



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 9, 2022

Representative Teresa Alonso Leon, Chair
House Committee on Education
900 Court Street NE
Salem, OR 97301

Re: References to “minority gender identity or sexual orientation education plan” in House Bill 4091 (2022)

Dear Representative Alonso Leon:

The House Committee on Education has asked for clarification about the addition of the language “the minority gender identity or sexual orientation education plan developed under ORS 329.847” into House Bill 4091 (2022). We conclude that the added language is not a substantive change and that the addition of the language is a housekeeping fix that adds clarity to the statutes without changing the meaning of the statutes.

The primary purpose of HB 4091 is to provide for the development and implementation of a statewide education plan for Native Hawaiian or Pacific Islander students. Included in the bill are amendments to ORS 327.254, which directs the Department of Education to use moneys in the Statewide Education Initiatives Account to provide funding for statewide education initiatives.¹ Among the allowed uses are the development and provision of “statewide equity initiatives, including the Black or African-American education plan developed under ORS 329.841, the American Indian or Alaska Native education plan developed under ORS 329.843, the Latino or Hispanic education plan developed under ORS 329.845 or any similar education plan identified by the department.”² House Bill 4091 proposes adding to that list the Native Hawaiian or Pacific Islander education plan developed under section 1 of the bill, and also adding the minority gender identity or sexual orientation education plan developed under ORS 329.847. The minority gender identity or sexual orientation education plan is an existing plan that was enacted in 2021.³

We do not believe that the addition of the minority gender identity or sexual orientation education plan makes a substantive change to ORS 327.254. This education plan generally qualifies as a statewide equity initiative because it is an education plan that is developed for statewide implementation by the Department of Education.⁴ Similarly to the education plans developed and implemented under ORS 329.841, 329.843 and 329.845 that address specific students from racial or cultural groups that historically have been underserved, the education plan developed and implemented under ORS 329.847 addresses sexual orientation and gender identities that historically have been underserved. Addressing resources and barriers for

¹ Sections 5 and 6 of House Bill 4091 (2022).

² ORS 327.254 (1)(e).

³ Section 1, chapter 644, Oregon Laws 2021 (Enrolled Senate Bill 52).

⁴ ORS 329.847 (2).

historically underserved groups is one cornerstone -of the Department of Education's goals related to equity.⁵ Because the education plan developed under ORS 329.847 is intended to be implemented statewide and has an equity focus, we conclude that the plan is a statewide equity initiative. As a statewide equity initiative, the plan is eligible for funding from the Statewide Education Initiatives Account. Adding a specific reference in ORS 327.254 to allow funding for the plan developed under ORS 329.847 does not result in a substantive change to the statute because the plan already is eligible for funding without being specifically identified.

In addition to concluding that the education plan developed under ORS 329.847 is eligible for funding as a general statewide equity initiative under ORS 327.254, we believe that the plan also satisfies the requirements of a "similar education plan." The education plan developed under ORS 329.847 is similar in form and substance to the other education plans developed under ORS 329.841, 329.843 and 329.845. Each plan has an advisory group⁶ that advises the Department of Education and assists the department in addressing disparities and disproportionate outcomes experienced by plan students.⁷ The Department of Education recognizes the similarity of these education plans and treats all four education plans in a similar manner in its administrative rules.⁸ The similar structure and treatment of the education plan developed under ORS 329.847 in relation to the other statewide education plans mean that the plan is eligible for funding from the Statewide Education Initiatives Account under ORS 327.254. Adding a specific reference in ORS 327.254 to allow funding for the plan developed under ORS 329.847 does not result in a substantive change to that statute because the plan already is eligible for funding without being specifically identified.

After concluding that the addition to ORS 327.254 of the reference to the education plan developed under ORS 329.847 does not result in a substantive change, the question may arise as to why that change is being made in HB 4091. The reason is to add clarity to the statutes. If a court in this state were to review the language of ORS 327.254 to determine if the statute allows moneys in the Statewide Education Initiatives Account to be used for the education plan developed under ORS 329.847, the court would begin with an analysis of the text and context of ORS 327.254.⁹ Most likely, the court would reach the same conclusion as the one we reached above; however, the court may find the language of the text ambiguous because all other statewide education plans are specifically identified. When the language of text is ambiguous, a court will consider the legislative history.¹⁰ The legislative record would find that at no point was the funding source provided by ORS 327.254 considered and rejected for purposes of the plan developed under ORS 329.847. Instead, the legislative record indicates that the plan was considered a continuation of the Student Success Act,¹¹ which established the funding sources for, and specified the uses of, the Statewide Education Initiatives Account. This was an assumption readily taken by the Department of Education, which requested the legislation that became ORS 329.847.¹² In the testimony provided by the director of the Department of Education, Colt Gill, the statewide education plans always were tightly intertwined with the Student Success Act, and Mr. Gill even refers to the provisions that would become ORS

⁵ See OAR 581-017-0010 (describing the Oregon Equity Lens used by the Department of Education when administering strategic investments, including when determining resource allocation and making strategic investments).

⁶ ORS 329.841 (2)(b), 329.843 (2)(b), 329.845 (2)(b) and 329.847 (2)(b).

⁷ ORS 329.841 (3)(a) and (4)(a), 329.843 (3)(a) and (4)(a), 329.845 (3)(a) and (4)(a) and 329.847 (3)(a) and (4)(a).

⁸ See OAR chapter 581, division 17.

⁹ *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 611 (1993).

¹⁰ *Id.* at 611-612.

¹¹ Chapter 122, Oregon Laws 2019 (Enrolled House Bill 3427).

¹² See section 1, chapter 644, Oregon Laws 2021 (Enrolled Senate Bill 52).

329.847 as the LGBTQ2IA+ Student Success Plan.¹³ As a “student success plan,” a logical assumption is that the plan would be eligible to receive moneys under the Student Success Act from the Statewide Education Initiatives Account. Based on this legislative history, we believe a court would conclude that adding a specific reference in ORS 327.254 to allow funding for the plan developed under ORS 329.847 does not result in a substantive change to statute.

The question may arise as to why ORS 327.254 currently does not include a reference to the plan developed under ORS 329.847 if the plan always was intended to be eligible for funding under ORS 327.254. Unfortunately, the most likely answer is that the omission was an oversight. ORS 327.254 provided a new funding source that was created in 2019. Until 2019, only one other statewide education plan was in existence and that plan was in an isolated silo. Between the funding source being new and statewide education plans having a history of being isolated, the interaction between the two statutes was not recognized and addressed when ORS 329.847 was enacted in 2021. Correcting the oversight is a “housekeeping fix,” which clarifies the statute without making a substantive change.

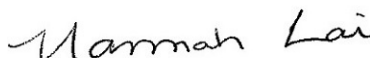
In conclusion, we do not believe the language added to ORS 327.254 referring to the plan developed under ORS 329.847 makes a substantive change. Instead the language adds clarity and is a housekeeping fix that corrects an omission caused by an oversight.

We hope this is helpful. Please let us know if you have any additional questions.

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Very truly yours,

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¹³ See Colt Gill, “Moving Equity Forward” (February 1, 2021) and the LGBTQ2SIA+ Student Success Plan (June 2020), both available at <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Testimony/SB52> (last visited February 9, 2022) as testimony and report submitted by Jessica Ventura of the Department of Education at the February 3, 2021, meeting of the Senate Committee on Education.