a) that "the contractor must be able to provide to the department statewide data containing the results of the assessment"?

SHORT ANSWER

Yes.

DISCUSSION

I. Introduction

A. Background

In 2007, the Assembly enacted ORS 329.488, which requires the department to contract with a vendor to administer a nationally-normed test to “all students in grade 10 who are enrolled in a public school.” Or Laws 2007, ch 858, § 42(1). We understand that the department subsequently contracted with the College Board to administer the PSAT/NMSQT® (PSAT) test.

We also understand that, prior to the enactment of ORS 329.488, some school districts had already been administering nationally-normed tests to their students, using either the PSAT or the ACT’s PLAN® (ACT-P) tests. Those districts had invested significant resources to implement those assessments.

In 2008, the Assembly enacted a law that required the department to permit certain districts “to use an entity other than the entity selected by the department pursuant to ORS 329.488” during the 2008-2009 school year. Or Laws 2008 (special session), ch 20, § 2(1). Among other conditions for such a “waiver,” a district must have “entered into a contract with the entity for the 2007-2008 school year to administer an assessment to students in the district who are in grade 10.” *Id.* at § 2(2)(a).

In 2009, the Assembly enacted a new provision that essentially extended a qualifying district’s ability to obtain a waiver from ORS 329.488 until June 30, 2011 and provided funding for those districts that use an alternative testing contractor pursuant to such a waiver. Or Laws 2009, ch 824, §§ 1(1) and (3), 2. Under both the 2008 and the 2009 enactments, the district’s testing contractor must have met and plan to meet the selection criteria for the department’s contractor established under ORS 329.488(2). Or Laws 2008 (special session), ch 20, § 2(2)(c); Or Laws 2009, ch 824, § 1(1)(c), (d).

As explained further below, the legislative history of the 2009 legislation clearly indicates that the Assembly intended that legislation to permit qualifying districts to continue to use the ACT-P test under a “waiver” from ORS 329.488. Your questions essentially seek to know whether the Assembly failed to achieve this clear intent, perhaps because the 2009 law did not adequately deal with the requirement in ORS 329.488(2)(a) that the department’s contractor “must be able to provide * * * statewide data containing the results of the assessment.”

B. Full text of pertinent laws

ORS 329.488 provides:

(1) The Department of Education shall contract with a nonprofit entity to administer a nationally normed assessment, in collaboration with the department, to all students in grade 10 who are enrolled in a public school. The purpose of the assessment is to predict the success of students on, and provide practice for students taking, college entrance exams.

(2) The department shall base the selection of the contractor under subsection (1) of this section on all of the following criteria:

(a) The contractor must be able to provide to the department statewide data containing the results of the assessment;

(b) The contractor shall provide an assessment that:

(A) Identifies students with high potential to excel in advanced placement (AP) or other honors courses based on a research-based correlation of scores on the grade 10 assessment to advanced placement examinations;

(B) Examines students in mathematics, reading and writing; and

(C) Provides results that can be used by Oregon's higher education institutions to recruit students to attend college;

(c) The contractor must be able to supply schools with an item-by-item analysis of student performance on the assessment; and

(d) The contractor must be able to make available to each student taking the assessment a free career assessment and online exploration of colleges and career opportunities.

(3) Notwithstanding subsection (1) of this section:

(a) The department may, under rules adopted by the State Board of Education, waive the assessment for specific groups of students; and

(b) Upon request from a student who is enrolled in a public school operated by a school district or the parent or guardian of the student, the school district shall waive the assessment for the student.

(Emphasis added).

Chapter 824 provides:

Sec. 1. (1) Notwithstanding ORS 329.488 and for the purpose of administering a nationally normed assessment to students in a school district who are in grade 10, the *Department of Education shall grant a waiver* to a school district to enter into a contract with a nonprofit entity other than the contractor selected by the department under ORS 329.488 *if*:

(a) The district had entered into a contract with the entity for the 2007-2008 school year to administer an assessment to students in the district who are in grade 10;

(b) The entity, in coordination with the district, administered an assessment during the 2007-2008 school year to students in the district who are in grade 10;

(c) *For the most recent school year in which the entity administered an assessment, the entity met the criteria established under ORS 329.488 (2) as in effect for the school year in which the entity administered the assessment; and*

(d) *The entity plans to meet the criteria established under ORS 329.488 (2) for the school year for which the school district seeks a waiver.*

(2) A waiver granted by the department under this section:

(a) Is valid for one school year; and

(b) May be renewed each school year.

(3) The department shall reimburse a school district for the cost of assessments allowed under this section from funds available to the department under ORS 327.008 (10).

Sec. 2. Section 1 of this 2009 Act is repealed on June 30, 2011.

(Emphasis added).

II. Template for statutory interpretation

Your questions require us to construe the laws quoted above. Our goal in interpreting statutes is to determine the legislature's intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-611, 859 P2d 1143 (1993); ORS 174.020. We begin by examining the statutory text in context. *PGE*, 317 Or at 610. In doing so, we apply statutory and judicial rules for reading text and context, such as not to omit what has been inserted or to insert what has been omitted and to give effect to all statutory provisions if possible. *Id.*, 317 Or at 610; ORS 174.010. We also examine the legislative history when it is useful to our analysis of statutory language. *State v. Gaines*, 346 Or 160, 171-172, 206 P3d 1042 (2009); ORS 174.020(1)(b), (3). Such "history is most useful when it is able to uncover the manifest general legislative intent behind an enactment." *Gaines*, 346 Or at 172-73 n. 9.

III. Department's waiver authority

The preconditions for a waiver under chapter 824 include two unambiguous requirements. First, the *district's contractor* must have met ORS 329.488(2)'s criteria for the *department's contractor* for the most recent school year in which the contractor administered the assessment. Or Laws 2009, ch 824, § 1(1)(c). Second, the district's contractor must plan to meet those criteria for the school year for which a waiver is sought. *Id.* at § 1(1)(d).

Like other state agencies, the department "is a creature of statute," and has "only such power and authority as has been conferred upon it by its organic legislation." *Ochoco Const., Inc. v. Department of Land Conservation and Development*, 295 Or 422, 426-427, 667 P2d 499, 502 (1983) (stating general rule for state agencies). Chapter 824, section 1(1) provides the only statutory authority for the department to grant a waiver under chapter 824 to a school district from the mandates of ORS 329.488. Accordingly, in answer to your first question, we conclude that the department may not grant a waiver under chapter 824 to a district that contracts with a vendor that does not meet all of ORS 329.488(2)'s requirements for the department's contractor.

IV. "Must be able to provide * * * statewide data containing the results of the assessment"

A. Text in context

The purpose of ORS 329.488(2) was to establish the department's criteria for the selection of a nonprofit entity to administer a nationally normed assessment to public school tenth-graders. Prior to the enactment of this statute, there was no department contractor that provided "statewide data" to the department about such an assessment. Accordingly, when enacted, the ORS 329.488(2)(a) requirement ("must be able to provide * * * statewide data" * * * of the assessment") was forward-looking.

In other words, a prospective contractor did not need to have preexisting "statewide data" when it responded to a request for proposals from the department. Instead, it appears that a prospective contractor merely needed to have the internal ability ("must be able") to report the

data generated by the test it subsequently administered not only on a per-student basis as essentially required by ORS 329.488(2)(b) (“identifies students”) or on a per-school basis as essentially required by ORS 329.488(2)(c) (“to supply schools”), but also on a composite total results basis.

Before proceeding further, we pause to review the plain meanings of the words “able” and “statewide.” The most pertinent definitions of “able” are:

1 a : possessed of needed powers (as intelligence or strength) or of needed resources (as means or influence) to accomplish an objective <*able* to solve a problem> <*able* to buy a house> **b :** designed, constructed, or naturally endowed with the power to perform a task or achieve an end <machines *able* to lift 10 tons> <owls *able* to see in the dark>

WEBSTER’S THIRD NEW INT’L DICTIONARY at 4 (2002). These definitions suggest that “able” in this context means the inherent capability or power to accomplish a task or objective. In other words, the “must be able to provide” statewide data criterion suggests that the prospective contractor only must have the internal capacity to provide “statewide data” from the results of the assessment.

The dictionary defines “statewide” as “extending throughout a *state* : including all parts of a *state*[.]” WEBSTER’S at 2229 (unabridged 2002). The relevant meaning of “extending” in this context is “to stretch out (as in distance, space, or time.)” WEBSTER’S at 804. And the pertinent meaning of “throughout” is “all the way from one end to the other of; in or to every part of.” WEBSTER’S at 2385. After assembling these definitions, it appears that the ordinary meanings of “statewide” are stretching all the way from one end of the state to the other or including all parts of the state.

We note, however, that the phrase “statewide data” does not stand alone but instead is part of the larger clause “statewide data containing the results of the assessment.” In 2007, the Assembly likely contemplated only one contractor and only one assessment test. The department’s contractor had to have the inherent ability to compile and provide to the department all of its results, whatever they were, of “the assessment.”

Even in 2007, the Assembly understood that the statewide data as to test results would not include data from every public school tenth-grader, even though ORS 329.488(1) directs the department to contract to administer the test to all such students. The reason was that ORS 329.488(3) (2007) permitted two categories of waivers from the assessment of “all students in grade 10.” First, the department was authorized to allow the contractor to “waive the assessment for specific groups of students.” ORS 329.488(3)(a) (2007).^{1/} Second, upon request of any student or a student’s parent or guardian, “the school district shall waive the assessment of the student.” ORS 329.488(3)(b)(2007). Thus, in 2007, ORS 329.488 itself contemplated that the statewide test results ultimately reported by the department’s contractor could include significant gaps.

Put another way, the phrase “must be able to provide * * * statewide data * * * of the assessment” in this context suggests that the contractor merely must have the internal capacity to report the results of the tests it administered throughout the state, however comprehensive or narrow that testing actually is, on a composite or “statewide” basis. Thus, so long as the contractor or a prospective contractor has the inherent ability to provide composite results of the tests it actually administers in the state, the contractor appears to satisfy the “must be able to provide * * * statewide data * * * of the assessment” criterion of ORS 329.488(2)(a).

Finally, the difficulty with interpreting ORS 329.488(2)(a) as requiring a district’s contractor to actually administer its assessment in every part of the state or to every tenth-grader is that it would render chapter 824 completely ineffective. That interpretation would be contrary to the rule of statutory construction that requires us to avoid a construction that renders one statute ineffective. *See, e.g., Thomas Creek Lumber and Log Co. v. Dept. of Rev.*, 344 Or 131, 137, 178 P3d 217 (2008) (stating and applying the rule); ORS 174.010 (“where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all”).

By definition, a district’s contractor is one “other than the contractor selected by the department under ORS 329.488.” Or Laws 2009, ch 824, § 1. If the department’s contractor is the only vendor that can provide a statewide assessment and statewide data, then it would be impossible for a district to have a different contractor. But the legislature clearly intended to allow some waivers to occur. That also suggests that the meaning of the “must be able to provide * * * statewide data” clause for purposes of ORS 329.488 and chapter 824 is that a district’s contractor merely must have the inherent capability to report its results on a composite or statewide basis (whatever those results are) in the most recent year in which it administered the assessment and plan to have that same capacity for the school year for which the district seeks a waiver.

This interpretation also accommodates the department’s contractor. Because, to the extent that there are waivers under ORS 329.488(3) or chapter 824 or instances of students not taking the contractor’s test for other reasons, that contractor also will not deliver test result data from every district or student in the state. Instead, properly understood, ORS 329.488 only requires that contractor to be able to deliver composite results from all its data sources in the state (the assessment results), whatever they are.

B. Legislative history

While we have been unable to find any helpful 2007 legislative history as to the intended meaning of ORS 329.488(2)(a), our conclusions are consistent with the legislative history of the 2009 waiver legislation.

In 2009, Ozzie Rose testified at the legislature in support of SB 976A (chapter 824). He represented those school districts using the ACT-P that sought a two year extension of the 2008 waiver from ORS 329.488 and funding for their administration of that test. Among other items,

Mr. Rose informed the House Rules Committee that, out of 45,600 2008-2009 tenth-graders in Oregon, the department's contractor administered its test only to 26,900 students. About 8,000 students were tested under a district waiver, and 10,900 students were not tested at all. Minutes, House Rules Committee (SB 976), June 27, 2009, Exhibit 2 at 2 (Memo from Ozzie Rose to House Rules Committee). Mr. Rose also testified in part that SB 976A extended the 2008 waiver for two more years "*if the alternative test meets the criteria, and it does.*" Testimony of Ozzie Rose, House Rules Committee (SB 976A), June 25, 2009, at 11:26-11:28 a.m. (emphasis added).

The carrier of chapter 824 (SB 976A) in the House was Representative Chris Harker. In his floor speech in support of the bill, he stated:

Colleagues, today I rise in support of Senate Bill 976 and a brief review of the history is in order and I'll try to emphasize brief. Under the 2007 statute, the Oregon Department of Education issued a contract to administer a standardized test to students in grade 10 around Oregon. The test selected was part of the SAT family of tests. Then in the 2008 session, this body permitted local districts to receive waivers if they were already using a similar test, just so long as that test provider met all the requirements of testing as stated in the 2007 legislation. At that time there were 13 school districts already using such a test. The ACT, which is short for American College Test. Those districts sought and received the waivers, based in part on an established history using the ACT instead of the SAT to assess their students' progress. Senate Bill 976 extends these waivers providing districts already using the ACT with the option to continue to do so. Don't get me wrong, both tests are excellent and although neither is perfect, each is broadly accepted as a valid assessment of student learning. However, without this bill, districts using the ACT will have to switch to the SAT, which would effectively erase the history they have on tracking student progress year-to-year. By passing Senate Bill 976, there will be a reshuffling of money through the Department of Education and the education service district. But the result is not a net loss to the State and schools. In fact, there will likely be a savings because ACT tests are cheaper to administer. In addition to the support this bill has from the affected schools districts, the State Board of Ed. voted unanimously this past March to support continuation of the waivers. Opposition to the bill has centered around the fact that a contract was awarded to the vendors of the SAT in 2007. However, waivers were granted to these school districts in 2008 because they were already using a comparable test. Both broadly accepted, recognized as legitimate. Colleagues, these districts have a record of tracking the student achievement with the ACT. Current and future students in these districts will be better served by passage of Senate Bill 976, enabling them to continue to track that progress as they have been for years and I urge your support. Thank you, Mr. Speaker.

Floor Speech of Representative Chris Harker, June 29, 2009 (SB 976A), at 1:43:28 p.m.

Senator Mark Hass carried chapter 824 (SB 976A) in the Senate. In his brief floor speech, Senator Hass said, in pertinent part, that the districts needed “this waiver to do what they’ve been doing all along” and that without this bill, “thirteen school districts will have to switch [testing contractors] which will be more expensive and less efficient.” Floor Speech of Senator Mark Hass, June 23, 2009 (SB 976A), at 1:48:18 p.m.

In sum, there is no doubt that the 2009 Assembly intended chapter 824 to permit qualifying districts to continue to administer the ACT-P. It also is fairly clear that the legislators believed that ACT and its ACT-P test met all the criteria for a waiver from ORS 329.488.

CONCLUSION

The department is prohibited from granting a waiver to a school district unless the district’s contractor met all of the criteria in ORS 329.488(2) as in effect for the most recent school year that it had administered an assessment and plans to meet all of the criteria for the school year for which a waiver is sought.

The selection criterion in ORS 329.488(2)(a) requires that a contractor must have the inherent capability to provide statewide data containing the results of the assessment that it administers. That criterion requires the contractor to be capable of compiling and providing data as to the results of all its tenth-grader testing in the state pursuant to a contract. Therefore, it is possible for a contractor that administers the test pursuant to district contracts in only 13 of the state’s 197 school districts to meet the criterion in ORS 329.488(2)(a).

Sincerely,

David E. Leith
Associate Attorney General and
Chief General Counsel
General Counsel Division

DEL:clr/DM2234852

¹ Oregon Laws 2008 (special session), chapter 20, section 1 (3) amended ORS 329.488(3)(a) as follows:

Notwithstanding subsection (1) of this section:

(a) The department may *[allow the contractor]*, **under rules adopted by the State Board of Education**, *[to]* waive the assessment for specific groups of students.