

Senate Bill 758

Sponsored by Senators GELSER BLOUIN, MANNING JR, Representatives BYNUM, HUDSON; Representative MCLAIN

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Prescribes timelines and redacting requirements for records related to provision of special education.

Provides that school district bears burden of proof related to special education and determinations and appropriateness regarding identification, evaluation, individualized education program or educational placement and provision of free appropriate public education.

Prohibits school district from preventing or discouraging school employee or volunteer from taking certain actions related to special education and violation of related laws. Prohibits certain nondisclosure agreements between school district and student, parent, school employee or school volunteer related to provision of special education.

Takes effect on 91st day following adjournment sine die.

A BILL FOR AN ACT

1
2 Relating to sharing of information related to special education; creating new provisions; amending
3 ORS 343.041, 343.165, 343.167, 343.173 and 343.175; and prescribing an effective date.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 343.173 is amended to read:

6 343.173. (1) Notwithstanding the limitation on access to records under ORS 192.311 to 192.478,
7 326.565, 326.575 and 336.187, the parent is entitled at any reasonable time to examine all of the re-
8 cords of the school district pertaining to the identification, evaluation and educational placement
9 of the child and the provision of a free appropriate public education to the child. **Records must**
10 **be provided without undue delay, and in no case within more than 10 calendar days from the**
11 **date of the request for the records. Records may be redacted only to the extent necessary**
12 **to protect personally identifiable information of other children unless disclosure is author-**
13 **ized by law or court order.**

14 (2) Any parent is entitled to obtain an independent evaluation at the expense of the school dis-
15 trict if the parent disagrees with an evaluation obtained by the district.

16 (3) If the school district disagrees with the parent's request for an independent educational
17 evaluation, the district may initiate a hearing under ORS 343.165 to show that the district's evalu-
18 ation is appropriate. If the final decision is that the district's evaluation is appropriate, the parent
19 has the right to an independent educational evaluation, but not at the district's expense.

20 (4) If the parent requests an independent educational evaluation of the child, the school district
21 shall provide information about where an independent educational evaluation may be obtained.

22 (5) If a hearing officer appointed under ORS 343.165 requests an independent educational eval-
23 uation as part of a hearing, the school district shall pay the cost of the evaluation.

24 (6) For purposes of this section, "independent educational evaluation" means an evaluation
25 conducted by a qualified examiner who is not employed by the school district responsible for the
26 child in question.

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

SECTION 2. ORS 343.165 is amended to read:

343.165. (1)(a) A hearing shall be conducted pursuant to rules of the State Board of Education if:

[(a)] (A) The parent requests a hearing to contest the determination of the school district concerning the identification, evaluation, individualized education program, educational placement or the provision of a free appropriate public education to the child; or

[(b)] (B) The school district requests a hearing to obtain a decision regarding whether its identification, evaluation, individualized education program or educational placement of the child is appropriate or whether the district's proposed action is necessary to provide the child with a free appropriate public education.

(b) In a hearing requested as provided by this subsection, the school district bears the burden of proof related to determinations and appropriateness regarding the identification, evaluation, individualized education program or educational placement and the provision of a free appropriate public education.

[(2)] (c) Notwithstanding [subsection (1)(b) of this section] **paragraph (a)(B) of this subsection**, a school district may not request a hearing if a parent refuses or revokes consent for placement in a program providing special education and related services.

[(3)(a)] (2)(a) Except as provided in paragraph (b) of this subsection, a hearing described in subsection (1) of this section must be requested within two years after the date of the act or omission that gives rise to the right to request a hearing under subsection (1) of this section.

(b) The timeline described in paragraph (a) of this subsection does not apply to a parent if the parent was prevented from requesting the hearing due to:

(A) Specific misrepresentations by the school district that it had resolved the problem forming the basis of the complaint; or

(B) The school district withholding from the parent information that the district was required to provide under this chapter.

[(4)] (3) The State Board of Education shall adopt rules that establish when a school district is obligated to initiate a contested case hearing to ensure that a student with a disability is provided with a free appropriate public education.

[(5) *The board's rules in subsection (1) of this section shall be as consistent as possible with the procedures applicable to a contested case under ORS chapter 183. However, the board's rules shall provide that:*]

(4) The rules adopted for a hearing as provided by subsection (1) of this section shall be as consistent as possible with the procedures applicable to a contested case under ORS chapter 183, except that:

(a) The school district is required to provide any evidence without undue delay, not to exceed 10 calendar days, to:

(A) A parent, if the parent requests the evidence;

(B) The Department of Education, a court or an entity designated by the department or court, if the department, court or entity requests the evidence; or

(C) A parent, the department, a court or an entity designated by the department or court if the evidence was provided to the school district's attorney and is not subject to attorney-client privilege;

(b) Any evidence provided to a parent, the department, a court or a designated entity of the department or court may be redacted only to the extent necessary to protect personally

1 **identifiable information of other students unless disclosure is authorized by law or court**
 2 **order;**

3 [(a)] (c) Any party to a hearing has the right to prohibit the introduction of any evidence that
 4 has not been disclosed to that party at least five business days before the hearing; and

5 [(b)] (d) The hearing officer may prohibit the introduction of any evidence regarding evaluations
 6 and recommendations based on those evaluations that a party intends to use at the hearing, if the
 7 evidence has not been disclosed to the other party at least five business days before the hearing,
 8 unless the other party consents to the introduction of the evidence.

9 [(6)] (5) Notwithstanding subsection [(5)] (4) of this section, in an expedited hearing the evidence
 10 must be disclosed to the other party not later than two business days before the hearing.

11 [(7)] (6) The parent shall be entitled to have the child who is the subject of the hearing present
 12 at the hearing and to have the hearing open to the public.

13 [(8)] (7) An expedited hearing shall be held if:

14 (a) In a dispute over a disciplinary action for a child with a disability, the child's parent disa-
 15 grees with a determination that the child's behavior was not a manifestation of the child's disability
 16 or with any decision regarding the child's educational placement; or

17 (b) The school district believes that maintaining the current placement for the child is substan-
 18 tially likely to result in injury to the child or others.

19 [(9)] (8) The hearing shall be conducted by an independent hearing officer appointed by the Su-
 20 perintendent of Public Instruction. The hearing officer:

21 (a) Shall not be:

22 (A) An employee of a school district involved in the education or care of the child;

23 (B) An employee of the Department of Education; or

24 (C) A person having any personal or professional interest that would conflict with the person's
 25 objectivity in the hearing.

26 (b) Shall possess:

27 (A) Knowledge of, and the ability to understand, the provisions of state and federal special ed-
 28 ucation laws, regulations and legal interpretations by federal and state courts;

29 (B) The knowledge and ability to conduct hearings in accordance with appropriate standard le-
 30 gal practice; and

31 (C) The knowledge and ability to render and write decisions in accordance with standard legal
 32 practice.

33 **SECTION 3. The amendments to ORS 343.165 by section 2 of this 2023 Act apply to com-**
 34 **plaints made on or after the effective date of this 2023 Act.**

35 **SECTION 4. Section 5 of this 2023 Act is added to and made a part of ORS chapter 343.**

36 **SECTION 5. (1) A school district may not prohibit or discourage a school employee or**
 37 **school volunteer from:**

38 (a) **Participating in good faith in interviews with individuals designated by the Depart-**
 39 **ment of Education, law enforcement, a court or any other entity involved in the investigation**
 40 **of a complaint under ORS 343.165;**

41 (b) **Making a good faith report of a violation of state or federal law involving special ed-**
 42 **ucation and related services;**

43 (c) **Sharing information in good faith with the student or the student's parent about the**
 44 **services provided or not provided to the student under this chapter;**

45 (d) **Reporting in good faith concerns about inappropriate restraint, seclusion or corporal**

1 **punishment of a student to the student's parent, the school, law enforcement, a court or**
2 **other authorities;**

3 **(e) Making a report of suspected abuse or neglect, including abuse or neglect that hap-**
4 **pens at a school, to law enforcement or the Department of Human Services; or**

5 **(f) Reporting a suspected violation of the rights of a child with a disability or the rights**
6 **of any other disabled person within the school district to the state protection and advocacy**
7 **system.**

8 **(2) A school district may not require a student, parent, school employee or school vol-**
9 **unteer to sign a nondisclosure agreement related to:**

10 **(a) Any violations of law or policy by the school district or by the a school employee or**
11 **school volunteer involving special education and related services;**

12 **(b) The resolution of a complaint, including a complaint concerning the services provided**
13 **for the student;**

14 **(c) Injuries sustained by a student, including injuries sustained due to the inappropriate**
15 **use of seclusion or restraint; or**

16 **(d) The death of a student.**

17 **(3) A school district may not otherwise cause a parent or student to believe the school**
18 **district will reduce or revoke services from a student or impose a financial penalty on a**
19 **parent or student due to the parent or student's good faith public or private disclosure of**
20 **information about any settlement or resolution to a dispute or complaint or about the ex-**
21 **perience of the parent or student with the school district.**

22 **SECTION 6. Section 5 of this 2023 Act applies to nondisclosure agreements entered into**
23 **before, on or after the effective date of this 2023 Act. Any parts of nondisclosure agreements**
24 **inconsistent with the provisions of section 5 of this 2023 Act are void and unenforceable.**

25 **SECTION 7. ORS 343.041 is amended to read:**

26 343.041. (1) Pursuant to rules of the State Board of Education, the Superintendent of Public In-
27 struction shall be responsible for the general supervision of all special education programs for
28 children with disabilities, early childhood special education and early intervention services for pre-
29 school children with disabilities within the state, including all such programs administered by any
30 state agency or common or union high school district or education service district.

31 (2) All special education programs for children with disabilities, early childhood special educa-
32 tion and early intervention services for preschool children with disabilities within this state shall
33 meet the standards and criteria established therefor by the State Board of Education.

34 (3) The State Board of Education shall adopt by rule procedures whereby the superintendent
35 investigates and resolves complaints that the Department of Education, a local education agency or
36 an early intervention or early childhood special education contractor has violated a federal law or
37 statute that applies to a special education or early childhood special education program. **Complaint**
38 **procedures must comply with the provisions of ORS 343.165.**

39 (4) The State Board of Education shall adopt rules relating to the establishment and mainte-
40 nance of standards to ensure that personnel providing special education and early childhood special
41 education and early intervention services are appropriately and adequately trained.

42 (5) The Governor shall direct that agencies affected by this section enter into cooperative
43 agreements to achieve necessary uniformity in meeting the standards and criteria established by the
44 state board under subsection (2) of this section.

45 (6) The Governor shall direct that each public agency obligated under federal or state law to

1 provide or pay for any services that are also considered special education or related services nec-
 2 cessary for ensuring a free appropriate public education to children with disabilities, including but
 3 not limited to the Department of Human Services, enter into cooperative agreements with the De-
 4 partment of Education concerning:

- 5 (a) Allocation among agencies of financial responsibility for providing services;
- 6 (b) Conditions, terms and procedures for reimbursement; and
- 7 (c) Policies and procedures for coordinating timely and appropriate delivery of services.

8 (7) All cooperative agreements entered into under subsections (5) and (6) of this section shall
 9 include procedures for resolving interagency disputes.

10 **SECTION 8.** ORS 343.167 is amended to read:

11 343.167. (1) If the finding at the hearing held under ORS 343.165 is that the identification, eval-
 12 uation and educational placement by the district are appropriate and that the child is being provided
 13 a free appropriate public education, the hearing officer shall decide in support of the determination
 14 of the district.

15 (2) If the finding at the hearing is that the identification, evaluation or educational placement
 16 is not appropriate or that the child is not being provided a free appropriate public education, the
 17 hearing officer shall grant appropriate relief within the hearing officer's scope of authority.

18 (3) In matters alleging a procedural violation, a hearing officer may find that a child did not
 19 receive a free appropriate public education only if the procedural inadequacies:

- 20 (a) Impeded the child's right to a free appropriate public education;
- 21 (b) Significantly impeded the parents' opportunity to participate in the decision-making process
 22 regarding the provision of a free appropriate public education to the child; or
- 23 (c) Caused a deprivation of educational benefits.

24 (4) Nothing in subsection (3) of this section shall be construed to preclude a hearing officer from
 25 ordering a school district to comply with procedural requirements.

26 (5) The decision shall be entered not later than 45 days after the request for hearing is filed
 27 unless an extension has been granted by the hearing officer at the request of the parent or the
 28 school district. Copies of the decision shall be sent to the parent and to the school district accom-
 29 panied by a statement describing the method of appealing the decision.

30 (6) In expedited hearings conducted pursuant to ORS 343.165 [(8)] (7), the State Board of Edu-
 31 cation shall adopt rules that require a hearing within 20 school days of the date the hearing is re-
 32 quested and a determination within 10 school days after the hearing.

33 (7) Pursuant to rules of the State Board of Education, the Superintendent of Public Instruction
 34 shall bill the school district for all reasonable costs connected with the appointment of an inde-
 35 pendent hearing officer and the conduct of a due process hearing. The district shall make payment
 36 to the Department of Education for the cost of the hearing within 30 days of receipt of the billing.

37 **SECTION 9.** ORS 343.175 is amended to read:

38 343.175. (1) A decision under ORS 343.165 is final unless the parent or the school district files
 39 a civil action under subsection (2) of this section.

40 (2) Either party aggrieved by the finding and decision of the hearing officer may commence a
 41 civil action in any court of competent jurisdiction.

42 (3) In any action brought under this section, the court shall receive the records from the ad-
 43 ministrative proceeding, shall hear additional evidence at the request of a party and, basing its de-
 44 cision on the preponderance of the evidence, shall grant such relief as the court determines is
 45 appropriate.

1 (4) Any civil action brought under this section shall be commenced within 90 days of the date
 2 of the hearing officer's final order.

3 (5) In any action or proceeding brought under ORS 343.165 or in an appeal from any action or
 4 proceeding brought under ORS 343.165, the court, in its discretion, may award reasonable attorney
 5 fees as part of costs to:

6 (a) The parents of a child with a disability, if the parents are the prevailing party;

7 (b) A prevailing party who is the Department of Education or school district against the attor-
 8 ney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable
 9 or without foundation, or against the attorney of a parent who continued to litigate after the liti-
 10 gation clearly became frivolous, unreasonable or without foundation; or

11 (c) A prevailing party who is the Department of Education or a school district against the at-
 12 torney of a parent, or against the parent, if the parent's complaint or subsequent cause of action
 13 was presented for any improper purpose, such as to harass, to cause unnecessary delay or to need-
 14 lessly increase the cost of litigation.

15 (6) Attorney fees awarded under this section shall be based on rates prevailing in the community
 16 in which the action or proceeding arose for the kind and quality of services furnished. No bonus
 17 or multiplier may be used in calculating these fees.

18 (7) Attorney fees may not be awarded and related costs may not be reimbursed under this sec-
 19 tion for services performed after a written offer of settlement to a parent if:

20 (a) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Pro-
 21 cedure, or in case of an administrative hearing, more than 10 days before the hearing begins;

22 (b) The offer is not accepted within 10 days; and

23 (c) The relief finally obtained by the parents is not more favorable to the parents than the offer
 24 of settlement.

25 (8) Notwithstanding subsection (7) of this section, attorney fees and related costs may be
 26 awarded to a parent who is the prevailing party and who was substantially justified in rejecting the
 27 settlement offer.

28 (9) Attorney fees may not be awarded relating to any meeting of the individualized education
 29 program team unless the meeting is convened as a result of an administrative proceeding under ORS
 30 343.165, or as a result of judicial action. A resolution session is not considered a meeting convened
 31 as a result of an administrative hearing or judicial action, or an administrative hearing or judicial
 32 action.

33 (10) Attorney fees may not be awarded for a mediation that is conducted before a request for
 34 a hearing under ORS 343.165.

35 (11) The court shall reduce the amount of attorney fees awarded under this section if:

36 (a) The parent unreasonably protracted the final resolution of the controversy;

37 (b) The amount of the attorney fees unreasonably exceeds the hourly rate prevailing in the
 38 community for similar services by attorneys of reasonably comparable skill, reputation and experi-
 39 ence;

40 (c) The time spent and legal services furnished were excessive considering the nature of the
 41 action or proceeding; or

42 (d) In requesting a hearing under ORS 343.165 [(1)(a)] **(1)(a)(A)**, the attorney representing the
 43 parent did not provide written notice to the Superintendent of Public Instruction that included:

44 (A) The child's name, address and school;

45 (B) A description of the problem and facts relating to the problem; and

1 (C) A proposed resolution of the problem.

2 (12) The court shall not reduce fees under subsection (11) of this section if:

3 (a) The school district unreasonably protracted the final resolution of the controversy; or

4 (b) The school district violated the procedural safeguards as set forth in ORS 343.146 to 343.183.

5 **SECTION 10. This 2023 Act takes effect on the 91st day after the date on which the 2023**
6 **regular session of the Eighty-second Legislative Assembly adjourns sine die.**

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