

## 2004 AG Opinions

Date	Description
December 3, 2004	<b>No. 104-011 (R04-029)</b> Re: Inflation Adjustment of Square Footage Cost for New School Construction
November 12, 2004	<b>No. 104-010 (R04-036)</b> Re: State and Local Public Health Benefits Subject to Proposition 200
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September 10, 2004	<b>No. 104-008 (R04-020)</b> Re: School Facilities Board Approval of Proposed Reductions in Square Footage of School Facilities
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**STATE OF ARIZONA**  
**OFFICE OF THE ATTORNEY GENERAL**

ATTORNEY GENERAL OPINION  By  TERRY GODDARD ATTORNEY GENERAL  December 3, 2004	No. I04-011 (R04-029)  Re: Inflation Adjustment of Square Footage Cost for New School Construction
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To: William Bell, Executive Director  
School Facilities Board

**Questions Presented**

You have asked the following questions regarding the cost per square foot allowed for new school construction:

1. May the School Facilities Board (“SFB”) adjust the amount budgeted for construction of a new school based on an inflation adjustment that is made pursuant to Arizona Revised Statutes (“A.R.S.”) § 15-2041 after the SFB approved the construction project?
2. If so, does the SFB have the authority to give such a cost adjustment to some projects but not to others based on specific criteria?

## Summary Answer

Typically the base cost for a new school construction project is established when the Terms and Conditions for a project are signed. After the Terms and Conditions are signed, the base cost may be increased only if SFB finds good cause. Because of the good cause requirement, the SFB has discretion to determine which projects qualify for a cost adjustment after a project has been approved.

## Background

### **A. The Students First Act of 1998.**

In *Roosevelt Elementary School District No. 66 v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994), the Arizona Supreme Court held that the system then in place for funding capital improvements for Arizona public schools violated Arizona's constitutional guarantee of maintaining a general and uniform public school system. *Id.* at 241-43, 877 P.2d at 814-16. In response to this decision, the Legislature passed Students First. *Hull v. Albrecht*, 192 Ariz. 34, 960 P.2d 634 (1998).

Students First established three funds for addressing the capital needs of Arizona public schools: the New School Facilities Fund, A.R.S. § 15-2041; the Deficiencies Correction Fund, A.R.S. § 15-2021, and the Building Renewal Fund, A.R.S. § 15-2031. The Act created the SFB and charged it with the task of overseeing the expenditures of Students First monies. A.R.S. §§ 15-2001 through

2006. The SFB also is required to establish minimum school facility adequacy guidelines to insure a general and uniform public school system. A.R.S § 15-2011.

**B. The New School Facilities Fund.**

The New Schools Facilities Fund was created to fund new school construction in accordance with the minimum school facility adequacy guidelines. Section 15-2041, A.R.S., sets forth the process for determining a school district's eligibility for monies for new school construction. If a district's capital plan indicates a need for a new school within the next four years, the district must submit a plan to the SFB by September 1 and request money from SFB for the new construction. A.R.S. § 15-2041(C). SFB reviews and evaluates the district's enrollment projections and either approves or revises the projections. A.R.S. § 15-2041(D)(1).

If the SFB determines that the additional space will not be needed within the next two years (in the case of an elementary school) or three years (in the case of a middle or high school) in order to meet the building adequacy standards, the SFB may hold the request for consideration for possible future funding, and the district must submit annually an updated plan until the additional space is needed. A.R.S. § 15-2041(D)(2). If the SFB determines that the additional space will be needed within the statutory time frames, the SFB then determines the amount of funding for the new construction pursuant to the formula prescribed by statute. A.R.S. § 15-2041(D)(3). The amount of money provided for a new school

construction project is calculated based upon the number of pupils requiring additional square footage to meet the building adequacy standards, the square footage required per pupil to meet the adequacy standards, and the statutory cost per square foot. A.R.S § 15-2041(D)(3)(b) and (c).

Initially, the statutory cost per square foot was \$90 for preschool programs for children with disabilities, kindergarten programs, and grades one through six, \$95 for grades seven and eight and \$110 for grades nine through twelve. A.R.S. § 15-2041(D)(3)(c). The Legislature recognized, however, that costs of construction may fluctuate from time to time due to market conditions. Therefore, the Legislature allowed for an increase in the base cost, the “Inflationary Increase,” by specifying that the base cost is to be adjusted at least annually as follows:

The cost per square foot shall be adjusted annually for construction market considerations based on an index identified or developed by the joint legislative budget committee as necessary but not less than once each year.

*Id.* Since the enactment of Students First, the base cost has been adjusted periodically to reflect fluctuations in the construction market. In addition, the Legislature authorized the SFB to increase the base cost if the school is located in a rural area or “based on geographic conditions or site conditions.” *Id.*

Once the SFB approves a new school construction project and determines the appropriate funding level, the school district has 60 days from the date of notification to officially accept, in writing, funding for the square footage approved by the Board. Arizona Administrative Code (“A.A.C.”) R7-6-502(D).

After a district accepts the funding and signs a “Terms and Conditions for New School Funding” (“Terms and Conditions”) agreement, the SFB provides 5% of the approved funding for architectural and engineering fees. *Id.*; A.R.S. § 15-2041(E). After receiving this money, the district must submit a design development plan and specifications, including budget estimates, for the project to the SFB for review and comment before any additional money is distributed. A.R.S. § 15-2041(E); A.A.C. R7-6-502(E). After the SFB staff reviews the plan and budget estimates, the district must put together a preliminary bid package and submit it to the SFB. A.A.C. R7-6-502(E).

After reviewing the design, budget estimates and preliminary bid package, the SFB staff makes a recommendation to the Board regarding the appropriateness of the district proceeding with the project. A.A.C. R7-6-502(G). This recommendation is based on whether the project is within the original scope the SFB approved budget, whether it meets the building adequacy standards, initial comments from the local building authority, and whether revised projections continue to justify the project. *Id.* If the SFB approves the project, the district is authorized to proceed with a final bid package. *Id.* The Executive Director of the SFB will authorize the district to proceed with the contract if the district has documented that it has obtained local building department approval, the bid is within the original scope and the SFB approved budget, and meets the building adequacy standards. A.A.C. R7-6-502(H). SFB approved funding for new school construction is available to the district for one year from the date of notification of

approval, and the bid process must be completed within that year. A.A.C. R7-6-502(I).

A potential problem arises when there is a delay between the time that the SFB approves the project and the time that construction on the project actually commences. The question raised here is whether a project can receive the Inflationary Increase after the Terms and Conditions agreement has been signed.

### **Analysis**

A fundamental rule of statutory construction is to find and give effect to legislative intent. *State v. Thompson*, 204 Ariz. 471, 474, 655 P.3d 420, 423 (2003). When a statute is ambiguous, courts determine legislative intent by reading the statute as a whole and by considering the statute's context. *See State v. Gallagher*, 205 Ariz. 267, 268, 69 P.3d 38, 39 (App. 2003).

Pursuant to A.R.S. § 15-2041(D)(3), the SFB “shall provide an amount” to build a new school that is determined by multiplying a per pupil square footage calculation by the cost per square foot. There are four factors that may increase the square footage amount: (1) the Inflationary Increase; (2) the automatic adjustment for schools located in rural areas; (3) geographic conditions; (4) and site conditions. The express mention of these four circumstances indicates that the Legislature intended to exclude all others. *Powers v. Carpenter*, 203 Ariz. 116, 18, 51 P.3d 338, 340 (2002). Thus, the SFB may only adjust the base square footage cost for the reasons the statute identifies.

The statute does not specify whether the square footage cost may be changed after the cost is initially established for a project. The authorized cost adjustments are in the portion of the statute that address the amount of funding SFB provides to a district after the SFB approves the enrollment projections. *See* A.R.S. § 15-2041(D)(3). This suggests that SFB is to apply these cost adjustments at that time. The issuance of the Terms and Conditions agreement formalizes the SFB's analysis of a district's request and triggers the distribution of money for new school construction. A.R.S. § 15-2041(E); A.A.C. R7-6-502(D). This means that the cost per square foot is based upon the statutory base cost (including any Inflationary Increases) in effect when the SFB issues the Terms and Conditions. Any Inflationary Increase that is approved after the Terms and Conditions would not apply to a project for which Terms and Conditions have already been executed.

The statutory language, however, does not foreclose the possibility of cost adjustments after the Terms and Conditions are executed. For example, the statute permits adjustments based on site or geographic conditions, and there are site or geographic conditions that would justify a cost adjustment that are not known until after construction is underway. Thus, the flexibility the statute provides would be frustrated by not permitting modifications after the Terms and Conditions are executed. Further, the regulations allow for this flexibility by permitting SFB to modify or waive requirements for "good cause." A.A.C. R7-6-402(J).

Just as there may be unforeseen site conditions that justify a cost increase, there may be circumstances in which project delays justify modifying the base cost of a project to update the Inflationary Increase. Thus, if SFB determines good cause exists, it may permit an inflationary increase after the terms and conditions are executed.

### **Conclusion**

The base cost of a new school construction project, with any Inflationary Increase, is determined at the time Terms and Conditions for the project are executed. The SFB may modify the base cost for a particular project based on a subsequent Inflationary Increase only based upon finding of good cause.

Terry Goddard  
Attorney General

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**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

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<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>November 12, 2004</p>	<p>No. I04-010 (R04-036)</p> <p>Re: State and Local Public Benefits Subject to Proposition 200</p>
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To: Anthony D. Rodgers, Director  
Arizona Health Care Cost Containment System

**Question Presented**

What are “state and local public benefits” for the purposes of Proposition 200?

**Summary Answer**

State and local public benefits for the purposes of Proposition 200 are those programs within Title 46 that qualify as state and local public benefits pursuant to federal law (8 U.S.C. § 1621).

**Background**

**A. Proposition 200.**

At the 2004 general election, Arizona voters approved Proposition 200, which addressed (1) verifying the identity of applicants for state and local public benefits, and (2) identification requirements for voter registration and voting. This measure will take effect when the Governor issues a proclamation after the state canvass of the election is

complete. Ariz. Const. art. IV, pt. 1, § 1(5). Although the Proposition takes effect when the Governor issues her proclamation, the provisions relating to voting cannot be implemented until the U.S. Department of Justice preclears them as the federal Voting Rights Act requires. 42 U.S.C. § 1973c.

Your question concerns only the provision in the Proposition that addresses state and local public benefits. The Proposition amended Title 46 of Arizona Revised Statutes to add a new section, A.R.S. § 46-140.01, that provides in part:

An agency of this state and all of its political subdivisions, including local governments, that are responsible for the administration of state and local public benefits that are not federally mandated shall do all of the following:

1. Verify the identity of each applicant for those benefits and verify that the applicant is eligible for benefits as prescribed by this section.
2. Provide any other employee of this state or any of its political subdivisions with information to verify the immigration status of any applicant for those benefits and assist the employee in obtaining that information from federal immigration authorities.
3. Refuse to accept any identification card issued by the state or any political subdivision of this state, including a driver license, to establish identity or determine eligibility for those benefits unless the issuing authority has verified the immigration status of the applicant.
4. Require all employees of the state and its political subdivisions to make a written report to federal immigration authorities for any violation of federal immigration law by any applicant for benefits and that is discovered by the employee.

Failure to report “discovered violations of federal immigration law by an employee is a class 2 misdemeanor.” A.R.S. § 46-140.01(B). An employee’s supervisor

who knows of an employee's failure to report and fails to direct the employee to report is guilty of a class 2 misdemeanor. *Id.* In addition to the criminal penalties, the Proposition permits any person to bring a civil action against a state agency or political subdivision to remedy violations. A.R.S. § 46-140.01(C). The Proposition must be enforced "without regard to race, religion, gender, ethnicity or national origin." *Id.*

**B. Related Federal Requirements.**

The Proposition's "findings and declarations" focus on the problem of illegal immigration. Prop. 200, § 2. The Supreme Court has recognized that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." *DeCanas v. Baca*, 424 U.S. 351, 354 (1976). Although states may enact some legislation that is related to the problem of illegal immigration, there are limits to what they can do. *Id.* For example, it is well established that states cannot exclude children who are undocumented immigrants from public schools, *Plyler v. Doe*, 457 U.S. 202 (1982), and Proposition 200 does not attempt to do so.<sup>1</sup>

Because of the dominant role of federal law in the immigration area, it is important to consider related federal legislation when implementing Proposition 200. The legislation most directly relevant to Proposition 200 is the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), a major piece of welfare reform legislation enacted in 1996. PRWORA, Pub. L. No. 104-193, 110 Stat. 2105 (codified in part in U.S.C., Titles 5, 7, 8, 21, 25, 42) (hereinafter referred to as "Federal Welfare Reform Act"). This federal legislation restricted eligibility for federal, state, and local benefits based on immigration status.

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<sup>1</sup> Although *DeCanas* was a preemption case and *Plyler* was an equal protection case, both discuss limitations on state authority to enact legislation relating to undocumented immigrants.

In general, a “qualified alien” as defined by the federal law is eligible for federal public benefits, but undocumented immigrants are not. 8 U.S.C. § 1611. Similarly, under the Federal Welfare Reform Act, undocumented immigrants are generally not eligible for “state or local public benefits,” as that term is specifically defined in that Act. 8 U.S.C. § 1621.

The Federal Welfare Reform Act also authorized “a State or political subdivision of a State . . . to require an applicant for State and local public benefits (as defined in section 1621(c) of this title) to provide proof of eligibility.” 8 U.S.C. § 1625. Prior to Proposition 200, Arizona had not legislatively determined what proof of eligibility is required for state and local public benefits. Further, under the Federal Welfare Reform Act, a state could provide state and local public benefits to undocumented immigrants by enacting a statute after August 22, 1996, “which affirmatively provides for such eligibility.” 8 U.S.C. § 1621. Arizona has not enacted such legislation.

### **Analysis**

The scope of A.R.S. § 46-140.01, as added by Proposition 200, is largely determined by the meaning of the phrase “state and local public benefits.” Because the Proposition does not define that phrase, the question of when to apply identification and reporting requirements under Proposition 200 must be determined by applying general principles of statutory construction.

In construing the meaning of a ballot initiative, the objective is to give effect to the intent of those who framed the provision and the electorate that adopted it. *State v. Givens*, 206 Ariz. 186, 188, 76 P.3d 457, 459 (App. 2003). The best indication of the intent of a statute is its language. *Id.* When there is uncertainty about the meaning of a

statute's terms, the statute's context, language, subject matter, historical background, effects and consequences, spirit and purpose are considered. *Blake v. Schwartz*, 202 Ariz. 120, 126, 42 P.3d 6, 12 (App. 2002). The fact that this statute imposes criminal penalties is also important to the analysis because a criminal statute must give fair notice of the conduct that it prohibits. *State ex rel. Purcell v. Superior Court*, 111 Ariz. 582, 584, 535 P.2d 1299, 1302 (1975). In light of these considerations, this Office examined the language of the Proposition, the information in the publicity pamphlet, the ordinary meaning of the words, the context and placement of the relevant terms within the existing and amended statutory scheme, and related federal laws.

**A. Publicity Pamphlet.**

Courts may rely on the information in the publicity pamphlet to help determine the meaning of an initiative. *Calik v. Kongable*, 195 Ariz. 496, 500, 990 P.2d 1055, 1059 (1999). The publicity pamphlet includes an analysis by Legislative Council, a fiscal analysis prepared by the Joint Legislative Budget Committee, arguments submitted to the Secretary of State supporting the Proposition, and arguments submitted to the Secretary of State opposing the Proposition. A.R.S. § 19-124.

The Legislative Council analysis is meant to “assist voters in rationally assessing an initiative proposal by providing a fair, neutral explanation of the proposal’s contents and the changes it would make if adopted.” *Fairness & Accountability v. Greene*, 180 Ariz. 582, 590, 886 P.2d 1338, 1346 (1994). In its analysis, Legislative Council advised voters that “Proposition 200 does not define the term ‘state and local public benefits that are not federally mandated.’” *Arizona Secretary of State, Ballot Propositions and Judicial Performance Review* 44 (Nov. 2, 2004) (“Publicity Pamphlet”).

Similarly, the Fiscal Impact Statement prepared by the Joint Legislative Budget Committee and included in the publicity pamphlet provided voters no information regarding the potential scope of the state and local public benefits subject to the Proposition. Instead, it noted only that:

Proposition 200 does not define the term “state and local public benefits that are not federally mandated.” Proposition 200’s provision requiring verification of an applicant’s eligibility for receipt of state and local benefits may affect the number of persons receiving benefits. The proposition’s verification requirements may affect the workload of state and local government agencies. The JLBC Staff is unable to quantify the fiscal impact of these provisions.

*Id.*

Some supporters advised voters that the measure applied only to “welfare,” emphasizing that Title 46 applies only to welfare. *Id.* at 44-45. One supporter referred to the fact that the phrase “state or local benefits” is defined in federal law.<sup>2</sup> *Id.* at 46-47. Thus, the publicity pamphlet provided the voters with no definitive guidance regarding the scope of public benefits subject to the Proposition.

#### **B. Ordinary Meaning of Terms.**

Often when terms are not defined in a statute, courts will rely on the ordinary meaning of the terms and may refer to dictionary definitions. *State v. Wise*, 137 Ariz. 468, 470 n.3, 671 P.2d 909, 911 n.3 (1983). Some of the dictionary definitions of “benefit” are consistent with the notion that supporters of Proposition 200 advocated, which limited Proposition 200 to welfare. *Black’s Law Dictionary* (8<sup>th</sup> ed. 2004) defines “benefit” as a “[f]inancial benefit that is received from an employer, insurance, or a

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<sup>2</sup> Opponents asserted that the Proposition might apply to all government benefits, including firefighting assistance, public libraries, police protection, parks, and public swimming pools. *Id.* at 47-48, 52. However, courts tend to give less weight to the statements of opponents when analyzing the meaning of an initiative. See *Legislature of California v. Eu*, 286 Cal. Rptr. 283, 289, 816 P.2d 1309, 1315 (1991).

public program (such as social security) in time of sickness, disability, or unemployment (a benefit from the welfare office).” Similarly, Webster’s defines “benefit” as “financial help in time of sickness, old age, or unemployment.” *Webster’s Third New Int’l Dictionary* 204 (1993). Other definitions, however, would support a much more expansive interpretation: “something that guards, aids or promotes well-being.” *Id.* Although these definitions provide some guidance, alone they lack sufficient specificity to advise state and local government agencies and their employees concerning which programs are subject to the requirements of A.R.S. § 46-140.01.<sup>3</sup>

**C. The Special Meaning of State and Local Benefits in Light of Context and Placement of the Term.**

Courts will also consider whether the context indicates that a term has a special meaning. *See In re Richard G.*, 196 Ariz. 309, 310, 995 P.2d 745, 746 (App. 2000). Placement of a statute is a relevant consideration in this analysis. *See, e.g., McMann v. City of Tucson*, 202 Ariz. 468, 473, 47 P.3d 672, 677 (App. 2002); *State v. Wilson*, 200 Ariz. 390, 397, 26 P.3d 1161, 1168 (App. 2001); *Allstate Ins. Co. v. Schmidt*, 88 P.3d 196, 199-201 (Haw. 2004); *Maryland v. Raines*, 857 A.2d 19, 37 (Md. App. 2004).

Arizona’s statutes are divided into titles, each of which is dedicated to a specific subject. Here, the drafters placed the portions of Proposition 200 that concerned voting and registering to vote in Title 16, which is entitled “Elections and Electors,” and the

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<sup>3</sup> Arizona criminal code, in section 13-3418, permits a court to “render [a] person who is convicted ineligible to receive any *public benefits*.” (Emphasis added.) There, the Legislature specifically stated:

[f]or the purposes of this section, “public benefits” includes any money or services provided by this state for scholarships or tuition waivers granted for state funded universities or community colleges, welfare benefits, public housing or other subsidies but does not include benefits available for drug abuse treatment, rehabilitation or counseling programs.

portion of the Proposition that concerned state and local benefits in Title 46, which is entitled “Welfare” and addresses specific government programs. Proposition 200 created a new “46-140.01.” This new statute follows A.R.S. § 46-140, which establishes reporting requirements and criminal penalties for welfare fraud in programs administered under Title 46. The numbering and the closely related subjects support the conclusion that A.R.S. § 46-140.01, like A.R.S. § 46-140, applies only to Title 46.

The language of the Proposition and the statutory scheme in Title 46 also support the conclusion that the term “state and local benefits” applies only to programs in Title 46. Title 46 includes programs of different State agencies that are administered at the state and local level.<sup>4</sup> In addition, Proposition 200 establishes that the government agency must “verify the identity of each applicant.” “Applicant” is defined in A.R.S. § 46-101(2) as “a person who has applied for assistance or services *under this title*, or a person who has applied for assistance or services *under this title* and who has custody of dependent child.”<sup>5</sup> (Emphasis added.)

The Proposition did not amend Title 36, which governs public health programs, or Title 1, which establishes principles applicable throughout all of state law, or Title 38, which establishes requirements generally applicable to public officers in state and local government. Placement of the statute governing “state and local public benefits” in Title 46 indicates that the statute applies to the programs in that title, but not to programs governed by other titles that comprise the Arizona Revised Statutes.

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By its terms, this definition applies only to A.R.S. § 13-3418. Proposition 200 does not incorporate this definition and uses the additional language “state and local public benefits not mandated by federal law.”  
<sup>4</sup> See, e.g., A.R.S. §§ 46-136 (work projects for the unemployed, general assistance, food stamps) (state); -139 (housing assistance in child protective services cases) (state); -193 (respite care for the elderly) (state); -292 to -300.06 (Temporary Assistance for Needy Families and related programs) (state), -241 to -241.05 (short-term crisis assistance) (local).

Limiting A.R.S. § 46-140.01 to Title 46 excludes the Arizona Health Care Cost Containment System (AHCCCS) from the reach of Proposition 200 because it is in Title 36. The statements in the publicity pamphlet of some supporters of Proposition 200 specifically mentioned AHCCCS when explaining the reasons for the Proposition. Publicity Pamphlet at 44-45. These statements, however, cannot override the fact that the language and placement of A.R.S. § 46-140.01 indicate that it applies only to applicants for programs in Title 46. Therefore, AHCCCS and other programs outside Title 46 are not subject to the new A.R.S. § 46-140.01. In addition, AHCCCS is a federal public benefit under 8 U.S.C. § 1611, rather than a “state or local public benefit.” *See* 8 U.S.C. 1621(c)(3) (excluding any federal public benefit under § 1611(c) from the scope of the term “state or local public benefit”).

Although non-Title 46 programs are not subject to Proposition 200, they are, of course, subject to the restrictions based on immigration status that are established in federal law. 8 U.S.C. §§ 1611 (federal public benefits); -1621 (state and local public benefits).

#### **D. Welfare Reform Legislation.**

Proposition 200 did not adopt or refer to the definition of “state or local public benefits” in the Federal Welfare Reform Act. 8 U.S.C. § 1621. Nevertheless, that federal law must be considered when implementing this Proposition. *See* 2B Norman J. Singer, *Statutes and Statutory Construction*, § 51.06 (6<sup>th</sup> ed. 2000) (state and federal statutes may be in *pari materia* and, if so, should be construed together). Although the drafters of Proposition 200 did not reference the federal law, they are presumed to know the law.

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<sup>5</sup> Similarly, the definitions of “recipient,” “assistance,” and “services” apply only to programs within *this title* – Title 46. A.R.S. § 46-101.

*See State v. Box*, 205 492, 496, 73 P.3d 623, 627 (App. 2003); *McLaughlin v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 295, 305 (Cal. App. 1999) (applying this principle to initiatives); *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000) (same).

The federal law is particularly important here because of preemption concerns. In 1997, a federal district court concluded that the Federal Welfare Reform Act preempted portions of California’s Proposition 187 that had denied social service benefits to undocumented immigrants. *See League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1255 (C.D. Cal. 1997). The district court observed that “because [the Federal Welfare Reform Act] is a comprehensive regulatory scheme that restricts alien eligibility for all public benefits, however funded, the states have no power to legislate in the area. . . . The only regulations that California can promulgate now are regulations implementing [the Federal Welfare Reform Act].” *Id.*

The Federal Welfare Reform Act specifically authorized states to “require an applicant for State and local public benefits (as defined in section 1621c of this title) to provide proof of eligibility.” 8 U.S.C. § 1625. Proposition 200 does this. Essentially, Proposition 200 implements the Federal Welfare Reform Act’s eligibility requirements for “state and local public benefits” with regard to programs in Title 46.<sup>6</sup>

The language of Proposition 200 supports this interpretation. Although Proposition 200 refers to verifying the identity and eligibility of applicants, A.R.S. § 46-140.01(A), it establishes *no* eligibility requirements for any programs. This void is filled by the Federal Welfare Reform Act which establishes eligibility requirements based on

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<sup>6</sup> For additional guidance regarding 8 U.S.C. § 1621 refer to *Dep’t of Justice, Notice of Final Order*, 66 Fed. Reg. 3613 (Jan. 16, 2001); *Dep’t of Health and Human Servc., Notice With Comment Period Re: PRWORA: Interpretation of “Federal Public Benefit,”* 63 Fed. Reg. 41658 (Aug. 4, 1998); *Dep’t of Justice, Notice of Interim Guidance*, 62 Fed. Reg. 61344 (Nov. 17, 1997).

immigration status. See 8 U.S.C. §§ 1611, 1621. In addition, A.R.S. § 46-140.01(A) applies to “state and local public benefits not mandated by federal law.” The federal law mandates some exceptions to the general prohibition against providing state and local public benefits to undocumented immigrants. For example, emergency health care, short-term, non-cash, in-kind emergency disaster relief, and public health assistance for immunizations are among the exceptions to the general federal prohibition against providing state and local benefits to undocumented immigrants. See 8 U.S.C. §1621(b). These programs that are exempt under federal law from the prohibition against providing state and local public benefits to undocumented immigrants, 8 U.S.C. § 1621, would also not be subject to the mandates of Proposition 200.

Although the federal definition of “state and local public benefits” includes matters well beyond the scope of Title 46, for the reasons described in this Opinion, Arizona’s new statutory requirement in A.R.S. § 46-140.01 is limited to Title 46 welfare programs. For example, 8 U.S.C. § 1621 applies to professional licenses. But Proposition 200 does not alter the screening procedures for applicants for a contractor’s license. To do so, Proposition 200 should have amended Title 32 (which governs most professional licenses, including those for contractors) or some statute that applies generally to all state agencies instead of amending only the statutes that govern certain welfare programs.

In sum, the programs subject to Proposition 200 are those within Title 46 that are subject to the eligibility restrictions in 8 U.S.C. § 1621. This interpretation is both consistent with the statutory language and avoids potential challenges based on vagueness or preemption that alternative interpretations might raise.

Although this Opinion is intended to provide general guidance regarding the scope of A.R.S. § 46-140.01, it does not attempt to answer all of the questions that will arise in implementing the statute. For example, it does not address the requirements regarding verifying identification, nor does it address specifically which programs within Title 46 are subject to Proposition 200. This Office will provide agencies responsible for programs within Title 46 with guidance to comply with the requirements of Proposition 200.

### **Conclusion**

“State and local public benefits” subject to Proposition 200 are those benefits received through programs in Title 46 that are subject to federal eligibility restrictions in 8 U.S.C. § 1621. Proposition 200 requires agencies to verify the identity of applicants for those state or local public benefits.

Terry Goddard  
Attorney General

**STATE OF ARIZONA**  
**OFFICE OF THE ATTORNEY GENERAL**

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<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>September 13, 2004</p>	<p>No. I04-009 (R04-022)</p> <p>Re: Child Care Licensing Exemption for Preschool Special Education Programs</p>
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To: Thomas W. Pickrell, Esq.  
General Counsel  
Mesa Unified School District

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 15-253(B), you submitted for review an opinion that you prepared for Mesa Unified School District. This Office concurs with your opinion that A.R.S. § 36-884, as amended effective August 25, 2004, exempts school facilities that operate a state and Federal mandated program of special education services exclusively for preschool children with qualifying disabilities under state and Federal law from the child care licensing requirements contained in A.R.S. § Title 36, Chapter 7.1 (A.R.S. §§ 36-881 through - 897.12). We issue this Opinion to provide guidance to other school districts concerning this subject. *See* Ariz. Att’y Gen. Op. I98-006 at 2 n.2 (review may be granted when facts have “broad statewide applicability”).

### **Question Presented**

You have asked whether an amendment to A.R.S. § 36-884 that became effective on August 25, 2004 exempts public school facilities from the child care licensing requirements of A.R.S. § Title 36, Chapter 7.1, where a school district operates a mandatory program of special education services exclusively for preschool children with qualifying disabilities.

### **Summary Answer**

As a result of the amendment to A.R.S. § 36-884, school facilities that operate a mandatory program of special education services exclusively for preschool children with qualifying disabilities under State and Federal law are exempt from the child care licensing requirements of A.R.S. § Title 36, Chapter 7.1.

### **Background**

#### **Preschool Programs for Children With Disabilities**

Federal and state law requires states to provide special needs preschools. *See* 20 U.S.C. § 1400 (the Individuals With Disabilities Education Act or “IDEA”); 34 C.F.R. § 300.552; A.R.S. § 15-764. The State requires public school districts to “make available an educational program for preschool children with disabilities who reside in the school district and who are not already receiving services that have been provided through the department of education.” A.R.S. § 15-771. A preschool child is defined as “a child who is at least three years of age but who has not reached the age required for kindergarten,” but also may include “otherwise eligible children who are within ninety days of their third birthday” if it is determined to be in their best interest. A.R.S. § 15-771(G). To be eligible for these educational programs, a preschool child must have one or more of the following disabilities (defined at A.R.S. § 15-761):

1. Hearing impairment
2. Visual impairment
3. Preschool moderate delay
4. Preschool severe delay
5. Preschool speech/language delay

A.R.S. § 15-771(A)(1) - (5). Special education and related services for preschool age children with qualifying disabilities are a part of early childhood special education (“ECSE”) and are commonly referred to as special needs preschools.

### **Child Care Program Licensing Requirements**

The Arizona Department of Health Services (“ADHS” or “the Department”) regulates child care facilities. *See* A.R.S. §§ 36-881(5). In order to operate, child care facilities must be licensed by ADHS. A.R.S. § 36-882(A). A “child care facility” is defined as “any facility in which child care is regularly provided for compensation for five or more children not related to the proprietor.” A.R.S. § 36-881(3). “Child care” is statutorily defined as “the care, supervision and guidance of a child or children, unaccompanied by a parent, guardian or custodian, on a regular basis, for periods of less than twenty-four hours per day, in a place other than the child’s or the children’s own home or homes.” A.R.S. § 36-881(2).

A public school is generally exempt from child care licensing requirements. A.R.S. § 36-884(3). A public school is not exempt, however, if child care is provided outside the “school’s regular hours” or “for children who are not regularly enrolled in kindergarten programs or grades one through twelve.” *Id.* Prior to the recent amendment to A.R.S. § 36-884, the Department determined that special needs preschools were subject to state child care licensing laws, and it had

been licensing such preschools in various public school districts throughout the State since 1996.

### **History of the Public School Exemption**

Prior to 1994, A.R.S. § 36-884 exempted public schools from the child care license requirement. The statute read: “This article does not apply to the care given to children by or in . . . [a] unit of the public school system.”

In 1994, the Legislature amended and narrowed the scope of the public-school exemption:

#### 36-884. Exemptions

[T]his article shall not apply to the care given to children by or in:

. . . .

3. A unit of the public school system. If a public school provides child care other than during the school’s regular hours or for children who are not regularly enrolled in kindergarten programs or grades one through twelve, that portion of the school that provides daycare is subject to standards of care prescribed pursuant to section 36-883.04.

1994 Ariz. Sess. Laws, 9<sup>th</sup> Spec. Sess., ch. 5, § 3. The purpose of this amendment was to create a single regulatory system that provided standards of care for public and private child care facilities.

1994 Ariz. Sess. Laws, 9<sup>th</sup> Spec. Sess., ch. 5, § 5. The Department interpreted this amendment to require all child care programs provided by public schools, including special needs preschools, to be licensed, regardless of whether the program was mandated by law or was offered exclusively to preschool children with qualifying disabilities. As a result of this interpretation, school districts requested legislation that would clarify that mandatory special education programs provided to preschool children with qualifying disabilities were exempt from A.R.S. § 36-882 licensing requirements.

In 2004, the Legislature amended A.R.S. § 36-884 to address preschool programs for children with disabilities:

36-884. Exemptions.

This article does not apply to the care given to children by or in:

.....

3. A unit of the public school system, INCLUDING SPECIALIZED PROFESSIONAL SERVICES PROVIDED BY SCHOOL DISTRICTS FOR THE SOLE PURPOSE OF MEETING MANDATED REQUIREMENTS TO ADDRESS THE PHYSICAL AND MENTAL IMPAIRMENTS PRESCRIBED IN SECTION 15-771. If a public school provides child care other than during the school's regular hours or for children who are not regularly enrolled in kindergarten programs or grades one through twelve, that portion of the school that provides child care is subject to standards of care prescribed pursuant to section 36-883.04.

2004 Ariz. Sess. Laws, 2d Reg. Sess., ch. 23, § 1 (emphasis added). This amendment became effective August 25, 2004.

### Analysis

The primary goal of statutory construction is to ascertain and give effect to the Legislature's intent. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). A statute's language is the best indicator of that intent. *Hosp. Corp. of Northwest, Inc. v. Ariz. Dep't of Health Servs.*, 195 Ariz. 383, 384, 988 P.2d 168, 169 (App. 1999). Also relevant are the statute's context, history, subject matter, effects and purpose. *Blum v. State*, 171 Ariz. 201, 205, 829 P.2d 1247, 1251 (App. 1992).

On its face, the amendment to A.R.S. § 36-884 is clear. It exempts from ADHS's licensing requirements preschool programs for children with disabilities provided by public school districts for the sole purpose of meeting the requirements of A.R.S. § 15-771. The legislative history of the amendment supports this interpretation.

The amendment to A.R.S. § 36-884 was part of House Bill 2031. As originally proposed, the amendment read:

3. A unit of the public school system, INCLUDING PRESCHOOL PROGRAMS FOR DISABLED STUDENTS AND AFTER SCHOOL TUTORING PROGRAMS.

After its first reading, the bill was assigned to the House of Representatives Committee on Health.

That Committee amended the bill to read:

3. A unit of the public school system, INCLUDING SPECIALIZED PROFESSIONAL SERVICES PROVIDED BY SCHOOL DISTRICTS FOR THE SOLE PURPOSE OF MEETING MANDATED REQUIREMENTS TO ADDRESS THE PHYSICAL AND MENTAL IMPAIRMENTS PRESCRIBED IN SECTION 15-771.

The amendment to HB 2031 was adopted unanimously and was enacted without any change. As set forth in House summaries for HB 2031, the amendment's purpose was to clarify that the exemption only included programs provided by school districts for the sole purpose of meeting mandated requirements of providing preschool programs for children with disabilities. Ariz. H.R. Comm. On Health, HB 2031 Summary, 46<sup>th</sup> Leg., 2d Reg. Sess. (Summaries dated January 22, 2004; February 3, 2004; and March 31, 2004).

Your opinion addresses only special needs preschools that exclusively serve special needs children who are qualified under A.R.S. § 15-771(A). Not all special needs preschools, however, are restricted to children with qualifying disabilities. Some programs include children who do not have qualifying disabilities. They do so in an effort to meet the federal requirement, set forth at 34 C.F.R. § 300.550, that "to the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled," as well as the state requirement, set forth at A.A.C. R7-2-401(G), that special education services be delivered in "the least restrictive environment as

identified by IDEA and regulations, and state statutes and state board of education rules.” Ordinarily, the parents of such children pay a fee for them to attend the program.

While the Legislature has amended the exemption that A.R.S. § 36-884(3) to exempt special needs preschools from the licensing requirements, the last sentence has remained unchanged. The result is that special needs preschools that include nondisabled children may be subject to child care regulation, depending on the number of nondisabled children enrolled and whether the district receives compensation.

Because nondisabled preschool children lack a qualifying disability, they are not eligible for and do not receive ECSE services— “professional services provided by school districts for the sole purpose of meeting mandated requirements to address the physical and mental impairments prescribed in section 15-771.” A.R.S. § 36-884(3). The new statutory exemption therefore does not include these children. Because the children are also not regularly enrolled in kindergarten or grades one through twelve, services provided to them are “child care” and thus are subject to the licensing requirement.

ADHS only has authority to license a child care program, however, if child care is being provided for five or more children for compensation. A.R.S. §§ 36-881(3), -882(A). If an otherwise exemption-qualified ECSE special needs preschool program enrolls nondisabled children without receiving compensation in addition to its federal and state ECSE funding, the program remains exempt. Likewise, if an otherwise exemption-qualified ESCE special needs preschool program provides services to four or fewer nondisabled children for compensation, the program remains exempt. If, however, an otherwise qualified ECSE special needs preschool program provides

services to five or more nondisabled children for compensation, the exemption becomes unavailable and the program must be licensed by ADHS.

**Conclusion**

The amendment to A.R.S. § 36-884(3) expressly exempts public school facilities from the child care licensing requirements of A.R.S. § Title 36, Chapter 7.1 where a school district operates a mandatory program of special education services exclusively for preschool children with qualifying disabilities. In addition, where nondisabled children are brought into a special needs preschool program meeting the requirements of A.R.S. §§ 36-884(3) and 15-771 at no charge to their parents or other funding in addition to the program's ESCE state and federal funding, or where four or fewer nondisabled children are brought into an otherwise exemption-qualified special needs preschool program and additional compensation is received by the program, that program is exempt from ADHS child care licensing requirements. Finally, when an otherwise exemption-qualified special needs preschool program provides services to five or more nondisabled children for compensation, that program requires a child care license from ADHS.

Terry Goddard  
Attorney General

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**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

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<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>September 10, 2004</p>	<p>No. I04-008 (R04-020)</p> <p>Re: School Facilities Board Approval of Proposed Reductions in Square Footage of School Facilities</p>
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To: Linda Good, Deputy County Attorney  
Pinal County

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 15-253(B), the Pinal County Attorney’s Office submitted for review an opinion provided to Coolidge Unified School District. This Office concurs with the opinion of the Pinal County Attorney’s Office that: (1) the School Facilities Board (the “SFB”) may interpret A.R.S. § 15-341(G)’s three-year time period as the three fiscal years immediately following the fiscal year in which the action reducing the pupil square footage below the required minimum square footage actually occurred; and (2) the SFB lacks authority to require school districts to obtain SFB’s approval for actions that would not reduce the pupil square footage below the required minimum square footage. This opinion is issued to provide guidance to the SFB and to school districts concerning these subjects.

### **Questions Presented**

You have asked if:

1. The SFB may interpret A.R.S. § 15-341(G)'s "three year" time period as the three fiscal years immediately following the fiscal year in which the action reducing the pupil square footage below the required minimum in A.R.S. § 15-2011 actually occurred; and
2. The SFB has the authority to require school districts to obtain SFB approval for actions affecting school facilities that do not reduce the pupil square footage below the minimum square footage requirements in A.R.S. § 15-2011.

### **Summary Answer**

1. The SFB may interpret the three-year time period in A.R.S. § 15-341(G) as the three fiscal years immediately following the fiscal year in which the action reducing the pupil square footage below the minimum requirements in A.R.S. § 15-2011 actually occurred.
2. The SFB lacks the authority to require school districts to obtain its approval for actions that do not reduce the pupil square footage below the minimum requirements in A.R.S. § 15-2011.<sup>1</sup>

### **Background**

School district governing boards are responsible for managing and controlling school property and facilities within the district. A.R.S. § 15-341(A). Although a governing board has broad latitude in managing district property and facilities, the Legislature requires that the

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<sup>1</sup> Because of the answer to these questions this Opinion does not address the SFB's ability to require a school district to re-submit a previously approved plan for additional review or approval. In the Pinal County analysis, this issue became relevant if SFB had incorrectly interpreted the statute or if the SFB had the authority to approve school district actions that did not reduce pupil square footage below the statutory requirements.

governing board obtain SFB approval before taking certain actions that reduce the space of the district's educational facilities.

The SFB was created as a result of the enactment of the Students First Act of 1998, in response to the Arizona Supreme Court's declaration that Arizona's former system of financing school facilities violated the Arizona Constitution. *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233, 240-43, 877 P.2d 806, 813-16 (1994). The Legislature created the SFB and designated it as the state agency charged with the responsibility of administering Students First and overseeing the expenditure of state funds for capital improvements of Arizona's public schools. One of the main components of Students First was the establishment of standards for school facilities, which are based in part, upon pupil square footage.

Specifically, A.R.S. § 15-341(G) mandates that:

a school district governing board shall not take any action that would result in . . . a reduction within three years of pupil square footage that would cause the school district to fall below the minimum adequate gross square footage requirements prescribed in § 15-2011, subsection C, unless the [district's] governing board notifies the school facilities board . . . of the proposed action and receives written approval from the school facilities board to take action.

The statutory language and legislative history of A.R.S. § 15-341(G) provide no direct guidance to the SFB regarding the commencement and calculation of the three-year time period. The SFB, however, has a long-standing interpretation of the three-year time period as the three fiscal years immediately following the fiscal year in which the action reducing the pupil square footage below the required minimum square footage actually occurred.

Coolidge Unified School District has asked whether the SFB's interpretation of A.R.S. § 15-341(G)'s three-year period is correct.

## Analysis

### **A. Three-Year Time Period in A.R.S. § 15-341(G).**

The SFB may interpret the three-year time period in A.R.S. §15-341(G) as the three fiscal years following the fiscal year in which the action reducing the pupil square footage below the required minimum square footage actually occurred. This interpretation is supported by the statutory language and is consistent with the legislative, school district governing board, and other SFB fiscal year budgetary planning procedures. In addition, as an administrative agency, the SFB's long-standing interpretation of a statute that it administers is entitled to deference.

Although A.R.S. § 15-341(G) does not specify whether the three-year time period is calculated on a fiscal year or calendar year basis, SFB makes other projections, reports, and fund distributions on a fiscal year basis. *See, e.g.*, A.R.S. §§ 15-2002(A)(9)(a) – (c) (requiring the SFB is required to annually submit reports to the Legislature and Superintendent of Public Instruction detailing “the amount of monies distributed by the SFB in the previous *fiscal year*,” requiring a list of “each capital project that received monies from the SFB during the previous *fiscal year*,” requiring “a summary of the findings and conclusions of the building maintenance inspections conducted during the previous *fiscal year*”); -2002(10) (13) (requiring SFB to submit a report requesting the amounts necessary for capital improvements and building refurbishment in the coming *fiscal year* and “information regarding demographic assumptions, a proposed construction schedule and new school construction cost estimates for the following *fiscal year*”) (emphasis added). In addition, all school districts within the State of Arizona operate their budgets on a fiscal year basis. All projected district revenue and expenditures are calculated and expended in accordance with a budgetary fiscal year, usually based on the state's fiscal year. In light of the requirements for projections, reports and fund distributions that are based on fiscal

years, it is reasonable for SFB to administer the three-year time period in A.R.S. § 15-341(G) on a fiscal year basis. Administering the statute on any other basis would create an unnecessary anomaly.

In addition, the SFB's long-standing policy of implementing the three-year time period in A.R.S. § 15-341(G) based on fiscal years is entitled to deference. *See, e.g., Better Homes Constr., Inc. v. Goldwater*, 203 Ariz. 295, 299, 53 P.3d 1139, 1143 (App. 2002) (court accords great weight to an agency's interpretation of a statute); *Berry v. State Dep't of Corr.*, 145 Ariz. 12, 13, 699 P.2d 387, 388 (App. 1985) ("historical statutory construction placed upon a statute by an executive body administering the law will not be disturbed unless clearly erroneous."). The SFB's interpretation of the three-year time period in A.R.S. § 14-341(G) may result in a time period calculation that extends longer than three calendar years; however, absent a more specific legislative directive, in this context basing the three-year time period on fiscal years is a sensible interpretation of the statute. *See Foster v. Anable*, 199 Ariz. 489, 491, 19 P.3d 630, 632 (App. 2001) (courts defer to an agency's interpretation of a statute it is charged with enforcing unless the court concludes that the legislature intended a different interpretation).

**B. The SFB Lacks Authority to Require Approval for All District Decisions Regarding School Facilities.**

Section 15-341(G), A.R.S., does not authorize the SFB to require that school districts receive SFB approval for actions that do not reduce the pupil square footage below the minimum requirements in A.R.S. § 15-2011. An administrative agency must exercise its authority within the parameters established by statute. *See Hernandez v. Frohmiller*, 68 Ariz. 242, 255, 204 P.2d 854, 862-63 (1949) (an administrative board that the Legislature has given the power to adopt rules and regulations may act only within the boundaries established by the standards, limitations, and policies of the act); *Grove v. Ariz. Criminal Intelligence Sys. Agency*, 143 Ariz.

166, 169, 692 P.2d 1015, 1018 (Ariz. App. 1984) (a rule adopted by an administrative agency must be in accordance with the statutory authority vested in the agency, must be reasonable, and must be adequately related to the act's purpose and must not be arbitrary or in contravention of any expressed statutory provision); *Kennecott Copper Corp. v. Indus. Comm'n of Arizona*, 115 Ariz. 184, 186, 564 P.2d 407, 409 (App. 1977) (an administrative agency must function within the parameters of its statutory grant and that to do otherwise operate would be an administrative usurpation of the Legislature's constitutional authority). Without a legislative mandate, the SFB may not review the district actions that do not reduce the pupil square footage below the required minimum.

### **Conclusion**

The SFB may interpret the three-year time period in § 15-341(G) as the three fiscal years immediately following the fiscal year in which the action reducing the pupil square footage below the required minimum square footage actually occurred. In addition, the SFB lacks statutory authority to require that school districts obtain SFB's approval for actions that do not reduce a school district's pupil square footage below the minimum requirements in A.R.S. § 15-2011.

Terry Goddard  
Attorney General

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**STATE OF ARIZONA**  
**OFFICE OF THE ATTORNEY GENERAL**

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<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>August 10, 2004</p>	<p>No. I04-007 (R04-018)</p> <p>Re: Prorating Compensation of School Employees</p>
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To: John C. Richardson, Esq.  
DeConcini McDonald Yetwin & Lacy, P.C.

**Question Presented**

You have asked whether Arizona Revised Statute (“A.R.S.”) § 23-351(C)(2), which permits school district employees to prorate their “annual salary” over any number of payments, applies to all school district employees, regardless whether their wages are computed by the hour or on a yearly basis.

**Summary Answer**

All employees of school districts may request that their compensation be paid over the actual months worked or be prorated in any number of payments as set forth in A.R.S. § 23-351(C)(2).

## **Background**

Pursuant to A.R.S. § 15-253(B), you submitted for review an opinion you prepared for the Assistant Superintendent of Marana Unified School District, concluding that A.R.S. § 23-351(C)(2) applies to all school employees.

The relevant section of the statute reads as follows:

In the case of employees of school districts or of the Arizona state school for the deaf and the blind, the annual salary may be prorated in any number of payments, and the employee may select whether to have the salary prorated or paid during the actual months worked. If the employee's salary is prorated, all such payments still due at the close of the school attendance year or fiscal year may at the option of the employee be paid in either a lump sum or paid within a period of two months after the close of the fiscal year.

A.R.S. § 23-351(C)(2).

The predecessor statute to this section, A.R.S. § 23-351(B)(2), was first enacted in 1961, with somewhat different provisions. 1961 Ariz. Sess. Laws ch. 11, § 1. That statute applied only to “certificated employees of school districts.” In 1965, the Legislature amended the statute to add “clerical employees” as other potential recipients of prorated payments. 1965 Ariz. Sess. Laws ch. 29, § 1. In 1988, the Legislature again amended the statute to allow “all school employees,” not only certificated teachers and clerical employees, to select whether to have their “salary” prorated or paid during the actual months worked. 1988 Ariz. Sess. Laws ch. 42, § 1. Another amendment in 1989 enabled the employees of the Arizona State School for the Deaf and the Blind (ASDB) to also prorate their compensation. 1989 Ariz. Sess. Laws ch. 149, § 1. The statute, as amended, remains virtually the same today, except for the numbering change to A.R.S. § 23-351(C)(2).

### Analysis

In order to ascertain the appropriate interpretation of the word “salary” in A.R.S. § 23-351(C)(2), legislative intent must be considered. *See Mail Boxes, etc. v. Indus. Comm’n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). The intent of the Legislature may be construed through an examination of the legislative history of the amendments to A.R.S. § 23-351(C)(2). *See Weekly v. City of Mesa*, 181 Ariz. 159, 163, 888 P.2d 1346, 1350 (App. 1994).

The January 14, 1988 “Fact Sheet” for SB 1046, which expanded the scope of A.R.S. § 23-351(C)(2) to encompass “all school employees,” states that the purpose of the bill was to “permit all school district employees to have their annual salary pro-rated [sic] which allows them to receive their wages spread out through the entire year.” *Ariz. State Senate, Fact Sheet for S.B. 1046*, 38<sup>th</sup> Leg., 2d Reg. Sess. (Jan. 14, 1998) (emphasis added). As is often the case in common usage, the staff’s explanation of the bill uses the terms “salary” and “wages” interchangeably.

The legislative history of the 1989 amendment, which permitted ASDB employees to prorate their annual compensation, also supports the interpretation that the statute covers employees who are compensated by the hour. The February 9, 1989 “Fact Sheet” for S.B. 1223, prepared by the Senate staff states:

Current statute provides employees of school districts with the option of having their salaries prorated throughout the summer or paid during the actual months worked. In 1988, S.B. 1046 permitted all employees of school districts rather than just certificated personnel to have the option of having their annual salary prorated.

During 1988-89, ASDB employed approximately 465 full-time employees with nearly 75% of them employed on less than a 12-month basis. The provisions in the bill would provide these ASDB employees with the same prorated salary option as public school employees.

*Ariz. State Senate, Fact Sheet for S.B. 1223, 39<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess. (Feb. 9, 1989).* The reference in the Fact Sheet to all employees is inconsistent with a narrow interpretation of the term “salary” that would exclude hourly employees.

The minutes of the legislative hearings concerning the 1989 amendments further support the conclusion that A.R.S. § 23-351(C)(2) applies to all employees. During the February 13, 1989, meeting of the Senate Committee on Education, the Senate intern explained SB 1223 as follows:

[I]t would allow employees of the Arizona State School for the Deaf and Blind to choose whether to have their salaries prorated over a 12-month period or to be paid during the actual months worked. . . . [O]ver 75% of the ASDB employees are employed for less than a 12-month basis.

*Min. of Ariz. S. Comm. on Educ., 39<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess. 5 (Feb. 13 , 1989).* At the same committee meeting, an ASDB teacher stated that “she, and all their teachers and staff, are in support of this bill. . . . She explained that right now they do not get paid in the summer and yet they have to pay their health insurance costs. This bill would enable them to continue receiving their checks and have those costs taken out of their checks.” *Id.*

During a March 22, 1989 House of Representatives Committee on Education meeting, Barry Griffing, Superintendent of ASDB, testified in favor of SB 1223. He stated that ASDB “would like their employees to be able to have their salaries prorated throughout the entire year. This would give the ASDB employees the same option as public school employees. . . . ASDB employees had been polled and 93 percent favor the prorated option.” *Min. of Ariz. H. R. Comm. on Educ., 39<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess. (Mar. 22, 1989).*

The statutory language and this legislative history indicate that A.R.S. § 23-351(C)(2) applies to all school district and ASDB employees.

### **Conclusion**

Under A.R.S. § 23-351(C)(2), all employees of school districts and all employees of Arizona State School for the Deaf and the Blind may elect to have their annual compensation prorated in any number of payments or paid over the actual months worked.

Terry Goddard  
Attorney General

**STATE OF ARIZONA**  
**OFFICE OF THE ATTORNEY GENERAL**

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ATTORNEY GENERAL OPINION  by  TERRY GODDARD ATTORNEY GENERAL  July 20, 2004	No. I04-006 (R04-010)  Re: Charter Schools Operated by For-profit Organizations
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TO: The Honorable Tom Horne  
Superintendent of Public Instruction

**Questions Presented**

You have asked the following questions concerning charter schools:

1. Is a charter school operated by a for-profit organization (or a for-profit charter operator and its charter school) considered a public local educational agency (LEA) under Arizona law?
2. Does a charter school operated by a for-profit organization (or a for-profit charter operator and its charter school) meet the federal definition of a “local educational agency,” as set forth in Section 9101 (26) of the Elementary and Secondary Education Act (codified at 20 U.S.C. § 7801 (26)) and Section 602(15) of the Individuals with Disabilities Education Act (codified at 20 U.S.C. § 1401 (15))? In answering this question, you asked this Office to

consider the definition of “elementary school” and “secondary school” set forth in Sections 9101 (18) and (38) of Title I of the Elementary and Secondary Education Act (20 U.S.C. § 7801 (18) and (38)), Sections 602(5) and (23) of the Individuals with Disabilities Education Act (20 U.S.C. § 1401(5) and (23)) and Arizona laws relating to non-profit institutions or schools to the extent it is pertinent to the analysis.

### **Summary Answer**

1. Because all Arizona charter schools are public schools and are mandated to comply with all federal and state laws relating to the education of children with disabilities in the same manner as school districts, all charter schools, including those operated by for-profit organizations, function as LEAs under Arizona law.
2. Because Arizona charter schools, including those operated by for-profit organizations, function as LEAs under state law, they meet the federal definition of a “local educational agency” as set forth in Section 9101 (26) of Title I of the Elementary and Secondary Education Act and Section 602(15) of the Individuals with Disabilities Education Act.

### **Background**

The United States Department of Education’s Office of Inspector General issued an audit report of twenty Arizona charter schools. The audit concluded that private for-profit entities that operate charter schools are not public entities and, as a result, are not eligible to receive funds under Title I of the Elementary and Secondary Education Act and the Individuals with Disabilities

Education Act. Officials within the United States Department of Education have requested additional information from the Arizona Department of Education to aid in their resolution of the issues raised in the audit report concerning charter schools.

### Analysis

#### A. All Charter Schools Function As LEAs under State Law.

##### 1. Charter Schools.

The Legislature established charter schools to improve pupil achievement and to give parents and pupils additional academic choices. A.R.S. § 15-181(A). All Arizona charter schools are "public schools," regardless of whether they are operated by public bodies, private persons, or private organizations. A.R.S. §§ 15-101(3), -181(A). Arizona's charter school laws do not differentiate between for-profit and nonprofit private organizations that apply to establish a charter school. A.R.S. § 15-183(B). Charter schools are established by contract between a sponsor (which may be a school district governing board, the State Board of Education, or the State Board for Charter Schools) and a public body, private person, or private organization. A.R.S. §§ 15-101(3), -183(B). The charter school sponsor provides initial authorization for a charter school, has continuing oversight responsibility, and has sole control of whether to renew a school's charter. A.R.S. § 15-183(R). The Legislature mandates the general components of the charter, school operation, school accountability, school financial requirements, and responsibilities of the charter school governing body. A.R.S. § 15-183(E). All charter schools may contract, sue and be sued, and hold property. A.R.S. § 15-183(H), (T). Thus, charter schools are distinct legal entities, with legal responsibilities independent of their public or private operators. Ariz. Att'y Gen. Op. No. I00-005;

*Cf. Jarvis v. Hammons*, 32 Ariz. 124, 129, 256 P. 362, 364, *on reh'g*, 32 Ariz. 318, 257 P. 985 (1927) (concluding that school districts are distinct legal entities).

While Arizona charter schools are exempt from some state educational laws and rules, all charter schools must “compl[y] with all federal and state laws relating to the education of children with disabilities in the same manner as a school district.” A.R.S. § 15-183(E)(5), (7). Further, charter schools are precluded from limiting admission based on disabling conditions. A.R.S. § 15-184(B). Like district schools, charter schools receive state funding based on a formula prescribed by statute. *See* A.R.S. § 15-185. District and charter schools receive the same base amount for each student, multiplied by a weighted amount that is determined by the student’s disability. *See* A.R.S. § 15-943. Under state and federal law, charter schools have the same responsibilities as school districts do to educate children with disabilities. Ariz. Att’y Gen. Op. No. I96-011 (in the context of providing special education, charter schools are home school districts for qualifying children pursuant to the mandate in A.R.S. §15-183(E)(7)). Both must develop policies and procedures for providing special education to all such children within their jurisdiction. A.R.S. § 15-763(A); 20 U.S.C. §§ 1412 and 1413.

## 2. Local Educational Agencies.

Arizona statutes and regulations governing special education services do not use the term “local educational agency” (LEA). *See* A.R.S. §§ 15-761 to 774. Instead, the relevant regulations use the term “public education agency” or “PEA,” which is defined as “a school district, charter school, accommodation school, state supported institution, or other political subdivision of the state

that is responsible for providing education to children with disabilities.” A.A.C. R7-2-401(B)(22)<sup>1</sup>. Under these regulations, charter schools are PEAs that are obligated to comply with state and federal laws in providing education to children with disabilities. *See* A.A.C. R7-2-401(B)(22). State law plainly requires all charter schools, regardless of whether they are operated by a for-profit or non-profit organization, to comply with state and federal laws to educate children with disabilities in the same manner as a school district. Thus, all charter schools are PEAs and function as LEAs under state law.

B. A Charter School That a For-profit Organization Operates Meets the Federal Definition of a “Local Educational Agency.”

1. Individuals with Disabilities Education Act (IDEA).

The IDEA applies to each public school in the United States, including charter schools. In a state that accepts IDEA funds, LEAs must comply with the IDEA and make services available to students with disabilities in whatever geographic area the LEA covers. *See* 20 U.S.C. § 1411(a); 34 C.F.R. § 300.2. The IDEA defines an LEA as:

(A) [A] public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.

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<sup>1</sup>The regulations also incorporate by reference the terms used in the Individuals with Disabilities Education Act (IDEA) 1997 Amendments (34 C.F.R. §§ 300.4 through 300.30, and 300.504 (2003)). A.A.C. R7-2-401(B).

(B) The term includes--

- (i) an educational service agency, as defined in paragraph (4),<sup>2</sup> and
- (ii) any other public institution or agency having administrative control and direction of a public elementary or secondary school.

20 U.S.C. § 1401(15)(A) and (B).

The regulations implementing the IDEA adopt the same definition of LEA, except they include language specifically addressing charter schools:

- (b) “any other public institution or agency having administrative control and direction of a public elementary or secondary school, *including a public charter school that is established as an LEA under State law.*”

34 C.F.R. § 300.18(b) (emphasis added).

Arizona charter schools are defined as public schools under state law. A.R.S. § 15-101(3). The Arizona Legislature established charter schools as public schools and mandated that they comply with all federal and state laws relating to the education of children with disabilities in the same manner as school districts. Because all charter schools, including those operated by for-profit organizations, function as “LEAs” under state law, charter schools operated by for-profit organizations meet the federal definition of a “local educational agency” as set forth Section 602(15) of the IDEA.

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<sup>2</sup> The term “educational service agency:”

(A) means a regional public multiservice agency -

(i) authorized by State law to develop, manage, and provide services or programs to local educational agencies; and

(ii) recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary and secondary schools of the State; and

(B) includes any other public institution or agency having administrative control and direction over a public elementary or secondary school.

20 U.S.C. § 1401(4). *See also* 34 C.F.R. § 300.18.

2. The Elementary and Secondary Education Act (ESEA).

The ESEA defines an “LEA” as:

(A) In general

[A] public board of education or other public authority legally constituted within a State, for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary or secondary schools.

(B) Administrative control and direction

The term includes any other public institution or agency having administrative control and direction of a public elementary school or secondary school.

20 U.S.C. § 7801 (26)(A) and (B).

The ESEA defines an elementary school as a “nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law.” 20 U.S.C. § 7801 (18). The ESEA defines a secondary school as “a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under state law, except that the term does not include any education beyond grade 12.” 20 U.S.C. § 7801 (38). Under state law, Arizona charter schools are public schools established for the purposes of offering instruction to pupils in programs for preschool children with disabilities, kindergarten programs or any combination of grades one through twelve. A.R.S. § 15-101(3), (19). Charter schools must provide a comprehensive program of instruction for at least a kindergarten program or any grade between grades one and twelve and must comply with all federal and state laws relating to the education of children with disabilities in the same manner as a school district. A.R.S. § 15-183(E)(3), (7). Thus, Arizona’s charter schools

provide the elementary and secondary education required by state law. Although the ESEA refers to “nonprofit school,” it also specifically includes public charter schools providing elementary and secondary education as determined by state law. Because the definition applies to all public charter schools, Arizona charter schools operated by a for-profit organization meet the federal definition of “local educational agency” as set forth Section 9101 (26) of Title I of the Elementary and Secondary Education Act (20 U.S.C. § 7801 (26)(B)).

### **Conclusion**

Charter schools, including those operated by for-profit organizations, are public schools that function as local educational agencies under Arizona law. In addition, charter schools that for-profit organizations operate meet the federal definition of local educational agencies as set forth in Section 9101 (26) of the Elementary and Secondary Education Act and Section 602(15) of the Individuals with Disabilities Education Act.

Terry Goddard  
Attorney General

**STATE OF ARIZONA**  
**OFFICE OF THE ATTORNEY GENERAL**

ATTORNEY GENERAL OPINION  by  TERRY GODDARD ATTORNEY GENERAL  June 21, 2004	No. I04-005 (R04-013)  Re: Provisional Community College Districts and Reimbursements Under A.R.S. § 15-1469
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To: The Honorable Daisy Flores  
Gila County Attorney

**Question Presented**

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 15-1448(H), you submitted for review an opinion addressing the following question: When a county has formed a provisional community college district and has instituted a tax levy pursuant to A.R.S. § 15-1409(J), do tuition reimbursement payments from the county cease at the end of the fiscal year in which the provisional district is formed or two years after the provisional district is formed?

**Summary Answer**

This Office concurs with your conclusion that the reimbursement payments terminate at the end of the fiscal year in which the provisional community college district is formed if the county approves the levy specified in A.R.S. § 15-1409(J).

## **Background**

Counties that meet minimum statutory thresholds for population and property value may organize community college districts pursuant to A.R.S. §§ 15-1402 to -1407. Until 2002, four rural counties did not have community college districts (“unorganized counties”). The residents of those counties were able to attend community colleges in other counties subject to a tuition reimbursement program set forth in A.R.S. § 15-1469. As long as the county’s share of Transaction Privilege Tax (“TPT”) revenues is less than 1% of the total distributed to all counties, the state Treasurer makes the reimbursement payment to the appropriate community college district and recoups the payment by withholding the equivalent sum from the unorganized county’s TPT revenues. A.R.S. §15-1469.01(A). The Joint Legislative Budget Committee calculates the reimbursement payments by May 15 of each year. A.R.S. § 15-1469(D)(1).<sup>1</sup>

In 1999, the Legislature authorized counties that cannot form a community college district to establish provisional community college districts. 1999 Ariz. Sess. Laws ch. 340 (codified in part as A.R.S. § 15-1409). In November 2002, voters in Gila County (previously an unorganized county) approved the formation of a provisional community college district and the levy required by A.R.S. § 15-1409(J). The net levy was to generate \$3 million, which is the sum of reimbursement payments and the cost of community college services provided in the prior fiscal year.

The statute addressing provisional community college districts discontinues the reimbursement established in A.R.S. § 15-1469:

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<sup>1</sup> The Legislature transferred the responsibility for the calculations from the State Board of Directors for Community Colleges to the JLBC in 2003. 2003 Ariz. Sess. Laws ch. 264, § 7.

If a provisional community college district is formed in a county that provides reimbursement for the attendance of nonresident state students pursuant to § 15-1469, that *county shall continue to provide reimbursement payments to community college districts for the remainder of the fiscal year in which the provisional community college district is formed*, provided that the county board of supervisors adopts a levy that is at least equal to the sum of the reimbursement payments and the amount of the community college services provided in the fiscal year immediately before the formation of the provisional community college district.

A.R.S. § 15-1409(J) (emphasis added.)

The issue here is whether the reimbursement payments stop after the fiscal year in which the provisional community college district is formed or whether the reimbursement payments stop after the county reimburses community college districts for students who attended community college in another county during the year in which the provisional college district is formed.

The opinion you submitted for review concludes that reimbursement payments stop after the fiscal year in which a county forms a provisional community college district and approves the necessary levy, which for Gila County was fiscal year 2003.

### **Analysis**

The purpose of statutory construction is to discern the intent of the Legislature. *Zamora v. Reinstein*, 185 Ariz. 272, 275 915 P.2d 1227, 1230 (1996). The best indicator of legislative intent is the statutory language. When a statute is ambiguous, one must attempt to determine legislative intent by interpreting the statute as a whole, taking into account its text, subject matter, historical background, effects and consequences, and spirit and purposes. *Id.* In addition, words of a statute are given their ordinary or accepted meaning “unless the legislature has offered its own definition or a special

meaning is apparent from the context.” *State v. Martinez*, 202 Ariz. 507, 510, 47 P.3d 1145, 1148 (App. 2002) (quoting *State v. Barr*, 183 Ariz. 434, 438, 904 P.2d 1258, 1262 (App. 1995)).

In A.R.S. § 15-1409(J), the Legislature provided that a county forming a provisional community college district “shall continue to provide reimbursement payments to community college districts for the remainder of the fiscal year in which the provisional community college district is formed” if the requisite levy is approved in the county forming the community college district. This statutory language indicates that reimbursement payments terminate after the fiscal year in which voters approve the community college district and establish the specified levy requirements.

The fact that the reimbursement formula in A.R.S. § 15-1469 relies, in part, on student count (FTSE) data from a prior fiscal year does not support a different conclusion. A.R.S. § 15-1409(J) expressly addresses the county’s obligation “to provide reimbursement payments.” Its language does not suggest that the county is to continue reimbursement payments in future fiscal years because one element of the reimbursement formula relies on student count data from an earlier fiscal year.

Further, the formula for reimbursement in A.R.S. § 15-1409(J) does not exclusively rely on data from the previous fiscal year. That formula uses student count for the prior fiscal year from the county that did not have an organized community college district, state aid from the current fiscal year, current fiscal year operational expenses, and total full-time equivalent students for the current fiscal year. A.R.S. § 15-1469(B). This calculation is “[t]he amount of reimbursement to [the] district from [the]

county [for the budget year] . . . [f]or students attending classes within the established community college district.” *Id.*

Another canon of statutory interpretation establishes that terms are ordinarily assigned a consistent meaning. *Callender v. Transpacific Hotel Corp.*, 179 Ariz. 557, 560, 880 P.2d 1103, 1106 (App. 1993). Aside from § 15-1409(J), the phrase “for the remainder of the fiscal year” also occurs in two other Arizona statutes: A.R.S. § 15-365 (concerning service programs operated through county school districts) and A.R.S. § 42-17110 (concerning the establishment of a budget in a newly incorporated city or town). For example, subsection (A) of A.R.S. 42-17110 provides:

Notwithstanding any other provision of this article, a city or town that is incorporated after the third Monday in July or before June 30 in any fiscal year may adopt an interim budget by ordinance *for the remainder of the fiscal year in which the city or town was incorporated.*

[emphasis added.]

The phrase “for the remainder of the fiscal year” should be interpreted in a manner consistent with the phrase’s ordinary meaning. Thus, in A.R.S. § 15-1409(J), the phrase “[a] county shall continue to provide reimbursement payments to community college districts for the remainder of the fiscal year in which the provisional community college district is formed” means that the last year in which payments are made is the year in which the district is formed. The Legislature has not evidenced any intent to extend reimbursement payments beyond the fiscal year in which the provisional district and a related levy is approved.

The statutory context also supports this conclusion. The reimbursement terminates only if the county adopts a levy to support the provisional community college district. This seems to anticipate a scenario in which a county might fail to adopt an

appropriate levy to support the provisional community district. Under those circumstances, county residents would have no choice but to continue to attend out-of-county community colleges, thereby creating only a nominal provisional community college district. The statutory scheme creates an incentive to avoid this problem by permitting the county to terminate its out-of-county reimbursement payments only if the county initiates a tax levy to support its own provisional district.<sup>2</sup> The statutory scheme does not suggest the Legislature intended to oblige the county to continue making out-of-county reimbursement payments for an interim period regardless of whether it instituted a tax levy to support the new district. There is no evidence that the Legislature intended to impose such a burden on a county establishing the provisional district and approving the related funding.

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<sup>2</sup> The legislative history provides no support for extending payments beyond the fiscal year in which the district and the levy are approved. A JLBC Fiscal Note explained the reimbursement process as follows:

The bill requires a county that has formed a provisional community college district to continue reimbursement payments to any community college district for the attendance of the county's nonresident state students for the remainder of the fiscal year in which the provisional community college district is formed. Beyond the first year, community college districts that previously received reimbursements for out-of-county students may sustain a revenue loss for the duration of these students' continued enrollment.

JLBC Fiscal Note, HB 2437 (House Engrossed), 44<sup>th</sup> Leg, 1<sup>st</sup> Reg. Sess: (language from HB 2437 incorporated into HB2436 in conference committee amendment).

**Conclusion**

Under A.R.S. § 15-1469.01(A) reimbursement payments terminate at the end of the fiscal year in which a county establishes a provisional community college district and voters approve the required levy.

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Terry Goddard  
Attorney General

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**STATE OF ARIZONA**  
**OFFICE OF THE ATTORNEY GENERAL**

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ATTORNEY GENERAL OPINION  by  TERRY GODDARD ATTORNEY GENERAL  June 3, 2004	No. I04-004 (R03-043)  Re: Partisan Primary Elections for Superior Court Judges
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TO: The Honorable William J. O'Neil, Presiding Judge  
Superior Court, Pinal County

**Question Presented**

You have asked whether it is permissible to conduct partisan primary elections for judges of the superior court in counties with populations of less than 250,000 persons. Specifically, you have asked whether Article VI, Section 12 of the Arizona Constitution, which requires that the names of candidates for superior court judge in those counties appear on the general election ballot without any partisan designation, is incompatible with Arizona Revised Statutes ("A.R.S.") § 16-331, which presupposes both a primary and general election for candidates for superior court judges.

**Summary Answer**

Section 16-331, which requires primary elections to determine which candidates will be on the general election ballot, does not violate the requirement in Article VI, Section 12 of the Arizona Constitution. As has been the long-standing practice in counties with populations of less than 250,000, candidates for superior court judge who are members of recognized political parties must

participate in a partisan primary election. Consistent with Article VI, Section 12 of the Arizona Constitution, the winners in the primary election then participate in the general election, but no partisan designation appears on the general election ballot.

### Analysis

#### A. Article VI, Section 12 of the Arizona Constitution.

Article VI, Section 12 of the Arizona Constitution provides, in relevant part:

Judges of the superior court in counties having a population of less than two hundred fifty thousand persons according to the most recent United States census shall be elected by the qualified electors of their counties at the general election . . . . The names of all candidates for judge of the superior court in such counties shall be placed on the regular ballot without partisan or other designation except the division and title of the office.

"The governing principle of constitutional construction is to give effect to the intent and purpose of the framers of the constitutional provision and of the people who adopted it. Unless the context suggests otherwise, words are to be given their natural, obvious and ordinary meaning." *Apache County v. Southwest Lumber Mills*, 92 Ariz. 323, 327, 376 P.2d 854, 856 (1962). Unambiguous constitutional language is to be given its plain meaning and effect. *U.S. West Communications, Inc. v. Arizona Corp. Comm'n*, 201 Ariz. 242, 245, 34 P.3d 351, 354 (2001).

The plain language of article VI, Section 12 provides that in counties with populations of less than 250,000 persons (1) judges of the superior court are elected at a general election by the qualified electors of their counties; and (2) the names of the candidates for judge of the superior court are placed on the regular ballot for the election without partisan designation. Because article VI, Section 12 only refers to a general election, the mandate that the names be placed on the regular ballot without partisan designation applies only to the general election ballot.

Since its adoption at the Constitutional Convention of 1910, the Arizona Constitution has always contemplated the election of superior court judges at a general election and mandated that the names of the candidates be placed on the general election ballot without any partisan designation. As adopted at the Constitutional Convention, article VI, Section 5<sup>1</sup> provided:

There shall be in each of the organized counties of the State a superior court, for which at least one judge shall be elected by the qualified electors of the county at the general election.

The names of all candidates for the office of judge of the superior court shall be placed on the regular ballot in alphabetical order without any partisan or other designation except the title of the office.

In 1974, an amendment to Section 12 of Article VI limited the election of superior court judges to counties with populations of less than 150,000 and established merit selection for judges in larger counties. This amendment effectively established merit selection of superior court judges in Maricopa and Pima Counties, leaving the system for electing superior court judges in all other counties intact. In 1992, Section 12 was amended again to increase the population threshold from 150,000 to 250,000, leaving the system for electing superior court judges in all counties except Maricopa and Pima Counties intact.

B. **Arizona Revised Statutes § 16-331.**

Arizona Revised Statutes § 16-331 addresses the election of superior court judges:

A. In any election at which two or more judges of the superior court are to be voted for or elected for the same term, it shall be deemed that there are as many separate offices to be filled as there are judges of the superior court to be elected. Each separate office shall be designated by the distinguishing number of the division of the court occupied in January 1 preceding the primary election by the respective judges whose terms expire after the general election and

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<sup>1</sup>*The Records of the Arizona Constitutional Convention of 1910* at 1412-13 (John S. Goff ed., 1991).

on or before the first Monday in January next succeeding such election.

B. The designation shall remain the same for all purposes of both the primary and general election and shall be used on all nominating petitions, nomination papers, ballots, certificates of election and election papers referring to the office. After election and the issuance of the certificate of election, the designating number shall have no further significance.

The language of subsection B of A.R.S. § 16-331 presupposes that candidates for superior court judge will participate in both a primary and general election. This is consistent with A.R.S. § 16-301 and A.R.S. § 16-501, which mandate that a person who is a member of a recognized political party who wants to have his or her name on the general election ballot for certain offices, including judicial offices, must be nominated by participating in the primary election.<sup>2</sup> Arizona Revised Statutes § 16-301 provides as follows:

At a primary election, each political party entitled and intending to make nominations for the ensuing general or special election shall, if it desires to have the names of its candidates printed on the official ballot at such general or special election, nominate its candidates for all elective, senatorial, congressional, state, judicial, county and precinct offices to be filled at such election except as provided in § 16-344.

Arizona Revised Statutes § 16-501 provides as follows:

Except as provided in title 16, chapter 3, article 5, no person shall have his name printed on the official ballot as a candidate in a general election unless he has complied fully with the provisions of law applicable to primary elections.

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<sup>2</sup> A different statute, A.R.S. § 16-341 provides for nomination other than by primary election. Section 16-341 applies to people who cannot be nominated in a primary election because they are not members of recognized political parties that hold primary elections: “[a]ny qualified elector *who is not a registered member of a political party that is recognized pursuant to this title* may be nominated . . . otherwise than by primary election . . .” A.R.S. § 16-341(A) (Emphasis added.)

(Footnote omitted.)

The primary goal of statutory construction is to give effect to the Legislature's intent. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). Statutory provisions should be construed in the context of related provisions and in light of their place in the statutory scheme. *City of Phoenix v. Superior Court*, 144 Ariz. 172, 175-76, 696 P.2d 724, 727-28 (App. 1985). It is presumed that the Legislature did not intend to write a statute that contains void, meaningless, or futile provisions, and thus when possible, statutes must be interpreted to give meaning to every word. *State v. Pitts*, 178 Ariz. 405, 407, 874 P.2d 962, 964 (1994). By referring to both a primary and a general election and some of the requirements of the primary election, A.R.S. § 16-331 recognizes that candidates for the superior court will participate in a primary election.

Article VI, Section 12 of the Arizona Constitution and A.R.S. § 16-331 do not contradict one another. When the winners of the primary election have been determined, the nominees of the recognized political parties for the office of superior court judge then participate in the general election, at which their names appear on the ballot without partisan designation.

### **Conclusion**

Pursuant to Article VI, Section 12 of the Arizona Constitution and A.R.S. § 16-331, candidates for superior court judge who are members of recognized political parties must first participate in a partisan primary election to determine whether they will be their parties'

nominees. The nominees of the recognized political parties then participate in the general election, at which their names appear on the ballot without partisan designation.

Terry Goddard  
Attorney General

**STATE OF ARIZONA**  
**OFFICE OF THE ATTORNEY GENERAL**

ATTORNEY GENERAL OPINION  by  TERRY GODDARD ATTORNEY GENERAL  May 26, 2004	No. I04-003 (R04-003)  Re: Law Enforcement Interviews of Students at Public Schools
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TO: The Honorable Slade Mead  
Arizona State Senate

The Honorable Linda Lopez  
Arizona House of Representatives

**Questions Presented**

You have asked the following questions related to the authority of law enforcement officers to interview students at public schools and the authority of school boards to adopt parental notification policies for such interviews:

1. Whether a school official must comply with a law enforcement officer's demand to interview a student;
2. Whether a school official must comply with a law enforcement officer's directive to refrain from contacting the parents of a student whom the officer intends to interview; and whether a school official may be held criminally liable for disregarding such a directive;

3. Whether a school official must comply with a law enforcement officer's directive to refrain from informing a student whom the officer intends to interview that the student has the right to consult his or her parents before answering the officer's questions; and whether a school official may be held criminally liable for disregarding such a directive;

4. Whether a school official must comply with a parent's demands to (a) inform the parent whenever a law enforcement officer seeks to interview the child/student, and (b) prohibit the officer from interviewing the child/student unless the parent is present; and

5. Whether a school official must advise a student of juvenile *Miranda* rights before interviewing the student regarding acts that constitute crimes.

### **Summary Answers**

1. If law enforcement officers<sup>1</sup> are seeking only to interview a student, the officers are subject to regular school policy regarding access to students. Law enforcement officers making an arrest or serving a subpoena or a search warrant, however, generally have the right to immediate access to a student.

2. Although Arizona law does not require that school officials notify parents before law enforcement officers interview a student, school officials may generally provide such notice. However, in instances where law enforcement officers seek to interview a student in connection with an investigation of child abuse or other criminal activity by the student's parent, insistence on parental notification and/or

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<sup>1</sup>Throughout this opinion, the term "law enforcement officer" includes members of federal, state, and local law enforcement agencies, and anyone acting on their behalf, including school resource officers.

consent is improper. A school official who insists on parental notification under these circumstances may be subject to “criminal liability” for hindering prosecution if the school official acts with the “intent to hinder the apprehension, prosecution, conviction or punishment of another for any [crime].” A.R.S. §§ 13-2511 and -2512. Insistence on parental notification is also inappropriate under circumstances in which delay pending parental notification would jeopardize public safety.

3. School officials must comply with a law enforcement officer’s directive to refrain from informing a student that the student may consult his or her parents before answering the officer’s questions if the proposed interview relates to an investigation of child abuse or other criminal activity by the student’s parent or where delay pending notification of a parent would jeopardize public safety. In other circumstances, a school official may inform a student that he or she may consult with a parent prior to questioning.

4. School officials are not required to comply with unconditional demands from parents for prior notice of, or consent to, police interviews of a student. This issue may appropriately be addressed in school policies as described above.

5. A school official is not required to advise a student of juvenile *Miranda* warnings unless the official is conducting a custodial interrogation and acting in the capacity of a law enforcement officer.

## Analysis

### **A. Authority of School Boards to Set Policies Regarding Law Enforcement Interviews.**

“School boards have only the authority granted by statute, and such authority must be exercised in a manner permitted by statute.” *Campbell v. Harris*, 131 Ariz. 109, 112, 638 P.2d 1355, 1358 (App. 1981); *see also* Ariz. Att’y Gen. Op. I88-062. Rules that school boards prescribe and enforce to govern schools must be consistent with law. A.R.S. § 15-341(A)(1).

Law enforcement officers making an arrest or serving a subpoena or search warrant have the right of immediate access to a student. Ariz. Att’y Gen. Op. I77-211; *see also* Ariz. Att’y Gen. Ops. I82-002, I82-094 (addressing procedures for taking a student into temporary custody). However, law enforcement officers seeking only to interview a student are subject to the school’s overall policy regarding access to students who are in class. Ariz. Att’y Gen. Op. I77-211. School policies regarding access to students should make this distinction between law enforcement officers arresting a student and those interviewing a student.

### **B. School Parental Notification Policies.**

Arizona law neither requires nor prohibits school policies requiring notice to parents before officers interview students. To the extent that schools adopt parental notification policies, they must be flexible enough to take into account a variety of circumstances, including whether the proposed questioning relates to allegations of child abuse or other criminal activity by the student’s parent(s), whether the student is suspected of committing a crime or is a possible witness in a criminal investigation, and whether delay pending parental notification will jeopardize public safety.

#### *1. Questioning regarding possible child abuse or other criminal activity by a parent.*

If a law enforcement officer seeks to interview a student in connection with an investigation

of alleged child abuse by a parent, parental notification is not permitted. *See* Ariz. Att’y Gen. Op. 188-062. Similarly, if a parent or guardian is suspected of some other type of crime and the student has information as a witness, parental notification is inappropriate because it could result in the parent evading arrest, destroying evidence, concealing the crime, or otherwise creating a threat to the community. *See* Wis. Att’y Gen. Op. OAG 5–94. Parental notification under these circumstances could expose school officials to criminal liability, depending on the school official’s intent. *See* A.R.S. §§ 13-2511, 13-2512.<sup>2</sup>

2. *Student suspected of criminal activity.*

When a student is suspected of criminal activity, the Fifth Amendment may apply to law enforcement interviews. The Fifth Amendment protection against compelled self-incrimination affords all citizens, including juveniles, the right to refuse to answer questions that a law enforcement officer poses. *State v. Maloney*, 102 Ariz. 495, 498, 433 P.2d 625, 628 (1967). Under *Miranda v. Arizona*, law enforcement officers may not conduct custodial interrogations without first advising criminal suspects that they have the right to remain silent, to consult with an attorney, to have an attorney appointed if they cannot afford an attorney, and that anything they say may be used against them in a court of law. 384 U.S. 436, 444 (1966). Questioning by law enforcement officers may be deemed “custodial” for *Miranda* purposes regardless of the location of the interview if the person being questioned has been deprived of freedom of action in any significant way. *See In re Jorge D.*, 202 Ariz. 277, 280-81, 43 P.3d 605, 608-09 (App. 2002) (custodial questioning of a

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<sup>2</sup>A.R.S. § 13-2512(A) provides: “A person commits hindering prosecution in the first degree if, with the intent to hinder the apprehension, prosecution, conviction or punishment of another for any felony, the person renders assistance to the other person.” The definition of “rendering assistance” to the other person—the parent in this scenario—includes knowingly “[w]arning the other person of impending discovery.” A.R.S. § 13-2510(2). Hindering prosecution in the second degree is the same crime except that it applies to those who hinder prosecution of persons who have committed misdemeanors rather than felonies. A.R.S. § 13-2511.

juvenile at school).

Confessions to law enforcement officers are presumed involuntary—notwithstanding *Miranda* warnings—and to rebut this presumption, the State must show by a preponderance of the evidence that the suspect made the confession freely and voluntarily. *State v. Jimenez*, 165 Ariz. 444, 448–49, 799 P.2d 785, 789–90 (1990). Courts apply a “totality of the circumstances” test in assessing the validity of a confession or of a juvenile’s waiver of his Fifth Amendment right against self-incrimination. *Fare v. Michael C.*, 442 U.S. 707, 724–25 (1979). Arizona courts have attached particular significance to whether a parent was present when police interviewed the juvenile. *See In re. Andre M.*, 2004 WL 875629 ¶ 11 (Ariz. Apr. 23, 2004) (noting that a parent “can help ensure that a juvenile will not be intimidated, coerced or deceived during an interrogation”). Although a parent’s absence during questioning does not, in itself, render a juvenile’s statement to police inadmissible, in that situation “the State faces a more daunting task of showing that the confession was neither coerced nor the result of ‘ignorance of rights or of adolescent fantasy, fright or despair’ than if the parent attends the interrogation.” *Id.*

In light of the significance that Arizona courts place on having a parent present during a juvenile’s custodial interrogation, school districts may appropriately adopt policies requiring parental notification prior to a law enforcement interview of a student suspected of committing a crime.

3. *Student is a possible witness in a criminal investigation.*

Fifth Amendment concerns do not present themselves when a student is a potential witness, rather than a suspect, in a criminal investigation. Although parental notification is not required under Arizona law, it is permissible in this situation (unless the child has witnessed criminal activity

relating to the child's parent), and schools may adopt policies requiring such notification.

#### 4. *Public Safety Concerns.*

Parental notification is inappropriate if delay pending notification creates a significant risk to public safety. Such a situation would exist, for example, if law enforcement officers suspect a student of possessing or having information about a handgun on campus. In other instances, delay attendant to a notification/consent policy may result in destruction of evidence or concealment of a crime. Any parental notification policy should be flexible enough to accommodate these types of circumstances and to allow for the exercise of common sense by school officials.<sup>3</sup>

#### C. **Informing Students that They May Refuse to Participate in a Law Enforcement Interview Without First Speaking with a Parent.**

School officials must comply with a law enforcement officer's directive to refrain from informing a student that the student may consult his or her parents before answering the officer's questions if the proposed interview relates to an investigation of child abuse or other criminal activity by the student's parent or if delay pending parental notification would jeopardize public safety. Under other circumstances, a school official may inform a student that he or she may consult with a parent and/or an attorney prior to questioning by the police, notwithstanding a police directive to the contrary.

The parameters regarding these types of communications are not established by caselaw or

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<sup>3</sup>An analysis of potential criminal liability requires specific facts. However, notifying parents under these circumstances, without more, would not subject a person to criminal liability for obstructing criminal investigations or prosecutions. *See* A.R.S. §13-2409. A person violates A.R.S. § 13-2409 when he or she "knowingly attempts by means of bribery, misrepresentation, intimidation or force or threats of force to obstruct, delay or prevent the communication of information or testimony relating to a violation of any criminal statutes to a peace officer . . ." Under some circumstances, a person could violate A.R.S. § 13-2403 by refusing to aid a peace officer. A person violates A.R.S. § 13-2403 if, "upon a reasonable command by a person reasonably known to be a peace officer," he or she "knowingly refuses or fails to aid" the peace officer in effectuating or securing an arrest or preventing the commission by another of any offense.

by statute but school officials and law enforcement should strive to strike the appropriate balance between the interests of schools in keeping parents informed of matters affecting their children and the needs of law enforcement officers conducting criminal investigations.

**D. Complying with Parental Requests for Notification Prior to Law Enforcement Interviews of the Student.**

As set forth above, school officials may notify parents of a proposed law enforcement interview of their child except when law enforcement authorities suspect a parent of abuse or some other type of crime or when delay pending notification creates a significant risk to public safety. School officials are not required to comply with parental demands regarding parental notification. This issue may, however, be addressed by school policies.

**E. Advising Students of Juvenile Miranda Rights.**

The *Miranda* requirement applies only to custodial interrogation by law enforcement agents. “School principals, though responsible for administration and discipline within the school, are not law enforcement agents.” *Navajo County Juvenile Action No. JV91000058*, 183 Ariz. 204, 206, 901 P.2d 1247, 1249 (App. 1995). However, a school official must give *Miranda* warnings if he or she is acting as an agent or instrument of the police. *Id.* Thus, a school official who interviews a student at the request or direction of a law enforcement agency, acts as an instrument of that agency and must advise the student of his or her *Miranda* rights before proceeding with the interview. *Id.*

**Conclusion**

Generally, school officials may notify parents before police interview their children. Any policy requiring parental notice or consent, however, must not apply when any alleged criminal

conduct involves the parent or when advance parental notification creates an unreasonable risk to public safety.

Terry Goddard  
Attorney General

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL OPINION	No. I04-002 (R04-008)
By	Re: Calculation of Student Count by a Joint Technological Education District
TERRY GODDARD ATTORNEY GENERAL	
May 24, 2004	

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To: A. Dean Pickett, Esq.  
Brandon J. Kavanagh, Esq.  
Mangum, Wall, Stoops & Warden, P.L.L.C.

**Question Presented**

You have asked whether a Joint Technological Education District (“JTED”), formed under Arizona Revised Statute (“A.R.S.”) § 15-392, is required to cap its student count for high school pupils attending classes and programs at a facility leased and operated by the JTED, but owned by the same member school district where the pupils are enrolled.

**Summary Answer**

A JTED is required to cap its student count pursuant to A.R.S. § 15-393(D)(3) when a course or program is provided in a facility that is *both* owned and operated by a school district in which its pupils are enrolled.

## Background

Pursuant to A.R.S. § 15-253(B), you submitted for review an opinion that you prepared for the Governing Board of the Northern Arizona Vocational Institute of Technology (“NAVIT”). This Office concurs with your conclusion regarding the “cap” on student count for purposes of A.R.S. § 15-393(D)(3) and issues this Opinion to provide guidance to others concerning this subject.

In 1990, the Legislature approved Senate Bill (SB) 1491, which, among other acts, created Joint Vocational and Technical Education Districts. 1990 Ariz. Sess. Laws, ch. 248, § 1 (codified as A.R.S. §§ 15-391 through -396). The following year, the Legislature enacted SB 1264 and changed the designation of the Districts to Joint Technological Education Districts (“JTED”). 1991 Ariz. Sess. Laws, ch. 154, § 4.

To form a JTED, school districts desiring to participate must submit a plan to the voters of their district. A.R.S. § 15-392(B). Once approved, the joint district is managed and controlled by a duly elected JTED governing board. A.R.S. § 15-393(A).

Funding for a JTED is similar to state financing of school districts. *See* A.R.S. § 15-393(C). An important component of JTED funding is the calculation of the “student count” of the joint district. *See* A.R.S. § 15-393(D). For purposes of student enrollment, a pupil may be considered a “full-time student” or a “fractional part-time student.” A.R.S. §§ 15-901(A)(1)(a)-(b).

The information provided to this Office indicates that NAVIT students cannot complete their entire high school curriculum by attending a NAVIT program, but must also take high school classes at participating members’ high school facilities. A NAVIT student therefore falls under the definition of “fractional student.” A high school “fractional student” is:

a part-time student who is enrolled in less than four subjects that count toward graduation as defined by the state board of education in a recognized high school and who is taught in less than twenty instructional hours per week prorated for any week with fewer than five school days. A part-time high school student shall be counted as one-fourth, one-half or three-fourths of a full-time student if the student is enrolled in an instructional program that is at least one-fourth, one-half or three-fourths of a full-time instructional program.

A.R.S. § 15-901(A)(2)(a)(ii).

Besides a name change for JTED, the Legislature included in SB 1264, additional provisions regarding student count. 1991 Ariz. Sess. Laws, ch. 154, § 4 (codified as A.R.S. §§ 15-393(D)(3)-(4)). That particular statute, A.R.S. § 15-393(D)(3), was later amended and presently reads as follows:

If a career and technological education and vocational education course or program provided pursuant to this article *is provided in a facility owned and operated by a school district in which a pupil is enrolled*, the sum of the daily attendance, as provided in section 15-901, subsection A, paragraph 6, for that pupil in both the school district and joint technological education district shall not exceed 1.250 and the sum of the fractional student enrollment, as provided in section 15-901, subsection A, paragraph 2, subdivision (a), shall not exceed 1.250 for the courses taken in the school district and the facility. The school district and the joint district shall determine the apportionment of the daily attendance and fractional student enrollment for that pupil between the school district and the joint district.

A.R.S. § 15-393(D)(3) (emphasis added).<sup>1</sup>

### **Analysis**

The definition of “fractional student” under A.R.S. § 15-901(A)(2)(a)(ii) allows a student who attends a high school facility part-time and a JTED part-time to be counted for attendance purposes in an amount greater than a whole. Thus, if a student took three classes at the member high school, the student would be counted as a three-fourths student. If the same student took

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<sup>1</sup>Before 2000, the statute set forth a formula by which a joint district and a school district calculated student enrollment. See 2000 Ariz. Sess. Laws, ch. 342, § 2. In 2002, the term “vocational and technological course or program” was changed to its current name. See 2002 Ariz. Sess. Laws, 2d ch. 89, § 5.

two classes at a JTED, the student would be counted as a one-half student for JTED purposes. This one student would be counted for state funding purposes as a 1.250 student. A student who took three classes at a JTED and three classes in the high school facility would be counted as 1.500.

The statute in question caps the student count at 1.250 per pupil if a JTED provides a program in a “facility owned and operated by a school district in which [this] pupil is enrolled.” A.R.S. § 15-393(D)(3). The issue is whether a JTED must comply with the cap when it does *not* own and operate a facility, but does lease and operate a school that is owned by a member district.

The Legislature, when enacting a statute, “is presumed to mean what it says.” *Homebuilders Ass’n. v. Scottsdale*, 186 Ariz. 642, 649, 925 P.2d 1359, 1366 (App. 1996). Words in a statute are assigned their “natural and obvious meanings unless stating otherwise.” *State v. Johnson*, 171 Ariz. 39, 41, 827 P.2d 1134, 1136 (App. 1992). The obvious meaning of the word “and,” as used in the phrase “owned and operated” in A.R.S. § 15-393(D)(3), is that two conditions must be satisfied for the student count cap to apply: NAVIT must (1) own and (2) operate the facility where it provides its programs.

The Arizona Supreme Court has acknowledged that “[i]t is a well-established rule that a court may in the interpretation of statutes, where ambiguity exists or the statute can not otherwise be harmonized, give effect to the legislative intent by interchanging the words ‘or’ and ‘and’.” *Shumway v. Farley*, 68 Ariz. 159, 165, 203 P.2d 507, 511 (1949). The statute at issue, A.R.S. § 15-393(D)(3), however, is clear and unambiguous on its face.

Neither the statutory text nor the legislative history supports exchanging the word “and” for “or” in this statute. The Fact Sheet to SB 1264 stated that the amendments to the bill

established “student count limitations if a joint technological district course or program is provided in a facility owned by a school district in which a pupil is enrolled. The total student count for a pupil enrolled in both the joint district and the school district cannot exceed 1.250.” The SB 1264 Fact Sheet also disclosed that the amendments adopted by the House of Representatives revised “the student count limitation for a school district if a joint district course or program is using the district’s facility. The facility has to be owned and operated by the school district before the limitation is to occur.” *Ariz. State Senate, Final Rev. Fact Sheet for S.B. 1264*, 40<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess., at 4 (1991); *see also* 1991 Ariz. Sess. Laws, ch. 154, § 4. The legislative history of A.R.S. § 15-393(D)(3) supports the premise that “and” should be given its ordinary meaning.

Under A.R.S. § 15-393(D)(3) a member school district must own *and* operate a facility used by a JTED in order for the statute’s constraints to apply.<sup>2</sup>

### **Conclusion**

A course or program provided by a JTED must be held in a facility that is owned by a member school district and also operated by that member school district in order for the cap in student count under A.R.S. § 15-393(D)(3) to apply.

Terry Goddard  
Attorney General

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<sup>2</sup> Although this Office concurs with your interpretation of the meaning of “and” as used in A.R.S. § 15-393(D)(3), this Opinion expresses no conclusion on the fact-specific issue of whether a particular facility is owned and operated by a school district.

**STATE OF ARIZONA**  
**OFFICE OF THE ATTORNEY GENERAL**

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<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>May 3, 2004</p>	<p>No. I04-001 (R03-020)</p> <p>Re: Joint Underwriting Association</p>
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TO: Christina Urias, Director  
Department of Insurance

**Questions Presented**

Your predecessor asked the following questions regarding the Joint Underwriting Association:

1. Does Article 1, Chapter 12, of Title 20 of Arizona Revised Statutes ("A.R.S.") which provides for the establishment and operation of a JUA, violate the prohibition in Article XIV, Section 2 of the Arizona Constitution, against creating corporations by special legislation?
2. Is a JUA subject to all public process laws applicable to the Arizona Department of Insurance, including state procurement, public records, open meeting, personnel code, fiscal controls, and governmental immunity provisions?
3. May the Director of the Department of Insurance assess monies against only those insurers writing liability insurance to fund the JUA or may the Director also assess all insurers writing casualty insurance?
4. If the JUA is unable to fulfill its financial obligations, does the JUA's debt constitute an obligation of the State?

5. If the JUA becomes insolvent and unable to fulfill its ultimate financial obligations after all legally permissible premiums and policyholder surcharges have been imposed, what course of action is available or required of the JUA?

### **Summary Answer**

1. The JUA is not a corporation created by special legislation. Rather, it is a public entity created within the Department of Insurance.
2. As a public body created by statute, the JUA is subject to all of the public process laws applicable to the Department of Insurance, including state procurement, public records, open meeting, personnel code, fiscal controls and governmental immunity provisions.
3. To fund the JUA, the Director may impose assessments only against insurers writing liability insurance. The provisions authorizing assessments do not apply to all insurers writing casualty insurance.
4. Because A.R.S. § 20-2220 provides that the State or any of its political subdivisions are not “otherwise responsible for losses sustained by the [JUA],” the State is not responsible for any debts the JUA may incur.
5. The JUA statutes require the JUA to take numerous actions to prevent financial insolvency; the JUA statutes, however, do not specify the course of action the JUA must take if it is unable to fulfill its ultimate financial obligations.

### **Background**

The purpose of the Joint Underwriting Association is to provide liability insurance coverages that are otherwise unavailable in Arizona. A.R.S. § 20-2201(A). The JUA may operate only if the Director of the Department of Insurance ("Director") finds after a public hearing that “liability insurance is substantially unavailable through private insurers for a particular line.” A.R.S. § 20-2202(B).

The JUA, which is within the Department of Insurance, consists of private insurers authorized to write and engaged in writing liability insurance, including the liability portion of

multi-peril insurance, in Arizona. A.R.S. § 20-2202(A). These insurers are members of the JUA and remain members as a condition of the authority to transact insurance in this State. *Id.*

The JUA is governed by a board of eleven directors appointed by the Director. A.R.S. § 20-2204(A). The JUA receives funding from assessments on the insurers that are association members. The Director may assess the members up to five hundred dollars for the JUA's initial operating expenses. A.R.S. § 20-2213(A) The Director may also annually assess each member up to two hundred dollars for the costs of administering the plan. A.R.S. § 20-2201(D).

Subject to the Director's approval, the JUA is authorized to: (1) issue liability insurance policies; (2) underwrite the insurance; (3) assume reinsurance from its members; (4) cede reinsurance; (5) receive, invest, and disburse monies; (6) open bank accounts and delegate authority for deposit, withdrawal, and disbursement of monies; (7) borrow monies for the association's necessary administrative expenses; (8) provide for such fidelity and surety bonds as are deemed necessary to transact the business of the association; (9) review, consider, and act on any matters deemed by it to be necessary and proper for the administration of the association; (10) develop, promulgate, and effectuate loss prevention programs; (11) sue and be sued; and (12) employ attorneys and other persons necessary to perform the functions of the association. A.R.S. § 20-2203(1) – (12).

Certain statutory procedures apply if the JUA anticipates financial difficulties. If the JUA determines that it will be unable to pay its outstanding lawful obligations within the next 180 days, the JUA must submit to the Director a schedule of policyholder surcharges and a plan of assessments that "in combination are sufficient to assure the continued sound financial operation of the association." A.R.S. § 20-2212(B). The surcharge, however, is capped at ten percent of the total

premium paid for a policy or policies obtained through the JUA, and the member assessments are capped at one percent of each member's net direct premium in Arizona that is attributable to the line of insurance. *Id.*

After the Legislature passed the original JUA legislation in 1986, the Director requested an Attorney General's Opinion concerning the constitutionality of the JUA statutes. The Attorney General concluded that the statutes creating the JUA probably violated the prohibition in Article XIV, § 2 of the Arizona Constitution against creating corporations by special laws. Ariz. Att'y Gen. Op. 187-037. The Legislature subsequently amended the JUA statutes in an effort to address the constitutional issue raised in the Attorney General's Opinion. *See* 1987 Ariz. Sess. Laws ch. 261.

### **Analysis**

1. **The Statutes Creating the JUA Do Not Violate the Prohibition Against Creating Corporations by Special Laws.**

Your first question is whether the existing JUA statutes violate Article XIV, Section 2 of the Arizona Constitution which provides: "Corporations may be formed under general laws, but shall not be created by special Acts." The courts presume all statutes to be constitutional and resolve any doubts in favor of constitutionality. *Ariz. Downs v. Ariz. Horsemen's Found.*, 130 Ariz. 550, 554, 637 P.2d 1053, 1057 (1981).

Article XIV, Section 2 prohibits creating both public and private corporations through special acts. *Fireman's Fund*, 112 Ariz. 7, 536 P.2d 695 (1975). The Arizona Constitution defines "corporation" to include "all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or co-partnerships." Ariz. Const. art. XIV, § 1.

In *Fireman's Fund*, the Arizona Supreme Court declared that the Arizona Insurance Guaranty Association, which was created to assume the liabilities of insolvent insurers, violated the

prohibition against creating a corporation by special legislation. 112 Ariz. at 9, 536 P.2d at 697. In reaching its conclusion, the court examined the powers of the guaranty association, its organizational structure, and the Director's authority over the association. *Id.* at 8, 536 P.2d at 696. The Court concluded that the Director had only limited oversight over the matters of the association and, therefore, the legislation establishing the association violated the Arizona Constitution by creating a corporation by special legislation. *Id.* at 8-9, 536 P.2d at 696-97.<sup>1</sup>

Although *Fireman's Fund* recognized the Legislature's authority to create a variety of governmental agencies to achieve its public purposes, the court observed that the unifying feature of governmental agencies is that each is "governed and controlled by public officials." *Id.* at 9, 536 P.2d at 697. If state institutions are governed and controlled by public officials, they "are not associations or joint stock companies" and are therefore not corporations. *Sullivan*, 45 Ariz. at 255, 42 P.2d at 623. The fact that the Legislature has "conferr[ed] upon the [entity] certain corporate powers and privileges impinges no constitutional rule." *Id.*

After this Office concluded that the original JUA statutes violated *Fireman's Fund*, the Legislature amended the relevant statutes to increase the Director's control over the JUA. A.R.S. § 20-2203 (as amended by 1987 Ariz. Sess. Laws, ch. 261, §2). As amended, the statutes require the JUA to obtain the Director's approval before exercising any of its enumerated powers. *Id.* After these changes, the Director either approves all of the JUA's actions or acts on its behalf.

Because of the Director's control over the JUA, the JUA is not a corporation that has been created by special legislation. The JUA statutes, therefore, do not violate article XIV, § 2 of the Arizona Constitution.

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<sup>1</sup>In 1987 the Arizona Legislature amended the statutes to address the court's concern. See A.R.S. § 20-2203 (as amended by 1987 Ariz. Sess. Laws, ch. 261, § 2).

2. The JUA Is Subject to All the Public Process Laws Applicable to the Arizona Department of Insurance.

You have also asked whether the JUA must comply with various public process laws applicable to the Department of Insurance. Each law and its applicability to the JUA will be discussed separately.

A. The State Personnel Code.

The Director of the Department of Administration has general responsibility for the direction and control of personnel administration for all offices and positions in state service.<sup>2</sup> A.R.S. § 41-761. The JUA has been created within the Department of Insurance, and all of its actions are subject to the control of the Director of the Department. A.R.S. §§ 20-2202(A); -2203. Nothing in statute exempts the JUA from the state personnel system. Consequently, the JUA is subject to the State personnel system directed by the Department of Administration.

B. The Open Meeting Law.

Arizona's Open Meeting Law applies to any public body, which is defined as:

the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision.

A.R.S. § 38-431(6). The JUA's board is subject to the Open Meeting Law because it is a multimember governing body of a state agency, created by statute. A.R.S. § 20-2204(A). *Cf. Prescott Newspapers Inc. v. Yavapai Cmty. Hosp. Ass'n*, 163 Ariz. 33, 39, 785 P.2d 1221, 1227 (App. 1989) (concluding that the Yavapai Community Hospital Association is not "of the state or

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<sup>2</sup> "State service" is defined as "all offices and positions of employment in state government except those offices and positions that are exempted [from the personnel administration statutes]." A.R.S. § 41-762(2).

[a] political subdivision” because it is created by a group of private individuals acting together as authorized by Arizona statutes and because its powers and duties are dictated by its Articles of Incorporation) (internal quotations and citation omitted).

C. The Procurement Code.

The procurement code applies to every expenditure of public monies by any state governmental unit under any contract for the procurement of materials, services, construction or the disposal of materials. A.R.S. § 41-2501. A state governmental unit includes “any department, commission, council, board, bureau, committee, institution, agency, government corporation or other establishment or official of the executive branch or corporation commission of this state.” A.R.S. § 41-2503(35). Public monies includes “money belonging to, received or held by, state . . . officers in their official capacity.” A.R.S. § 35-302. The JUA is a state governmental unit, and none of the exemptions in the procurement code apply to it. *See Fund Manager, Pub. Safety Personnel Ret. Sys. v. Superior Court*, 152 Ariz. 255, 259-260, 731 P.2d 620, 624-625 (App. 1986)..

The JUA’s monies are also public monies. The JUA is supported by assessments that the Director imposes on the JUA members. A.R.S. §§ 20-2201(D), -2213(A). The assessments are deposited in a fund created by statute. A.R.S. § 20-2201(E). The Director administers the fund monies as a continuing appropriation for the purposes specified in the JUA statutes. A.R.S. § 20-2201(E). Because the JUA is a state governmental unit, it must comply with the state procurement code when expending its public monies.

D. The Public Records Law.

Public officers and public bodies are required to maintain all records “reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their

activities which are supported by monies from the state or any political subdivision of the state.”

A.R.S. § 39-121.01(B).

A public body, for the purposes of Arizona’s Public Records Law, is

the state, . . . any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from the state or any political subdivision of the state, or expending monies provided by the state or any political subdivision of the state.

A.R.S. § 39-121.01(2). An officer is “any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body.” A.R.S. § 39-121.01(1).

The JUA is a public body that the Legislature created within the Department of Insurance. A.R.S. §20-2202(A). Thus, the JUA is a public body as defined by the public records laws and the members of the JUA Board of Directors are officers within the meaning of A.R.S. § 39-121.01(2). Therefore, the JUA’s records are public records subject to the requirements of A.R.S. §§ 39-121 through –126.

E. Application of State Budgetary or Fiscal Controls to the JUA.

State budgetary or fiscal controls apply to the JUA because the JUA is funded by state monies and is part of a budget unit of the state. A “budget unit” of the state is “any department, commission, board, institution or other agency of the state organization receiving, expending or disbursing state funds or incurring obligations against the state.” A.R.S. § 35-101(7). “State monies” means all monies that are in the State's treasury or that come lawfully into the state treasurer's possession or custody. A.R.S. § 35-321(10). This includes monies in the general fund as well as other special funds designated by law. A.R.S. § 35-142 (A)(8).

Monies from the Director's annual assessment are deposited into an assessment fund for voluntary plans, and the Director administers the funds as a continuing appropriation. A.R.S. § 20-2201(E). This fund is expressly exempt from the provision in A.R.S. § 35-190, that provides that appropriations generally lapse at the end of a fiscal year. *Id.* Because the JUA is part of a budget unit it must comply with state budgetary and fiscal controls governing the receipt, expenditure and accountability of public monies. *See generally* A.R.S. §§ 35-101 through -215.

F. The Governmental Immunity Provisions Applicable to the JUA.

The JUA statutes specifically provide that the JUA may "sue and be sued", but that "no judgment against the JUA shall create any liability in the individual member companies" of the JUA. A.R.S. § 20-2203(11). In addition, A.R.S. § 20-2219 provides an immunity for "acts or omission, made in good faith."

There is no liability on the part of nor does any cause of action accrue against the association or its members, the director or his authorized representatives or any other person or organization for any acts or omissions made in good faith by them during any proceeding or concerning any matters within the scope of this chapter.

The more general statutes, A.R.S. §§ 12-820.01 and -820.02, provide immunity to public entities and public employees under certain circumstances, and those would apply to the JUA, its employees and board members when appropriate. *See* A.R.S. § 12-820 (1),(5),(6),(7) (defining public entity and public employee).

3. Scope of Assessments that the Director May Impose.

Your third question is whether the Director may impose an assessment on only those insurers writing liability insurance or whether the Director may impose assessments on all insurers writing casualty insurance.

The JUA is funded by an initial assessment of up to five hundred dollars that the Director may impose on every participating insurer of the JUA. A.R.S. § 20-2213. The Director is also authorized to annually assess each insurer that is authorized to transact liability insurance in Arizona up to two hundred dollars for the costs of administering the plan. A.R.S. § 20-2201(D).

Only insurers that issue liability insurance are subject to the JUA assessments. A.R.S. §§ 20-2201(D) (authorizing director to assess "each insurer authorized to transact liability insurance in this State"); -2213 (one percent cap based on "net direct premium attributable to the liability insurance the member writes"). Liability insurance is

insurance against legal liability for the death, injury or disability of any human being, or for damage to property, and provision of medical, hospital, surgical or disability benefits to injured persons and funeral and death benefits to dependents, beneficiaries or personal representatives of persons killed, irrespective of legal liability of the insured, when issued as an incidental coverage with or supplemental to liability insurance.

A.R.S. § 20-252(1).

Casualty insurance is a broader term that includes liability insurance as well as other types of insurance. A.R.S. § 20-252. The assessments for the JUA do not extend to all types of casualty insurance; they are expressly limited to insurers that issue liability insurance. *See e.g.*, A.R.S. § 20-2201(D).

#### 4. State Liability for Obligations of the JUA.

You have also asked whether debts that the JUA may incur are obligations of the State. Any costs that the Director incurs in implementing the JUA statutes are charged to the association.

The statutes expressly limit the liability for the JUA to the JUA itself and provide that the State is not "otherwise responsible for losses sustained by the [JUA]." A.R.S. § 20-2220.

The Arizona Guaranty Fund is also not available to pay claims against the JUA. The JUA is not a member of the Guaranty Fund and the Guaranty Fund is not “responsible for losses sustained by the [JUA].” A.R.S. § 20-2220.

Under this statutory scheme, the JUA, rather than the State or some other State fund, is responsible for the JUA's financial obligations.

5. Course of Action Available or Required if the JUA Becomes Insolvent and Unable to Continue Operating.

Finally, you ask for direction on what course of action may be available if the JUA becomes insolvent and unable to continue operation. The JUA statutes provide a framework for preventing financial insolvency, but offer no specific guidance as to what course of action to take if the JUA cannot fulfill its financial obligations.

“A board or commission which is a creation of a statute created for a special purpose has only limited powers and it can exercise no powers which are not expressly or impliedly granted.” *Fund Manager, Pub. Safety Pers. Ret. Sys. v. Tucson Police Pub. Safety Pers. Ret. Sys. Bd.*, 137 Ariz. 536, 540, 672 P.2d 201, 205 (App. 1983). The JUA has the general authority to review, consider and act on any matters necessary and proper for the administration of the association. A.R.S. § 20-2203(9).

The JUA statutes also contain numerous provisions “to assure the continued sound financial operation of the association.” A.R.S. § 20-2212(B). They authorize the JUA to “[d]evelop, promulgate and effectuate loss prevention programs.” A.R.S. § 20-2203(10). They also require the JUA to submit to the Director a plan of operation, which includes a “provision for a system or program of reasonable loss control efforts.” A.R.S. § 20-2205. The statutes also provide a mechanism in the event the JUA anticipates that a deficiency will occur. In that situation, the JUA

is required to certify to the Director that “within the next one hundred and eighty days thereafter the association will be unable to pay its outstanding lawful obligations as they mature in the regular course of business.” A.R.S. § 20-2212(A). At the time of certification, the JUA is required to submit a schedule of policyholder surcharges and a plan of member assessments, “which in combination, are sufficient to assure the continued sound financial operation of the association.” A.R.S. § 20-2212(B). The statute, however, caps the amount of the policyholder surcharges at ten percent of the total premium paid and the member assessments at one percent of the net direct premium paid respectively. *Id.*

Finally, the statutes provide that “[d]issolution of the association, including its assets and liabilities, shall be accomplished under the supervision of the director.” A.R.S. § 20-2221. The statutes do not, however, provide guidance on how the JUA’s liabilities should be addressed if the funding surcharge cap has been reached and the JUA’s liabilities exceed its assets.

### **Conclusion**

The JUA is a public entity within the Department of Insurance and subject to the supervision of the Department's Director. It is subject to the Open Meeting Law, Public Records Law, and other laws governing state entities. The JUA is funded by assessments against liability insurers, and the State is not liable for the JUA’s losses.

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