

2000 AG Opinions

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To: Honorable Betsey Bayless

December 22, 2000
Re: Ban on Lobbyists Paying for
Entertainment for State Officers or
Employees

Arizona Secretary of State

I00-031
(R00-047)

Question Presented

You have asked whether a State officer or employee may attend a sporting or cultural event at the invitation of a lobbyist if the State officer or employee reimburses the lobbyist for the cost of such entertainment.

Summary Answers

Section 41-1232.08, Arizona Revised Statutes ("A.R.S.") (effective January 1, 2001), prohibits a lobbyist from making an "expenditure for entertainment for a State officer or State employee" and prohibits State officers and employees from accepting such expenditures. This law prohibits a lobbyist from purchasing entertainment, defined as the expenditure paid to attend or participate in a sporting or cultural event or activity, for the benefit of a particular State officer or employee, even if the State officer subsequently reimburses the lobbyist for the expenditure. If, however, a lobbyist paid for entertainment that, at the time of the payment, was not for a particular State officer or employee, a State officer or employee may purchase the entertainment from the lobbyist, at full cost, before receiving the ticket.

Background

The Legislature has enacted several statutes regulating lobbyists.⁽¹⁾ A.R.S. §§ 41-1231 through -1239. These statutes require lobbyists to register and file expenditure reports with the Secretary of State and prohibit a private sector lobbyist from giving any State officer or employee "gifts" with a value of more than ten dollars during any calendar year. A.R.S. § 41-1232.02. This gift limitation has included a number of exemptions, including, for example, food or beverages, and travel and lodging. A.R.S. § 41-1231(9). Those items exempt from the gift limitation are not subject to the ten dollar annual cap but, with some exceptions, are subject to disclosure requirements. *Id.* For public sector lobbyists, the gift prohibition applies only to gifts to a member of the Legislature. A.R.S. § 41-1232.03 (expenditure reporting for public bodies and public lobbyists).

In its 2000 regular session, the Legislature amended the statutes governing lobbyists. 2000 Ariz. Sess. Laws ch. 364. This legislation, which becomes effective January 1, 2001, eliminates the entertainment exemption from the gift limit and adds a new section, A.R.S. § 41-1232.08(A), which provides:

A principal, designated lobbyist, authorized lobbyist, lobbyist for compensation, public body, designated public lobbyist or authorized public lobbyist or any other person acting on that person's behalf *shall not make an expenditure or single expenditure for entertainment for a State officer or employee.* A State officer or State employee shall not accept an expenditure or single expenditure for entertainment from a principal, designated lobbyist, authorized lobbyist, lobbyist for compensation, public body, designated public lobbyist or authorized public lobbyist or any other person acting on that person's behalf.

(Emphasis added.)⁽²⁾

"Entertainment" is "the amount of any expenditure paid or incurred for admission to any sporting or cultural event or for participation in any sporting or cultural activity." A.R.S. § 41-1231(5) (as amended by 2000 Ariz. Sess. Laws ch. 364, § 1, effective January 1, 2001). The only exceptions are for entertainment in connection with a special event and entertainment that is "incidental" to a speaking engagement.⁽³⁾ A.R.S. § 41-1232.08(C). Rather than simply requiring disclosure of the expenditures, as the law had previously required, the Legislature has now prohibited, with limited exceptions, State officers and employees from accepting free tickets to sporting and cultural events, free rounds of golf, and other types of "entertainment" from lobbyists.⁽⁴⁾

Analysis

In interpreting statutes, the primary task is to determine the intent of the Legislature. See *Canon Sch. Dist. No. 50. v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994). The best indication of legislative intent is the statutory language. *Id.*

The prohibition in A.R.S. § 41-1232.08 applies to "an expenditure or single expenditure for entertainment." An "expenditure" is broadly defined to include:

a payment, distribution, loan, *advance*, deposit or gift of money or anything of value and *includes a contract, promise or agreement, whether or not legally enforceable, to make an expenditure that provides a benefit to an individual state officer or state employee* and that is incurred by or on behalf of one or more principals, public bodies, lobbyists, designated public lobbyists or authorized public lobbyists.

A.R.S. § 41-1231(6) (emphasis added).⁽⁵⁾ The ordinary meaning of "advance" is "a furnishing of something (as money or goods) before a return is received; payment beforehand; money or value supplied beforehand." *Webster's Third International Dictionary* at 30 (1983). The statutes do not expressly address reimbursement; however, the definition of "expenditure" is broad enough to preclude, under some circumstances, State officers reimbursing lobbyists for entertainment expenses.⁽⁶⁾

Under the broad definition of expenditure, a lobbyist could not, for example, purchase a ticket for a sporting event for a State officer or employee with the understanding that the State officer or employee will subsequently pay the lobbyist for the ticket. At the time of purchasing the ticket for a State officer or employee, the lobbyist has made an expenditure prohibited by A.R.S. § 41-1232.08(A) because the lobbyist has made a payment or advance that provides a benefit to an individual State officer or employee. It might be argued that the State officer or employee does not "benefit" at the time of the purchase, but rather benefits when he or she uses the ticket to attend the event. Such a narrow interpretation, however, overlooks the broad statutory definition of expenditure, which includes advances, loans and promises to make payments. It also suggests a lobbyist could, for example, purchase a season ticket for a particular legislator with the expectation of game-by-game reimbursement. That arrangement obviously benefits the State officer or employee in violation of the statute. Given the broad definition of "expenditure," the statute prohibits a lobbyist from purchasing entertainment for a particular State officer or employee unless the State officer or employer has paid the lobbyist for the full price of the ticket before the lobbyist purchases the ticket.

The analysis differs if a lobbyist did not purchase entertainment for a particular State officer or employee. If, for example, a lobbyist has season tickets that were not purchased to provide a benefit to a particular State officer or employee, then the lobbyist did not make an "expenditure" at the time of the purchase of the tickets. If subsequently the lobbyist would like to give a ticket to a State officer or employee, that State officer must pay the lobbyist full price for the ticket before receiving the ticket. Although State officers and employees cannot accept "an expenditure for entertainment" from a lobbyist, if the State officer or employee pays for the entertainment in advance, the State officer or employee has paid for the entertainment. Under this circumstance, such reimbursement does not violate the prohibition in A.R.S. § 41-1237.08.

This distinction, which is based on whether the lobbyist purchased the entertainment for a particular State officer or employee, is consistent with the statutory language and the policy that the statute reflects. The entertainment prohibition aims to eliminate certain special favors from lobbyists to State officers and employees, thereby eliminating a potential appearance of impropriety. The statutory scheme does not prohibit State officers and employees from attending entertainment events with lobbyists; it does, however, require that State officers and employees pay their own way.

Conclusion

Section 41-1237.08, A.R.S., prohibits lobbyists from purchasing entertainment for a particular State officer or

employee, even if the State officer or employee will subsequently

reimburse the lobbyist for the purchase. It does not, however, preclude a State officer or employee from paying a lobbyist the full price of entertainment if the lobbyist did not purchase the entertainment for the particular State officer or employee.

Janet Napolitano
Attorney General

1. A lobbyist is any person, other than a designated public lobbyist or authorized public lobbyist, who is employed by, retained by or representing a person other than himself, with or without compensation, for the purpose of lobbying and who is listed as a lobbyist by the principal in its registration Lobbyist includes a lobbyist for compensation, designated lobbyist and authorized lobbyist. Lobbyist includes attorneys whose practice involves bonding, underwriters of bonds and investment bankers whose business includes bonding.

A.R.S. § 41-1231(12). The terms "authorized public lobbyist" and "designated public lobbyist" are defined elsewhere in statute. *See* A.R.S. § 41-1231(2), (4). "Lobbying," with some exceptions, means attempting to influence the passage or defeat of any legislation by directly communicating with any legislator . . . or attempting to influence any formal rule making proceeding pursuant to chapter 6 of this title or rule making proceedings that are exempt from chapter 6 of this title by directly communicating with any state officer or employee.

A.R.S. § 41-1231(11).

2. The statute prohibits both making and accepting the expenditures for entertainment. Violations may result in criminal or civil penalties. A.R.S. §§ 41-1237(A) (class 1 misdemeanor); -1231.01 (civil penalties).

3. A "special event" is a "function to which all members of the [L]egislature, either house of the Legislature or any committee of the [L]egislature are invited." A.R.S. § 41-1231(9)(e). A speaking engagement is: the amount of any expense paid or incurred for entrance fees, lodging, food and beverage, entertainment, travel and other expenses for the state officer's or employee's attendance at an event, committee, meeting, conference or seminar, including meetings of state, regional or national organizations or their committees concerned with legislative or governmental activities if the state officer or employee participates in the event as a speaker or panel participant. . .

A.R.S. § 41-1231(20).

4. A State officer is a person "who is duly elected, appointed or retained through election to any state office, or a member of any state board, commission or council, and includes a member of the [L]egislature." A.R.S. § 41-1231(22). A State employee is "an employee of the [L]egislature, a university under the jurisdiction of the Arizona [B]oard of [R]egents, the judicial department or a State office, agency, board, commission or council." A.R.S. § 41-1231(21).

5. A "single expenditure" is "an expenditure that provides a benefit of more than twenty dollars to an individual state officer or state employee. . . ." A.R.S. § 41-1231(19). The lobbyist expenditure reports itemize single expenditures identifying the State officer or employee benefitting from each single expenditure. A.R.S. §§ 41-1232.02(B), -1232.03(B). Other expenditures are reported in the aggregate. A.R.S. §§ 41-1232.02(C), -1232.03(C).

6. The Legislature considered expressly prohibiting any reimbursement from a State officer or employee to a lobbyist, but the language that would have done so was eliminated in conference committee. *See* HB 2554, 44th Leg. 2nd Reg. Sess. (Ariz. 2000) (House Engrossed version, Senate engrossed version). The language eliminated in Conference Committee provided that a gift included:

Reimbursement for the cost of admission to any entertainment or sporting event for an employee or member of the Legislature, public official or state employee or the spouse or child of a member of the Legislature, public official or state employee paid to a principal, lobbyist, public body, designated public lobbyist or authorized public lobbyist or any other person acting on that person's behalf.

Conference Committee Amendment to HB2554, 44th Leg. 2nd Reg. Sess (Ariz. 2000).

The legislative record does not indicate why the Legislature failed to include the proposed language that addressed reimbursement. The failure to include that language could indicate the Legislature's intent to allow reimbursement or it could indicate a determination that the definition of "expenditure," which includes loans, advances and other payments, already adequately covered the issue. *Cf.* Norman J. Singer, Sutherland on Statutory Construction, § 48.18 (6th ed. 2000) (legislative action on proposed amendments).

**To: Colonel Dennis A Garrett
Director, Arizona Department of
Public Safety**

**December 18, 2000
Re: Sex Offender Registration Requirements
100-030, (R00-028)**

Questions Presented

You have asked:

1. What are the sex offender registration requirements for individuals convicted and required to register under prior Arizona statutes who, if convicted today, would not meet the sex offender registration criteria? Your opinion request specifically mentioned legislative changes in 1995 that eliminated the registration requirement for offenders with a single conviction for indecent exposure or public sexual indecency.
2. What are the obligations of the Department of Public Safety ("DPS") regarding court orders that waive the statutorily required sex offender registration or notification requirements?
3. What are DPS's obligations regarding court orders that set aside sex offense convictions contrary to A.R.S. § 13-907?

Summary Answer

1. Convicted sex offenders who were required to register under the law in effect at the time of conviction are not required to register if they do not meet the current statutory criteria in A.R.S. § 13-3821. Therefore, for example, a person with a single conviction for indecent exposure or public sexual indecency before 1995 is no longer statutorily required to register as a sex offender.
2. DPS must comply with any court order, including an order that appears to be contrary to law, such as an order waiving statutorily required sex offender registration or notification requirements, until that order is modified or vacated.
3. In performing its recordkeeping responsibilities, DPS must recognize a court order entered pursuant to A.R.S. § 13-907 that improperly sets aside a sex offense conviction until such an order is modified or vacated. However, an order under A.R.S. § 13-907, whether proper or improper, does not relieve an offender of the statutory obligation to register under A.R.S. § 13-3821.

Background and Analysis

1. Sex Offender Registration

The Legislature enacted sex offender registration requirements in 1983.⁽¹⁾ 1983 Ariz. Sess. Laws Ch. 202, § 13 (codified at A.R.S. § 13-3821). Under A.R.S. §§ 13-3821 and -3822, specified offenders must register with the sheriff in the county in which they reside and must also notify the county sheriff of any change of address. The sheriff must provide the registration information and any change of address to DPS. Failure to comply with the registration requirements is a Class 4 felony. A.R.S. § 13-3824. There are other statutory provisions, such as providing that a registrant's drivers license is valid for only one year, that facilitate the identification and location of convicted sex offenders who are required to register. A.R.S. § 13-3821(H). In addition, in 1995, the Legislature established a sex offender community notification program that applies to offenders

who are required to register, and DPS oversees this program. A.R.S. §§ 13-3825 (notification program); 41-1719 (DPS coordinator of notification program).

Initially, the Legislature required individuals convicted of any violation of Chapter 14 (sexual offenses) or Chapter 35.1 (sexual exploitation of children) of Title 13 to register as sex offenders. See 1983 Ariz. Sess. Laws ch. 202, § 13. In 1995, the Legislature eliminated the requirement that all persons convicted under Chapter 14 or Chapter 35.1 register and, instead, specified the particular offenses that require registration. 1995 Ariz. Sess. Laws ch. 257. Although no longer requiring registration for all convictions under chapters 14 or 35.1, the Legislature gave the sentencing judge discretion to require registration for any violation of those chapters. A.R.S.

§ 13-3821(C).⁽²⁾ In addition, although a first conviction for indecent exposure or public sexual indecency no longer required registration, a second or subsequent conviction for these crimes involving a minor under 15 would require registration, as would any third conviction for those offenses, regardless of the age of the victim. A.R.S. § 13-3821(A)(13) - (16).

The sex offender registration law is regulatory and its "overriding purpose . . . is facilitating the location of child sex offenders by law enforcement personnel, a purpose unrelated to punishing . . . for past offenses." *State v. Noble*, 171 Ariz. 171, 178, 829 P.2d 1217, 1224 (1992). Consistent with this purpose, the Legislature's 1995 amendments focused the registration requirement on certain serious offenders or repeat offenders, with a particular emphasis on offenses involving children. The 1995 legislation did not evidence any legislative intent to require continued registration by persons who would not be required to register under the amended law. Generally, the law at the time the offense is committed governs criminal sentencing, and a change in the law does not affect the sentence of a person convicted and sentenced under the earlier law. A.R.S. § 1-246; *State v. Stine*, 184 Ariz. 1, 3, 906 P.2d 58, 60 (App. 1995). These principles, however, do not apply to sex offender registration because registration is not part of a person's punishment. Registration is regulatory, rather than punitive. *Noble*, 171 Ariz. at 178, 829 P.2d at 1224 (holding that requiring a person register for an offense committed before the effective date of the registration laws does not violate the ex post facto clause of the State and federal constitutions). For offenses subject to mandatory registration, the duty to register as a sex offender arises from statute. See *State v. Garcia*, 156 Ariz. 381, 382, 752 P.2d 34, 35 (App. 1987). Thus, the people currently obligated to register are those convicted of an offense currently listed in statute and any others a judge, in his or her discretion, has ordered to register. Accordingly, those offenders who were previously required to register, but are not required to register under current law, are no longer statutorily required to register.⁽³⁾

If a court required registration as a term of probation, the analysis changes. Although, as established in *State v. Garcia*, the registration obligation arises from statute, if the court included it as a term of probation, that court order creates an obligation that must be honored. See A.R.S. § 13-901 (probation). Thus, if a court included registration as a term of probation for a person convicted of an offense before 1995 that is no longer subject to the registration requirement, that person was not immediately relieved of the obligation to register when the 1995 legislation became effective. Instead, that person was required to comply with the registration requirement as long as it remained a term of his or her probation.⁽⁴⁾

2. Court Orders Waiving Sex Offender Registration.

You have also asked about DPS's "obligation to recognize" court orders that purport to waive sex offender registration requirements. This question arises because A.R.S. § 13-3821 does not authorize courts to waive the statutory sex offender registration requirement. DPS's relevant statutory responsibilities include maintaining a database with information about sex offenders required to register and notifying the appropriate county if, according to the information available, a person has failed to register as required by A.R.S. § 13-3821. A.R.S. § 13-3825(A), (B). DPS also maintains an internet website (www.azsexoffender.com) that provides information to the public concerning certain sex offenders. A.R.S. § 13-3827.

The Arizona Supreme Court has stated that "the concept that any person, lay or professional, may determine whether a court order is 'void on its face' and thus susceptible to being ignored as unconstitutional can find no justification in the law." *State v. McLaughlin*, 125 Ariz. 505, 507, 611 P.2d 92, 94 (1980) (quoting *State v. Chavez*, 123 Ariz. 538, 543, 601 P.2d 301, 306 (App. 1979)).⁽⁵⁾ Similarly here, although a court may have erred by waiving statutorily required sex offender registration, DPS must respect such an order until the order is modified or vacated through appropriate judicial proceedings. *Cf. Broomfield v. Maricopa County*, 112 Ariz. 565, 568, 544 P.2d 1080, 1083 (1975) ("It is a settled principle of law that an order issued by a court with jurisdiction over the subject matter must be obeyed by the parties until that order is reversed by orderly and proper proceedings.").

3. Court Orders Under A.R.S. § 13-907.

You also asked about DPS's obligations regarding an order under A.R.S. § 13-907 that improperly sets aside a sex offense conviction.⁽⁶⁾ This question has implications for DPS's general responsibilities to maintain criminal justice records and for the sex offender registration program.

For the reasons discussed previously, when performing its record keeping responsibilities, DPS must respect any court order entered under A.R.S. § 13-907, even if such an order appears to improperly set aside a sex offense conviction. Unless such an order is modified or vacated through appropriate judicial proceedings, DPS records should reflect entry of any such order under A.R.S. § 13-907.⁽⁷⁾

An order under A.R.S. § 13-907, however, has no impact on an offender's obligation to register under A.R.S. § 13-3821. With limited exceptions, offenders required to register are ineligible for orders to set aside convictions under A.R.S. § 13-907. Section 13-907, A.R.S., does not apply to offenses: (1) involving the infliction of serious injury; (2) involving the use or exhibition of a deadly weapon or dangerous instrument; (3) in violation of Chapter 14 of the Title; (13) in which the victim is a minor under fifteen years of age; or (5) in violation of certain local or State traffic laws. Although most offenses requiring registration are in Chapter 14, some are not, such as taking a child for the purpose of prostitution (A.R.S. § 13-3212); sexual exploitation of a minor (A.R.S. § 13-3553); commercial sexual exploitation of a minor (A.R.S. § 13-3552); unlawful imprisonment involving a victim under eighteen (A.R.S. § 13-1303); and kidnapping involving a victim under eighteen (A.R.S. § 13-1304). If the victim is under fifteen years of age, those offenders are ineligible under A.R.S. § 13-907, but those offenders whose victims were older children may seek orders under A.R.S. § 13-907. Thus, a proper order under A.R.S. § 13-907 could be issued for certain offenders subject to the registration requirements.

An order under A.R.S. § 13-907 does not affect a person's obligation to register under A.R.S. § 13-3821 for three reasons. First, because registration is merely regulatory under *Noble*, it

is not a "penalt[y] or "disabilit[y]" under A.R.S. § 13-907. In the past, this Office has emphasized that setting aside a judgment under A.R.S. § 13-907 "does not bar consideration of the fact of conviction in matters pertaining to the protection of the public." Ariz. Att'y Gen. Op. 186-003. As the Supreme Court explained in *Noble*, registration is not to punish the offender but to facilitate the work of law enforcement. Therefore, it is not a penalty or disability within A.R.S. § 13-907. *Cf. Noble*, 171 Ariz. at 178, 829 P.2d at 1224.

Second, under A.R.S. § 13-3821, a person "who has been convicted" of one of the specified offenses must register, and an order under A.R.S. § 13-907 does not erase "the fact of conviction." *See Russell v. Royal Maccabees Life Ins. Co.*, 193 Ariz. 464, 467-468, 974 P.2d 443, 446-447 (App. 1998) (duty to disclose conviction on insurance application). A conviction that has been set aside may still be used as a prior conviction in any subsequent prosecution and may be used by the Department of Transportation for license suspensions and revocations. A.R.S. § 13-907(A). In addition, a person still has an obligation to disclose the conviction, despite an order under A.R.S. § 13-907. *Russell*, 193 Ariz. at 470, 974 P.2d at 449. The conviction may also be used for licensing decisions, Ariz. Att'y Gen. Op. 183-042, and it is not removed from DPS records, Ariz. Att'y Gen. Op. 189-082. Because an order under § 13-907 does not erase "the fact" of conviction, a person receiving such an order remains a person "who has been convicted" for the purposes of A.R.S. § 13-3821.⁽⁸⁾

Third, allowing an order under §13-907 to eliminate an obligation to register is inconsistent with A.R.S. § 13-3821. The current sex offender registration statute establishes, with limited

exceptions, a life-long procedure for those convicted of a specified offense.⁽⁹⁾ As described earlier, the Legislature may eliminate the registration requirement or make other changes that limit a person's obligation to register; however, the statutes governing sex offender registration do not provide a mechanism for a court to release from the registration requirement an offender who is statutorily required to register.

Conclusion

Because the Legislature eliminated registration requirements for particular offenses, persons previously convicted of those offenses are no longer statutorily required to register. They must, however, continue to register if a court has required registration as a term of probation.

An order purporting to waive a statutory obligation to register as a sex offender, although contrary to A.R.S. § 13-3821, must be obeyed until it is vacated or modified.

An order under A.R.S. § 13-907 setting aside a conviction, whether or not the order is proper, does not affect a person's obligation to register as a sex offender as required by A.R.S. § 13-3821.

In addition, if an order is improperly entered under A.R.S. § 13-907 setting aside a sex offense conviction, DPS must still reflect the entry of such an order in its records for the particular offender, until such order is vacated or modified.

Janet Napolitano
Attorney General

1. The Legislature repealed a previous sex offender registration law in 1978. 1978 Ariz. Sess Laws ch. 201, § 242.

2. Offenses no longer subject to mandatory registration because of the 1995 amendments include, for example, adultery (§ 13-1408), cohabitation (§ 13-1409); sodomy (§ 13-1411), and lewd and lascivious acts (§ 13-1412). In 1998, the Legislature added to the crimes that require registration (i) unlawful imprisonment and (ii) kidnapping when the victim is under 18 and the crime is not committed by the child's parent. A.R.S. § 13-3821(A)(1), (2).

3. Those offenders previously required to register but who need not register under current law are also not required to comply with other statutory requirements that apply to people required to register, such as notifying the county sheriff of address changes, A.R.S. § 13-3822, and renewing driver's licenses annually, A.R.S. § 13-3821(H).

4. When sentencing a defendant who is statutorily required to register, a judge might also order the defendant to register. See *Noble* at 172-73, 829 P.2d at 1218-19. There may be a question whether such an order merely gives notice of the statutory obligation to register or whether it creates an obligation to register that exists independent of the statute. This Opinion does not address this question but instead focuses on the statutory duty.

5. Because of significant First Amendment considerations, the Arizona Supreme Court recognized an exception to this principle in a case in which a newspaper printed a factual account of a judicial proceeding in violation of a court order. *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966). Citing the constitutional protections ensuring freedom of the press and open courts, the Supreme Court refused to hold the newspapers in contempt for violating the invalid court order. *Id.* The Court has not extended this opinion to other situations. See *State v. McLaughlin*, at 507, 611 P.2d at 94 (refusing to apply *Phoenix Newspapers* rationale in kidnapping case in which defendant challenged validity of child's custody order).

6. Section 13-907 is Arizona's "expungement" statute. Under A.R.S. § 13-907(A), with some exceptions, "every person convicted of a criminal offense may, upon fulfillment of the conditions of probation or sentence and discharge by the court, apply to the judge, justice of the peace or magistrate who pronounced sentence or imposed probation . . . to have the judgment of guilt set aside." An order under A.R.S. § 13-907 releases the offender "from all penalties and disabilities resulting from the conviction."

7. Before an order to set aside a conviction under A.R.S. § 13-907 is entered, Arizona Rule of Criminal Procedure 29.2(C) requires notice to the prosecutor and, if it is a felony, to the Attorney General. The rules also provide time for the prosecutor to file an objection. Ariz. R. Crim. Proc. 29.4. A timely objection should be filed where an ineligible offender seeks to set aside a conviction under A.R.S. § 13-907. If such an order has been issued, the appropriate prosecutorial agency should assess what opportunities exist to have the order vacated.

8. The same is not true of a conviction that is reversed on appeal. See *G.R. Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 115 (1983) (in contrast to a conviction vacated or reversed on appeal, "expunction does not alter the legality of the previous conviction"); *State v. Kiser*, 111 Ariz. 316, 317, 529 P.2d 215, 216 (1974) (if prior felony conviction reversed on appeal there is no longer a judgment of conviction).

9. A person convicted for unlawful imprisonment of a minor or kidnapping of a minor must register for ten years after "the person is released from prison, jail, probation, community supervision or parole and the person has fulfilled all restitution obligations." A.R.S. § 13-3821(K). If that person, however, has any other convictions for an offense requiring registration, the person "is required to register for life." *Id.* In addition, a judge may order a juvenile who is adjudicated delinquent for an offense specified in A.R.S. § 13-3821 to register, but that requirement only extends until the juvenile reaches 25 years of age. A.R.S. § 13-3821(D).

Questions Presented

You have asked the following questions regarding energy conservation measures and statutory limits on school district budgets:

1. May school districts qualify for the energy reduction adjustment in Arizona Revised Statutes ("A.R.S.") § 15-910.02 by reducing baseline utility budgets, reducing repair costs, and adopting new maintenance and operating strategies?
2. Does A.R.S. § 15-910.02 allow school districts to account for excess utility savings only in the first fiscal year after implementing the energy cost reduction program or can these savings be considered in future fiscal years as well?
3. Can school districts use the money saved as a result of the operational and energy savings (other than excess utility savings) for capital and soft capital purchases?
4. If a district saves capital money because, for example, energy savings measures reduce the need to replace capital equipment, can the district use the capital savings for other capital and soft capital items?
5. Can a school district reallocate savings generated as a result of energy and operational improvements to any part of a school district's Maintenance and Operation ("M & O") budget?

Summary Answer

1. Only those measures listed in A.R.S. § 15-910.02(A) qualify for the energy reduction adjustment. Those measures are: (1) employee training to reduce utility costs and (2) "the use of energy services consultants or other . . . energy specialists who advise the district and its employees on energy savings, conservation measures, or efforts to improve energy efficiency." A.R.S. § 15-910.02.
2. Under A.R.S. § 15-910.02, school districts may take the energy reduction adjustment in any future fiscal year in which the district qualifies.
3. If a school district realizes a savings in its M & O budget and those savings are outside the excess utilities portion of a school's budget, then the school district may budget those funds into the unrestricted capital outlay section of future budgets.
4. If a school district realizes a savings in its unrestricted capital budget (because of, for example, reduced equipment costs), then the district may budget those savings for other capital and soft capital items.
5. A school district that realizes a savings in the utilities subsection of its M & O budget because of energy and operational improvements may apply those funds to another M & O expenditure, provided that the school district has not otherwise exceeded any other subsection of its M & O budget. The same is true for the energy reduction adjustment under A.R.S. § 15-910.02. If the savings are in excess utilities, and the district does not qualify for the energy reduction adjustment, then the district may not reallocate those savings for other M & O expenditures.

Background

The Legislature has established a complex school finance system. See A.R.S. Title 15, Chapter 9, Articles 3 and 4. As part of this system, the Legislature has limited the amounts school districts may allocate to certain portions of their budgets, including M & O. See A.R.S. § 15-947. The statutory limit on a school district's M & O budget is referred to as the general budget limit. The general budget limit for a school district is, in part, the sum of two budget formulas, known as the revenue control limit ("RCL") and the capital outlay revenue limit ("CORL"). A.R.S. § 15-947(C). The main factors in these formulas are the number of students in the school district and statutorily-established dollar amounts per student. See A.R.S. §§ 15-943 (base support level), -944 (base revenue control limit), -947(A) (revenue control limit), -961 (capital outlay revenue limit). A school district receives monies for its M & O budget from various sources, including State appropriations and county and local tax levies.

A school district's direct costs for heating, cooling, water, and electricity are utility costs that are part of a school district's general M & O budget. The M & O budget format includes two categories of utility costs: utility expenditures and "excess utility costs." A.R.S. § 15-910(A). Districts apply a statutory formula to determine an amount for utility expenditures; any additional expenditures for utilities are budgeted as excess utility costs. *Id.* Unlike the amount budgeted in the utility expenditure line, amounts budgeted as excess utility costs are outside the district's RCL. A.R.S. § 15-910. The exemption from the RCL permits districts to increase their general budget limit to pay for "excess utility costs." If a school district's expenditures for utilities in a fiscal year exceed the amount budgeted for utilities, the district can use the monies it budgeted for excess utility costs to cover the shortfall. See A.R.S. § 15-910(D) ("governing board may expend from the excess utility cost category only after it has expended for utility purposes the full amount budgeted in the utility expenditure line of the budget"). The district may only use property tax revenues within the school district to pay for these excess utility costs. The Legislature has also established incentives for school districts to reduce their utility costs. See A.R.S. § 15-910.02. If, through employee training and contracts with energy specialists, a district reduces its excess utility costs, the district may use one half of the savings to reduce property taxes in the school district and the other half to increase the district's general budget limit. A.R.S. § 15-910.02(A), (C), (E). This increased allowance in the M & O budget is an "energy reduction adjustment." A.R.S. § 15-910.02(C).

Analysis

A. Only Employee Training Regarding Reducing Utility Costs or the Use of Energy Specialists Under Contract with the District Qualify for the Energy Reduction Adjustment.

A school district that adopts measures pursuant to A.R.S. § 15-910.02(A) and successfully reduces its excess utility costs, as described in statute, qualifies for the energy reduction adjustment. Section 15-910.02(A) applies to employee training regarding reducing utility costs and the "use of energy services consultants or other contractual arrangements with energy specialists who advise the district and its employees on energy savings, conservation measures, or efforts to improve energy efficiency." The statute also expressly excludes capital expenditures on energy saving equipment. *Id.*

Only those energy savings measures listed in A.R.S. § 15-910.02(A) qualify for the energy reduction adjustment. See *Pima County v. Heinfeld*, 134 Ariz. 133, 134, 654 P.2d 281, 282 (1982) (the expression of one or more items of a class in a statute indicates the Legislature's intent to exclude all items of the same class that are not expressed); *Roller Village, Inc. v. Superior Court*, 154 Ariz. 195, 199, 741 P.2d 328, 332 (App. 1987) (a statute setting forth the subject or things on which it is to operate will be construed as excluding from its effect

those not expressly mentioned). Thus, the qualified measures must be for employee training or certain energy specialists under contract with the district as described in A.R.S. § 15-910.02(A).

The statute does not spell out what types of strategies a district might pursue in employee training or the use of energy specialists, except to exclude capital expenditures. In your opinion request you specifically asked whether reducing repair costs and baseline utility budgets and establishing new maintenance and operating strategies fall within A.R.S. § 15-910.02(A) and qualify for the energy adjustment reduction. Those specific strategies could, in theory, be part of employee training or addressed by energy specialists described by A.R.S. § 15-910.02(A); however, determining whether a specific program is within A.R.S. § 15-910.02(A) requires an analysis of the details of the program based on the statutory requirements.⁽¹⁾

B. School Districts May Use the Energy Reduction Adjustment Beyond the First Fiscal Year After Implementing the Energy Savings Measures.

Under A.R.S. § 15-910.02(C), a school district that adopts qualified measures to reduce utility costs "may include in its budget an energy reduction adjustment based on a reduction of excess utility costs in the fiscal *years* following the fiscal year of implementation." (Emphasis added.) Because A.R.S. § 15-910.02(C) uses the plural "years," school districts may take the energy reduction in any future fiscal year in which the school district qualifies for the adjustment and not just the first year following implementation of the energy saving measures. *Odle v. Shamrock Dairy of Phoenix*, 7 Ariz. App. 515, 518, 441 P.2d 1550, 1553 (1968) (in construing a statute, the Legislature is presumed to express its meaning as clearly as possible and, therefore, words are to be accorded their obvious and natural meaning).

C. If School District Realizes Operational Savings Outside of Excess Utilities, the School District May Budget Those Savings for Capital Purchases.

You asked about a district's ability to budget operational and energy savings (other than utility savings) for capital expenditures.⁽²⁾ These savings would fall within the M & O section of the district's budget. A school district's governing board may budget amounts within the general budget limit into either the M & O or capital outlay section of the district's budget.⁽³⁾ A.R.S. § 15-905(F)(1). Therefore, if a school district realizes a savings in its M & O budget outside of excess utilities as a result of measures taken to reduce utility costs, that school district's governing board may reallocate those savings from the M&O budget into the capital outlay section of future budgets so that those funds can be used for capital purchases, including soft capital purchases.⁽⁴⁾

D. A District May Use Savings in Its Unrestricted Capital Budget for Other Capital Purchases.

Your opinion request also notes that a district's energy savings measures could reduce some capital costs, such as the costs of replacing certain equipment. A school district may use its unrestricted capital funds for any capital purpose set forth in A.R.S. § 15-903(C).⁽⁵⁾ Therefore, if a school district realizes a savings in its unrestricted capital budget as a result of energy savings measures, that school district's governing board may reallocate those savings so that they may be used for other capital and soft capital items.

E. A School District May Reallocate Savings in the Utilities Section of Its Budget and

the Energy Adjustment Under A.R.S. § 15-910.02 to Any Part of the School District's M & O Budget.

A district's ability to reallocate savings generated as a result of energy savings measures to other parts of the school's M & O budget depends on whether the savings are in utilities or excess utilities and whether the district qualifies for the energy adjustment under A.R.S. § 15-910.02.

Generally, school districts may use their M & O monies for any properly approved M & O expenditure so long as the district has not exceeded any other subsection of its overall M & O budget limit. A.R.S. § 15-905(G).⁽⁶⁾ Therefore, subject to governing board approval and applicable budget limits, districts may reallocate M & O savings in utilities (as opposed to excess utilities) for other M & O expenditures.

If the savings are in excess utilities and the district qualifies for the energy reduction adjustment under A.R.S. § 15-910.02, the district may spend only a half of the savings. The district must use the other half of the savings to reduce district property taxes. A.R.S. § 15-910.02. The portion the district may spend is subject to the same restrictions as set forth in A.R.S. § 15-905(G) for other M & O expenditures, which means those savings may be reallocated subject to governing board approval and applicable budget limits.

If the savings are in excess utilities and the district does not qualify for the energy reduction adjustment under A.R.S. § 15-910.02, the district cannot reallocate those savings to other M & O expenditures. Because excess utilities are outside the district's RCL, savings in excess utilities that do not qualify under A.R.S. § 15-910.02 reduce local property taxes but do not create savings that a district may reallocate for other uses.

Conclusion

Under A.R.S. § 15-910.02(A), reductions in utility costs resulting from employee training and the use of certain energy consultants qualify for the energy reduction adjustment and corresponding tax decrease. School districts may take the energy reduction adjustment provided by A.R.S. § 15-910 in all future fiscal years in which the district qualifies.

If a school district realizes a savings in its M & O budget (other than excess utility savings), then it may use those funds for capital purchases. In addition, if a school district realizes a savings in its unrestricted capital budget, then it may use those funds for other capital purchases.

School districts may use their energy adjustment monies under A.R.S. § 15-910.02 for any M & O expenditure, provided that such expenditure is approved by the school district's governing board and the district has not exceeded its overall budget limit. A.R.S. § 15-905(G). It may also use savings in the utilities subsection in this manner. If the district's savings are in excess utilities, but the district does not qualify for the energy adjustment under A.R.S. § 15-910.02, then the district may not reallocate those savings for other M & O expenditures.

Janet Napolitano
Attorney General

1. Section 15-910.02(A), A.R.S., specifically prohibits school districts from including a capital expenditure as an energy savings measure. Repair costs may be a capital expenditure depending on the nature of the repair. See

A.R.S. § 15-2031(B), (C) (building renewal funds may be used major renovations and repairs, but not routine maintenance).

2. Savings within excess utilities through measures under A.R.S. § 15-910.02 are subject to the requirements in that statute.

3. The capital outlay section of the budget includes separate subsections for unrestricted capital and soft capital. A.R.S. § 15-903(C).

4. "Soft capital purchases" include the items described in A.R.S. § 15-962 ("short term capital items that are required to meet academic standards"). Although the district may spend capital savings on soft capital purchases, such moneys are obviously not part of the soft capital allocation fund described in A.R.S. § 15-962.

5. In contrast, other capital funds may only be used for the purposes set forth in statute. See A.R.S. §§ 15-962 (districts must use monies received for soft capital under this section for "short-term capital items that are required to meet academic adequacy standards such as technology, textbooks, library resources, instructional aids, pupil transportation vehicles, furniture and equipment"); -2021(F) (Deficiencies Correction Fund monies may only be used to correct stated deficiencies); -2031 (Building Renewal Fund monies may only be used for major renovations and repairs, upgrading systems and areas that will maintain the useful life of a building, for infrastructure costs or relocation and placement of portable or modular buildings).

6. This statutory provision, however, must be read in conjunction with other statutes that require districts to use certain monies for designated purposes.

To: The Honorable Carol Springer
State Treasurer

December 8, 2000
Re:Disposition of Income from
State Trust Lands

Issue Presented

Since statehood, Arizona statutes have allowed rental proceeds and interest earned on the sale of State trust lands to be spent for the benefit of trust beneficiaries. You have asked if the Arizona Constitution and the Enabling Act instead require that all such monies generated from the rental, sale, or use of State trust lands be deposited in a permanent fund or investment.

Summary Answer

The Arizona Constitution and Enabling Act do not require all monies generated from the rental, sale, or use of State trust lands to be deposited in a permanent fund. The statutes permitting rental proceeds and the interest earned on the sale of State trust lands to be spent for the benefit of the trust beneficiaries comply with the Constitution and Enabling Act.

Background

The Arizona-New Mexico Enabling Act, which is the federal law authorizing the creation of the States of Arizona and New Mexico, granted to the State of Arizona more than ten million acres of land in trust for designated beneficiaries. Act of June 20, 1910, ch. 310, 36 Stat. 557, 568-579 ("Enabling Act"), §§ 24, 25. The Enabling Act granted most of the land, originally more than eight million acres, in trust for the benefit of the common schools. *Id.* § 24. The remainder was granted in trust for the benefit of universities and other public institutions. In addition to designating certain lands as trust lands and identifying the beneficiaries, the Enabling Act established requirements for the lease and sale of trust land to ensure that the land is managed in a manner that benefits the trust beneficiaries. *See Kadish v. State Land Dep't*, 155 Ariz. 484, 487, 747 P.2d 1183, 1186 (1987) (restrictions ensured States would not dissipate trust assets).

The Arizona Constitution expressly accepted the requirements of the Enabling Act. Ariz. Const. art. XX, § 12 ("The State of Arizona and its people hereby consent to . . . the provisions of the Enabling Act . . . concerning the lands thereby granted or confirmed to the State). Arizona's Constitution also incorporated some parts of the Enabling Act. For example, much of Article X, which governs State and school lands, incorporates parts of the Enabling Act. Article XI, concerning education, also includes provisions concerning trust lands.

In 1915, the Legislature enacted the State Lands Code, which created the State Land Department ("Land Department") and established a system for managing State trust lands and using funds generated by the lands for the benefit of the trust beneficiaries. 1915 Ariz. Sess. Laws, 2nd S.S., Ch. 5. These statutes established separate funds for each of the beneficiaries. Essentially the same structure remains in current statutes. *See* A.R.S. §§ 37-521 (common schools); -522 (universities); -523 (normal schools); -524 (agricultural and mechanical schools and the school of mines); -525 (other State institutions). For each of the funds, the statutes direct the deposit in the permanent fund of the "proceeds of the lands," as well as the proceeds of the sale of timber, mineral, gravel, and other natural products of the land. (The permanent common school fund also includes certain monies resulting from the sale by the federal government of public lands in the State.) *See* Enabling Act § 27; A.R.S. § 37-521(A)(6). The statutes direct that rental proceeds, interest, and distributions from the

permanent fund may be used for the trust beneficiaries.

From 1978 through the end of fiscal year 1999, the permanent fund grew from \$100 million to \$932.5 million. ⁽¹⁾ 1998-99 Ariz. State Land Dept. Ann. REP. at 10 ("Annual Report"). The expendable fund revenues in fiscal year 1999 totaled \$85.6 million, of which \$65.8 million were investment earnings from the permanent fund. *Id.* at 12. The Legislature appropriates these expendable fund monies to schools and other trust beneficiaries to pay for various costs necessary for their operations. *Id.* at 9.

Analysis

A. The Constitution and the Enabling Act Do Not Require That All Moneys Generated by State Trust Lands Be Deposited in a Permanent Fund.

The Enabling Act, as originally enacted, did not require that all revenues generated by State trust land be deposited in the permanent fund. Paragraph 7 of section 28 of the Enabling Act provided in part:

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the State treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The State treasurer shall keep all such moneys invested in safe, interest-bearing securities

Enabling Act, § 28 (amended 1957).

Another section of the Enabling Act provided that the lands are:

held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any said lands shall be subject to the same trusts as the lands producing the same.

Enabling Act, § 28, paragraph 1.

At Arizona's constitutional convention, delegates debated whether the Enabling Act required rental proceeds to be deposited in a permanent fund. Records of the Constitutional Convention (ed. John S. Goff) at 846-47, 945-47. The drafters of the Constitution concluded that rental proceeds could be spent for the benefit of the trust beneficiaries and incorporated this concept in two separate sections of Arizona's Constitution. Article XI, Section 8, which as originally approved, read in part:

The income derived from the investment of the permanent State school fund, *and from the rental derived from school lands*, with such other funds as may be provided by law shall be apportioned annually to the various counties of the State in proportion to the number of pupils of school age residing therein.

(amended 1964) (Emphasis added.) ⁽²⁾ Similarly, section 10 of that article provides:

The revenue for the maintenance of the respective State educational institutions shall be derived from the

investment of the proceeds of the sale, *and from the rental of such lands* as have been set aside by the Enabling Act approved June 20, 1910, or other legislative enactment of the United States, for the use and benefit of the respective State educational institutions. . . .

(Emphasis added.)

The drafters of Arizona's Constitution also incorporated the language from paragraphs 1 and 7 of section 28 of the Enabling Act as Article X, sections 1 and 7 respectively. Because the Constitution expressly permits the expenditure of rental proceeds in Article XI, it necessarily follows that Article X, sections 1 and 7 did not require that *all* revenues from State trust lands be deposited into a permanent fund. *See Kilpatrick v. Superior Court*, 105 Ariz. 413, 419, 466 P.2d 18, 24 (1970) (different parts of the Constitution are to be read as part of a whole and harmonized).

Moreover, although no Arizona court has addressed the issue, the New Mexico Supreme Court concluded that New Mexico's Enabling Act, which was identical to Arizona's, did not require rental proceeds to be placed in a permanent fund. *State v. Llewellyn*, 167 P. 414 (N.M. 1917), *cert. denied*, 245 U.S. 666 (1917). The court in *Llewellyn* noted that the Enabling Act's requirement that the State Treasurer invest moneys "was directed . . . to the moneys derived from the sale of the lands granted to the State or to the natural products thereof, such as coal, timber, stone, etc., and that it has no application to moneys derived from the rental of these lands." *Id.* at 422. Thus, the language in the original Enabling Act never required that all proceeds from State trust lands be deposited in a permanent fund.⁽³⁾ Instead, the Enabling Act attempted to ensure that the beneficiaries benefit from the trust lands.

A constitutional amendment referred by the Arizona Legislature (Sen. Con. Res. 1007, 43rd Legis., 2nd Reg. Sess. (1999)) and approved by the voters in 1998 ("Proposition 102") did not change any requirements regarding what must be deposited in a permanent fund. Ariz. Secretary of State, 1998 Ballot Propositions For The General Election of Nov. 3, 1998 at 18-25 (1998) ("1998 Publicity Pamphlet"). Proposition 102 amended Article X, Section 7 to expand the investment options of the permanent fund beyond safe, interest-bearing securities. *Id.* This amendment also inserted the word "permanent" to modify "fund" in Article X, Section 7, so that section now provides in part:

Whenever any monies shall be in any manner derived from any of said lands, the same shall be deposited by the State treasurer in the permanent fund corresponding to the grant under which the particular land producing such monies was, by the Enabling Act, conveyed or confirmed.

Id. at 19.

Viewed in context and in a manner consistent with other constitutional provisions, this change clarified that the investment procedures outlined in Article X, Section 7 applied only to the permanent fund, but did not change whether revenues generated from the trust land must be deposited in the permanent fund. This conclusion is supported by the language of the measure and the legislative history. Nothing in the legislative history or in the publicity pamphlet suggested Proposition 102 changed what revenues from the trust land are deposited in to a permanent fund.⁽⁴⁾ 1998 Publicity Pamphlet. Instead, the measure was described as expanding investment options for the permanent fund. *See id.* at 18-20. Staff of Arizona House of Representatives Bill Summary, S. Con. Res. 1007, 43rd Legis., 2nd Reg. Sess. (May 4, 1998); Hearing on S. Con. Res. 1007 (1998), before the House Committee on Appropriations, 43rd Legis. 2nd Reg. Sess. (April 29, 1998). Additionally, although Proposition 102 amended Article XI, § 8, it did not delete the constitutional provision that allows schools to spend rental proceeds, rather than deposit them in the permanent fund. 1998 Publicity Pamphlet at 21. This, again, supports the conclusion that Proposition 102 did not require that all revenues be deposited in the permanent fund, but rather just expanded the options for the

investment of the permanent fund and the requirements for distributions from the permanent fund.

B. The Statutes Permitting Expenditure of Rental Proceeds and Interest on Sale Proceeds Comply with the Constitution and the Enabling Act.

The Legislature has permitted rental proceeds and interest on sales to be spent by trust beneficiaries rather than deposited in the permanent fund. As described above, Arizona's Constitution expressly permits the expenditure of rental income, Ariz. Const., art. XI, § 8, and the New Mexico Supreme Court approved the expenditure of rental proceeds from State trust lands. *Llewellyn*, 167 P. at 414. The Arizona Constitution also permits the expenditure of the investment of sale proceeds, Ariz. Const. art. XI, § 10. The expenditure of interest income on sales is consistent with these constitutional provisions.

The statute directing the deposit of monies received by the State distinguishes principal from rental proceeds and interest as follows:

1. The unexpendable principal of monies received from federal land grants shall be placed in separate funds and the account of each such separate fund shall bear a title indicating the source and the institution or purpose to which such fund belongs.
2. The interest, rentals and other expendable money received as income from federal land grants shall be placed in separate accounts, each account bearing a title indicating the source and the institution or purpose to which the fund belongs. Such expendable monies shall be expended only as authorized, regulated and controlled by the general appropriation act or other act of the legislature.

A.R.S. § 35-142(A)(1),(2).

The Legislature's distinction between principal and interest is consistent with the purpose of the permanent fund and the related constitutional requirements. The permanent fund consists of revenues "earned from the sale of State Trust land and the sale of minerals and natural products such as sand and gravel, water and fuelwood." Annual Report at 10; *see also Llewellyn*, 167 P. at 422 (investment requirement applies to money "derived from the sale of the lands granted to the State or to the natural products thereof"). When deposited in the permanent fund, the sales revenues continue to earn money for the beneficiaries, "in essence replacing the value of Trust lands or resources that were sold or removed." Annual Report at 10.

Unlike the sales price, the interest on the sale does not replace the value of the trust land. Rather, the interest on the sale is income earned on the sales price. Moreover, in a sale on terms, the Enabling Act and the Constitution prohibit title to the land from transferring to the purchaser until the State receives the full sales price. *See* Enabling Act, § 28, ¶4 (" . . . the legal title shall not be deemed to have passed until the consideration shall have been paid"); Ariz. Const. art. X, § 4 (same language as Enabling Act). For these reasons, the interest earned on sales of trust land is income that, under the Constitution and Enabling Act, may be spent for the immediate benefit of trust beneficiaries, just as rental income and investment earnings from the permanent fund are spent for trust beneficiaries.

Conclusion

The Enabling Act and the Constitution do not require that all monies generated from State

trust lands be deposited in the permanent fund. The statutes permitting the trust beneficiaries to use rental proceeds and interest on sales of State trust lands do not violate the State Constitution or the Enabling Act.

Janet Napolitano
Attorney General

1. The State's Permanent Land Fund consists of the separate funds for the designated trust beneficiaries. See Ariz. Att'y Gen. Op. 199-008.

2. The 1964 amendment to Article XI, Section 8 provided for apportionment of income derived from permanent State school fund investments "only for common and high school education in Arizona, and in such manner as may be prescribed by law." Ariz. Const. art. XI, § 8 (amended 1998).

3. Congress deleted paragraph 7 of section 28 from the Enabling Act in 1957, Pub. L. No. 85-180, 17 Stat. 457 (1957), and no subsequent amendments to the Enabling Act address what must be deposited in a permanent fund. Your opinion request specifically mentioned section 25 of the Enabling Act, which governs lands designated to repay certain county bond debt. Section 25 provides that after the payment of those debts the "remainder of lands and the proceeds of sales thereof shall be added to and become part of the 'permanent school fund'." Enabling Act, § 25. This ensures that the land and proceeds of sales of the land remain part of the permanent school fund, but does not address the expenditure of rental proceeds and interest income for the trust beneficiaries.

4. ⁴ See *Bussanich v. Douglas*, 152 Ariz. 447, 450-51, 733 P.2d 644, 647-48 (1986) (purpose of amendment can be ascertained from publicity pamphlets and arguments supporting constitutional amendment).

To: The Honorable Lisa Graham Keegan

October 31, 2000

Superintendent of Public Instruction

Re: Testing for English Language Proficiency

I00-027

(R00-049)

Issue Presented

Is the Superintendent of Public Instruction ("Superintendent") required to submit English language proficiency criteria developed under § 15-756(7) of the Arizona Revised Statutes ("A.R.S.") to the State Board of Education ("State Board") for approval?

Summary Answer

Because the Legislature has specifically delegated the task of developing English language proficiency criteria to the Superintendent, those criteria are not subject to State Board approval.

Background

In 1999, the Legislature amended the statutes that address bilingual and English as a second language programs to require the Superintendent to develop criteria for determining whether a student is limited English proficient, including a list of tests for school districts to use.

A.R.S. § 15-756(7), added by 1999 Ariz. Sess. Laws, Ch. 249 § 3.⁽¹⁾ School districts are to adopt the Superintendent's assessment criteria and procedures. A.R.S. § 15-753(C).

Prior to this change, the State Board had adopted rules whereby it approved certain English and primary language assessment tests for bilingual education purposes, and noted that districts must use tests approved by the State Board. A.A.C. R7-2-306. You have asked whether, in light of the Legislature's direct assignment of the development of English proficiency criteria to you, it is still necessary to submit the tests selected under A.R.S. § 15-756(7) to the State Board for its approval.

Analysis

Under Arizona's Constitution, the powers and duties of the State Board of Education and the Superintendent of Public Instruction are as "prescribed by law." Ariz. Const. art. XI, §§ 3, 4. The law provides that the State Board is the "policy determining body" of the Department of Education. A.R.S. § 15-231(B)(1). Its responsibilities include prescribing a minimum course of study for common, middle, and high schools, and competency requirements for promotion from third grade, eighth grade, and high school. A.R.S. §§ 15-203(12), (13). The State Board is also charged with adopting proficiency examinations "for its use." A.R.S. § 15-203(17).⁽²⁾ No statute specifically charges the State Board with developing tests for determining English language proficiency. *Cf.* A.R.S. § 15-203(15) (requiring State Board to adopt list of approved tests for determining special education assistance to gifted students).

The Legislature has now specifically directed the Superintendent to develop English proficiency criteria for purposes of English acquisition education. That statute now supplants any general authority of the State Board regarding English proficiency criteria. *See Mercy Healthcare Ariz., Inc. v. Arizona Health Care Cost Containment Sys.*, 181 Ariz. 95, 100, 887 P.2d 625, 630 (App. 1994) ("A basic principle of statutory interpretation instructs that specific statutes control over general statutes."). The Superintendent's new responsibilities include identifying a list of tests for school districts to use to assess students' oral, reading and writing skills, and determining the score on each test that denotes English proficiency. A.R.S. § 15-756(7).

Nowhere does the statute require that the tests chosen by the Superintendent be submitted to the State Board. See A.R.S. § 15-756. Similarly, the statute requires school districts to adopt language assessment criteria "*as prescribed by the superintendent of public instruction,*" without requiring or even mentioning State Board approval. A.R.S. § 15-753(C) (emphasis added).⁽³⁾

The only requirement for State Board approval of English proficiency tests comes from its own rules. A.A.C. R7-2-306. In this case, specific statutory authority for English proficiency testing has now been granted to the Superintendent. When rules conflict with a statute, "the rules must yield to the statute." *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 528, 869 P.2d 500, 502 (1994). Therefore, the State Board regulation must yield to the specific statutory mandate that the Superintendent develop criteria to determine limited English proficiency.

In A.R.S. § 15-756(7), the Legislature has delegated the development of English proficiency criteria and testing to the Superintendent without the need for State Board rule-making or approval. See *Canon Sch.*, 177 Ariz. at 529, 869 P.2d at 503 ("fundamental goal[]" of statutory construction is to give effect to legislative intent).

Conclusion

Pursuant to A.R.S. § 15-756(7), the Superintendent is not required to submit tests and criteria for determining English language proficiency to the State Board for its approval.

Janet Napolitano
Attorney General

1. The new section provides that the Superintendent of Public Instruction shall:

Develop criteria for determining whether a child is limited English proficient. The criteria shall include a list of tests from which a school district shall select in order to assess the pupil's oral, reading and writing skills. The superintendent shall determine a score on each test that denotes English proficiency. The criteria shall not allow the scores for the initial determination of whether a pupil is English proficient to be higher than the scores for the reassessment of whether a pupil is limited English proficient. In addition to the minimum scores on the selected tests, the criteria shall also include other factors, such as teacher observations and parental approval, that must be satisfied before a pupil is determined to be proficient in English. A.R.S. § 15-756(7).

2. In addition, the State Board is responsible in many areas for establishing standards, testing, and curriculum. The State Board prescribes a minimum course of study incorporating the academic standards that it adopts for common and high schools. A.R.S. §§ 15-701(A)-701.01(A). Additionally, it must adopt competency tests for high school graduation in reading, writing and mathematics. A.R.S. § 15-701.01(A)(3). The State Board is also charged with "assessment and accountability." A.R.S. Title 15, chapter 7, article 3. It is responsible for adopting and implementing the AIMS tests (Arizona instrument to measure standards tests, which tests student achievement of the board-adopted academic standards in reading, writing, and mathematics), as well as a "nationally standardized norm-referenced achievement test" for grades three through twelve in reading, language arts, and mathematics, that is consistent with state standards. A.R.S. § 15-741(A)(2), (3). Finally, the State Board is also required to "[e]stablish a fair and consistent method and standard by which norm-referenced test scores from schools in a district may be evaluated taking into consideration demographic data." A.R.S. § 15-741(A)(11).

3. In addition to not interfering with the State Board's direct statutory authority, directing the Superintendent to develop English language proficiency criteria also does not interfere with the Board's general responsibility to set the competency standards for promotion, as those standards must be met by all students.

To: The Honorable Lisa Graham Keegan

October 31, 2000

Re: Individual Education Programs for Limited
English Proficient Students

Superintendent of Public Instruction

I00-026
(R00-048)

Question Presented

You have asked whether Arizona Revised Statutes ("A.R.S.") § 15-754(B) requires a "limited English proficient" ("LEP") student to participate in an individual education program if the student's parent or guardian does not want the student to do so.

Summary Answer

Section 15-754(B) does not require an LEP student to participate in an individual education program if that student's parent or guardian does not want the student to do so.

Background

School districts generally must provide a bilingual program or English as a second language program for LEP students. A.R.S. § 15-754(A), (B). The statutes further specify four different programs that may satisfy this requirement: three types of bilingual programs and a formal English as a second language program, which includes daily instruction in English language skills and academic development in English. A.R.S. § 15-754(A). If an LEP student is not enrolled in one of these specified programs, then "[a]n individual education program must be provided for" that student. A.R.S. § 15-754(B). *See also* Ariz. Att'y Gen. Op. 187-127. An individual education program for LEP students is "a systemic, individualized program" to promote English language skills and academic achievement "through the use of the pupil's primary home language for subject matter instruction, to the extent possible." A.R.S. § 15-754(B).

Under existing Arizona law, "[p]upil participation in any bilingual education program or English as a second language program is voluntary" and requires parental notification. A.R.S. § 15-752(C). Current federal law similarly allows parents to decline enrollment of their children in bilingual or ESL programs. *See* 20 U.S.C. § 7602(b)(2).

Analysis

Under A.R.S. § 15-754(B), an individual education program "must be provided for" LEP students who are not enrolled in specified bilingual or English as a second language programs. This requirement, however, must be read in context of the entire statutory scheme. *See Goddard v. Superior Court*, 191 Ariz. 402, 404, 956 P.2d 529, 531 (App. 1998). Here, the Legislature has also directed that pupil participation in *any* bilingual education program is voluntary and requires parental notification. A.R.S. § 15-752(C). An individual education program, in this context, is an alternative form of bilingual education that must be made available to students who are not enrolled in the types of bilingual or English as a second language programs identified in A.R.S. § 15-754(A).

The existing statutes obligate school districts to offer the option of an individual education program, but do not require that a student participate in such a program if the student's parent or legal guardian objects. This interpretation harmonizes the statutory obligation to "provide" an individual education program for certain LEP students with the statutory directive that participation in any bilingual or English as a second language program is voluntary. *Cf.*

Goddard, 191 Ariz. at 404, 956 P.2d at 531 (noting that a statute should be interpreted in reference to "the system of related statutes of which it forms a part").

Conclusion

Section 15-754(B), A.R.S., does not require an LEP student who was voluntarily withdrawn from LEP education programs under § 15-752 to participate in an individual education program if his or her parent or guardian chooses to opt out of a such a program.

Question Presented

You have asked whether the pay and allowances paid to individual members of the Arizona National Guard are subject to Arizona's income tax.⁽¹⁾

Summary Answers

The Soldiers' and Sailors' Civil Relief Act does not exempt members of the Arizona National Guard who are residents of Arizona from Arizona income tax on their compensation and allowances.

Background

The National Guard is the modern militia reserved to the states by Article I, section 8, clauses 15 and 16 of the United States Constitution. *Maryland v. United States*, 381 U.S. 41, 46 (1965), *vacated on other grounds*, 382 U.S. 159 (1965); *see also* Ariz. Const. art. XVI, § 2 ("The organized militia shall be designated the National Guard of Arizona . . ."). Except when activated for service by the President of the United States, the National Guard of Arizona is considered a State organization. *Williams v. Superior Court*, 108 Ariz. 154, 158, 494 P.2d 26, 30 (1972); *see also* Ariz. Const. art. V, § 3 ("The Governor shall be commander-in-chief of the military forces of the State, except when such forces shall be called into the service of the United States."). The Governor is the commander-in-chief, and the Arizona Adjutant General acts as the Governor's military chief of staff. A.R.S. § 26-102(A). When on duty, members of the National Guard are under the command and at least indirect supervision of the Arizona Adjutant General. *Id.* The National Guard is governed by State, as well as federal laws. *See, e.g.*, 32 U.S.C.

§§ 101 through 502; A.R.S. §§ 26-101 through -253.

Your opinion request describes two types of affiliation with the National Guard. First, there is the traditional guardsman who serves essentially one weekend a month and a two-week annual training period. For these periods, the guardsman receives pay and allowances from the Department of Defense due to the dual status of being a part of the Reserve Forces of the United States. The second category is the full-time member, who receives full-time pay and allowances.

This second category is considered "full-time National Guard duty" under federal law. *See* 32 U.S.C. § 101(19). According to your opinion request, there are individuals in both categories who reside in Arizona and perform their duties primarily within the State of Arizona. *See* A.R.S. § 26-155 (able-bodied residents of the State may be enlisted as members of the National Guard).

The Soldiers' and Sailors' Relief Act

The Soldiers' and Sailors' Civil Relief Act of 1940 ("Act"), 50 U.S.C. app. §§ 501- 593 applies special legal rules to persons in the military service of the United States. Among other things, the Act defines the residence of military personnel for tax purposes. *See* 50 U.S.C. app. § 574. For income tax purposes, the Act has two components. First, a person shall not be deemed to have lost a residence or domicile in a state because he or she is absent from the state in compliance with military or naval orders, and the person does not acquire a residence or domicile in any other state solely by reason of being absent from his or her home state. *See* 50 U.S.C. app. § 574. Thus, a person's residence or domicile remains the same even if the person

moves to other states while in the military. Second, compensation for military or naval service shall not be deemed income for services within a state if the recipient is not a resident or domiciliary. In other words, if a military person is working within a state but is not a resident or domiciliary of that state, the state of actual physical location may not impose an income tax on that person's military compensation.

Your question concerns the application of these principles to members of the Arizona National Guard subject to State command. This Opinion does not apply to federal military personnel on active duty assigned to assist the National Guard, such as the Property and Fiscal Officer ("PFO"). See Ariz. Att'y Gen. Op. 199-007 ("The PFO is an active duty federal officer subject to federal control, and does not fall within the State command.").

Analysis

Arizona residents and domiciliaries are subject to Arizona income taxation because Arizona taxes its residents on all of their income, even from sources outside the State. A.R.S. § 43-102(4). Under Arizona law, compensation paid to members of the Arizona National Guard who are Arizona residents is subject to Arizona income tax.⁽²⁾

The Act does not limit Arizona's ability to tax National Guard members who are Arizona residents and are subject to State command because the Act does not apply to them. The Act applies to any "person in military service," which includes "persons and no others" who are members of the Army, Navy, Marine Corps, Air Force, Coast Guard, and all officers of the Public Health Service. 50 U.S.C. app. § 511(1). "Military service" under the Act includes "Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service." *Id.* Although annual training of National Guard personnel may, to some extent, be under the supervision of the United States, it is not "preliminary to induction into the service" within the meaning of the Act. See A.R.S. § 26-171 (National Guard training). Therefore, the members of the National Guard subject to State command are not "person[s] in military service" under the Act. Consequently, the Act's provisions regarding residency for income tax purposes do not apply to members of the National Guard, either part- or full-time, who are subject to State command.

Conclusion

Members of the Arizona National Guard who are residents of Arizona are subject to Arizona income tax on their compensation and allowances. The Soldiers' and Sailors' Relief Act does not prevent such persons from being treated as Arizona residents for purposes of income taxation.

Janet Napolitano
Attorney General

1. You submitted your request under Arizona Revised Statutes ("A.R.S.") § 26-177, which provides "the attorney general shall, upon request of the adjutant general or the staff judge advocate of the national guard, give opinions upon legal questions pertaining to military affairs of the state."

2. Whether a particular person is a resident of Arizona requires a fact-specific inquiry beyond the scope of this Opinion. *Cf.* A.R.S. § 43-104(19) (defining "resident" for purposes of the income tax).

Question Presented

You have asked whether the language in A.R.S. § 32-1132(A) that limits a single award from the Contractors' Recovery Fund ("Fund") to \$20,000 and provides that "[n]o more than the maximum individual award from the Fund shall be made on any individual residence or to any injured person" (1) forever precludes an injured person from recovering from the Fund after reaching the \$20,000 limit, and (2) precludes any person from recovering from the Fund for damages to a particular residence after the \$20,000 limit has been reached as a result of a claim relating to construction work at that residence.

Summary Answers

The statutes governing the Fund limit to \$20,000 the amount any injured person can recover for an "act, representation, transaction or conduct." A.R.S. § 32-1132(A). After reaching the \$20,000 limit, an injured person cannot recover any more money from the Fund for future construction work done at the residence that was the subject of the \$20,000 claim. However, that person is not precluded from recovering from the Fund in the future for damages resulting from construction work done on a different residence. In addition, subsequent owners of a residence subject to the \$20,000 limit are not precluded from recovering from the Fund for damages resulting from different construction work on that residence.

Background

The Legislature established the Fund in 1981 to compensate people who are damaged by the acts of residential contractors.⁽¹⁾ A.R.S. § 32-1132(A). 1981 Ariz. Sess. Laws ch. 221, § 18. Monies in the Fund come from licensed residential contractors who must pay biennial assessments to the Fund. A.R.S. § 32-1132(B). In addition, a registered contractor whose conduct results in a claim against the Fund must reimburse the Fund for any amounts paid, and the contractor's license is suspended until the Fund is repaid in full. A.R.S. § 32-1139(B). To qualify as an "injured person" eligible to receive monies from the Fund, a person must be an "owner of residential real property which is classified as class five property under § 42-162, subsection A, paragraph 5 and which is actually occupied by the owner as a residence." A.R.S. § 32-1131(3). The owner must be "damaged by the failure of a residential contractor . . . to adequately build or improve a residential structure or appurtenance on that real property." *Id.* Lessees of residential real property "who contract directly with a residential contractor or indirectly with a subcontractor of that contractor" are also eligible to seek recovery from the Fund, as are homeowners' associations "after transfer of control from the builder or developer for damages to the common elements within the complex." *Id.*

The Legislature has established limits to Fund recoveries. An "injured person" may recover "not more than twenty thousand dollars for damages sustained by the act, representation, transaction or conduct." A.R.S. § 32-1132(A). Awards from the Fund are limited to actual damages resulting "directly from the contractor's violation" and may not exceed "an amount necessary to complete or repair a residential structure or appurtenance." *Id.* In addition, "[n]o more than the maximum individual award from the fund shall be made on any individual residence or to any injured person." *Id.*⁽²⁾ *The Legislature has also limited the Fund's liability to \$100,000 per residential contractor license. A.R.S. § 32-1139(A). The Legislature has also established a number procedures related to the management of the Fund, assessments on contractors, subrogation rights against a bond for payments made from the Fund, and procedures for asserting claims against the Fund. See generally A.R.S. §§ 32-1131 through -1140.*

Your question concerns the limits on Fund recoveries. Specifically, you ask how the limits apply in the

following situations:

1. A homeowner hires a contractor to construct a residence and is damaged by the contractor's actions and recovers \$20,000 from the fund and is later damaged by a second contractor who was hired to do improvements to the house.
2. The homeowner described in scenario one sells the house and the new owner hires a contractor to improve the house and is damaged by the contractor.
3. The homeowner in scenario one who recovered \$20,000 from the fund for damages incurred during the construction of the residence has another home constructed and is damaged by the actions of the contractor who build the second home.

Analysis

The cardinal rule of statutory construction is to find and give effect to the Legislature's intent. *Mail Boxes, etc., U.S.A. v. Industrial Comm'n of Arizona*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). For purposes of statutory interpretation, "each individual provision at issue must be considered in the context of the entire statute of which it is part." *Goddard v. Superior Court*, 191 Ariz. 402, 404, 956 P.2d 529, 531 (App. 1998). Although courts generally follow the plain meaning of statutes, courts will avoid constructions that lead to impossible or absurd consequences. *Miller v. City of Tucson*, 153 Ariz. 380, 381, 736 P.2d 1192, 1193 (App. 1987). Here, the Legislature has, since the creation of the Fund in 1981, limited the recovery an injured person may receive from the Fund for damages "sustained from . . . [any] act representation, transaction or conduct." A.R.S. § 32-1132(A); 1981 Ariz. Sess. Laws ch. 221, § 18. Currently, the limit is \$20,000. *Id.* In 1987, the Legislature added the limitation that "no more than the maximum individual award from the Fund shall be made on any individual residence or to any injured person." A.R.S. § 32-1132(A); 1987 Ariz. Sess. Laws ch. 297, § 3. The plain language of the 1987 amendment suggests that after an injured person reaches the \$20,000 limit, that person is not eligible to recover ever again from the Fund -- even for work done by a different contractor on a different residence several years later. It also suggests that once the \$20,000 is reached for a particular residence, no person -- even a subsequent owner many years later -- can ever recover from the Fund for any future damages to that residence. This reading, however, renders meaningless the language establishing the \$20,000 limitation for "damages sustained by the act, representation, transaction or conduct" of a contractor because this transaction-based limitation is consumed by the limit of \$20,000 for any injured person. If any injured person is limited to \$20,000, the Legislature could have eliminated the \$20,000 limit that an injured person can recover for any particular transaction because it becomes superfluous if an injured person's cumulative recovery from the Fund is capped at \$20,000. In addition, interpreting the statute to mean that once \$20,000 from the Fund is paid for a claim or multiple claims on a particular residence, no injured person - including future owners -- can recover for claims relating to work done at that residence imposes a restriction that serves no rational purpose. Certainly, the Legislature's statutory scheme attempts to limit the Fund's liability, while serving its purpose of providing some limited protection to homeowners. For example, the \$100,000 limitation per licensed contractor may preclude some injured persons from recovering, but this \$100,000 recovery is clearly limited to the Fund's solvency, since contractors must reimburse the Fund for amounts paid. However, precluding future owners from asserting claims, without requiring any notice to such owners of such a limitation is inconsistent with the goal of protecting homeowners and does not rationally protect the Fund's solvency.

Thus, some interpretation is necessary to provide meaning to the \$20,000 limit for each transaction and also to the 1987 amendment limiting to \$20,000 the award "on any individual residence or to any injured person." (3) The statute also should be read in a manner consistent with the overall statutory scheme, and the expressed legislative intent to establish a system to provide some protection to homeowners damaged as a result of the work of residential contractors.

Such a restrictive reading, however, leads to results that are inconsistent with the Fund's purpose of protecting people injured by residential contractors. Such an interpretation also substantially restricts the definition of who is an "injured person" able to recover from the Fund. Courts attempt to avoid statutory interpretations leading to "impossible or absurd results." For example, although courts usually interpret "or" in the disjunctive, courts have adopted a different construction when "impossible or absurd consequences will result." State v. Pinto, 179 Ariz. 593, 595, 880 P.2d 1139 (App. 1994). When statutory language "gives rise to different interpretations . . . [courts] will adopt the interpretation that is most harmonious with the statutory scheme and legislative purpose." Id.

In this situation, the Legislature attempted to place an additional limitation on a person's ability to recover from the Fund when it amended the law in 1987. The \$20,000 cap limits an injured person's recovery for a particular construction project ("the act, representation, transaction, or conduct" of a contractor). The additional language extending the \$20,000 limit "to any individual residence or to any injured person" precludes the injured person who received \$20,000 from the Fund from receiving any additional monies from the Fund for that residence. Thus, in addition to the \$20,000 limit for a particular project, cumulative claims by an individual cannot exceed \$20,000 for that particular residence. However, the \$20,000 limit does not restrict on a subsequent owner's ability to recover from the Fund for construction work at that same property. This interpretation applies to the scenarios you pose as follows:

- 1. A homeowner who hires a contractor to construct a residence and is damaged by the contractors and recovers \$20,000 from the Fund is precluded from a subsequent Fund award for damages caused by a second contractor at a later date who was hired to do improvements to the house.*
- 2. If the homeowner in scenario one sells the house and the new owner hires a contractor to improve the house, the new owner would not be precluded from recovering a Fund award for damages caused by the second contractor.*
- 3. If the homeowner in scenario one who recovered \$20,000 from the Fund later has another home built and is damaged by the actions of the contractor who built the second home, the homeowner is not precluded from recovering a Fund award for damages on this subsequent residence.*

Conclusion

No person can recover from the Fund more than \$20,000 for damages resulting from damage to a particular residence. However, a person who received \$20,000 from the Fund may later recover for damages incurred in a different residence. In addition, a subsequent owner may recover for damages to a property even though an earlier owner received claims for \$20,000 on that property.

Janet Napolitano
Attorney General

- 1. When the Legislature created the Fund, the Legislature stated that the legislation's purpose was "the protection of owners and lessees by establishing a contractors' recovery fund . . ." 1981 Ariz. Sess. Laws, ch. 221, § 1.*
- 2. Section 32-1132(A) provides in part: There is established the residential contractors' recovery fund, to be administered by the registrar, from which any person injured by an act, representation, transaction or conduct of a residential contractor, which is in violation of this chapter or the rules adopted pursuant to this chapter, may be awarded in the county where the violation occurred an amount of not more than twenty thousand dollars for damages sustained by the act, representation, transaction or conduct. An award from the fund is limited to the actual damages suffered by the claimant as a direct result of the contractor's violation but shall not exceed an amount necessary to complete or repair a residential structure or appurtenance within residential property lines, except that an award from the fund shall not be available to persons injured by an act, representation, transaction or conduct of a residential contractor whose license was in an inactive status, expired, cancelled, revoked or suspended pursuant to § 32-1154,*

subsection A at the time of the contract. Not more than the maximum individual award from the fund shall be made on any individual residence or to any injured person. . . .

3. The need to construe a statute to avoid results that seem inconsistent with the statutory scheme suggests a legislative clarification of the limits on Fund recoveries may be appropriate.

To: The Honorable Lisa Graham Keegan,
Superintendent of Public Instruction

September 15, 2000

Re: State Funding for Students in Early
Kindergarten and Early First Grades
I00-023
(R00-013)

Questions Presented

1. May school districts count students who are enrolled in early first grade programs as full-time students for purposes of State school funding?
2. May school districts count students who are enrolled in early or pre-kindergarten programs as half-time students for purposes of State school funding?

Summary Answers

1. The State funding for students in a program labeled "early" first grade depends on the nature of the program. If such program is designed, based on the State standards and district curriculum, for students to complete first grade and advance to second grade, then the students in the program are first graders for the purposes of State funding, and they are counted as full-time students. However, if the program is, based on the State standards and district curriculum, designed for children to move from "early" first grade into first grade the following year, the children are considered kindergartners for the purposes of State funding, and they are counted as half-time students.
2. The State funding for students in a program labeled "early" kindergarten also depends on the nature of the program. If such a program is designed, based on the State standards and district curriculum, for children to complete the kindergarten curriculum and advance to first grade, then the students in the program are considered kindergartners for the purposes of State funding, and are counted as half-time students. However, if a program labeled "early" kindergarten is designed to prepare children for kindergarten, then the program is not a kindergarten, and the students are not counted for the purposes of calculating State aid under the school finance formula.

Background

Eligibility for Kindergarten and First Grade

Age determines whether a child is eligible to enter kindergarten or first grade in a public school in Arizona. See A.R.S. § 15-821. A child is eligible for kindergarten if the child is five years old, and "a child is deemed five years of age if the child reaches the age of five before September 1 of the current school year." A.R.S. § 15-821(C). The Legislature has given school district governing boards the discretion to admit children into kindergarten who turn five between September 1 and January 1 of the current school year "if it is determined to be in the best interests of the children." *Id.*

The age requirements for first grade track the age requirements for kindergarten. A child is eligible for first grade if the child is six years of age, and "a child is deemed six years of age if the child reaches the age of six before September 1 of the current school year." A.R.S. § 15-821(C). A governing board may admit into first grade children who turn six between September 1 and January 1 "if it is determined to be in the best interests of the children." *Id.* This determination is to be made "based upon one or more consultations with the parent, parents, guardian or guardians, the children, the teacher and the school principal." *Id.*

State Funding

State funding for school districts is based on a statutory formula that considers, among other things, the number of students within a district or "average daily membership." A.R.S. §§ 15-941 through -971. Under the State funding scheme, kindergarten students are "fractional" and count "as one-half of a full-time student." A.R.S. § 15-901(A)(2)(a)(i). A kindergarten student for the purposes of the funding statutes is "at least five years of age prior to January 1 of the school year and enrolled in a school kindergarten program that meets at least three hundred forty-six instructional hours during the minimum number of days required in a school year" *Id.* Because the State funds only half-day kindergarten programs through the school finance formula, school districts offering all-day programs must pay for the half not supported by State funds from other resources. See Ariz. Att'y Gen. Op. 199-026 (fees for extended day kindergarten).

The State funds first grade students as full-time students, and the State requires that full-time students in first, second and third grade "be enrolled in an instructional program that meets for a total of at least six hundred ninety-two hours during the minimum number of days required in a school year" A.R.S. § 15-901(A)(2)(b)(i).

Except for specifying a minimum number of hours, the Legislature does not establish substantive requirements for kindergarten or first grade programs. Instead, the Legislature requires the State Board of Education ("State Board") to establish academic standards for public schools and requires school districts to develop curriculum designed to meet the State's standards. A.R.S. § 15-701.

Preschool Programs

In addition to funding kindergarten through twelfth grade, the State provides funding through the statutory formula for preschool for children with disabilities. A.R.S. §§ 15-901(A)(2)(a)(i), -943. This is the only preschool program funded through the school finance formula. A "preschool child" eligible for this program must be at least three years of age but not yet old enough for kindergarten and must have a hearing impairment, visual impairment, speech or language delay or another disability specified in statute. A.R.S. § 15-771(A), (F).⁽¹⁾

"Early" Kindergarten and First Grade

Your question concerns the State's obligation to fund "early" kindergarten and "early" first grade programs. According to your opinion request, these programs are for children who turn five between September 1st and January 1st of the current school year. You indicate that from "early" kindergarten, the children are "promoted" to the "regular" kindergarten program the following year. Similarly, according to your opinion request, early or transitional first grade programs are aimed at students who turn six between September 1 and December 31 of the current school year. You indicate that after a year in an early first grade program the students will attend first grade. Although your letter assumes the students in early first grade programs are kindergartners, you also indicate that these students are not enrolled in a traditional kindergarten program. Your question concerns how these programs fit within the State's school's finance formula.

Analysis

In construing the statutes governing State funding for school districts, the goal is to implement the Legislature's intent. *Canon Sch. Dist. v. W.E.S. Constr. Co.* 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994). This requires an examination of several factors, including the statutes' context, its language, subject matter and historical background, its effects and consequences and its spirit and purpose. *Hayes v. Continental Ins. Co.* 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994). State funding for students in "early" kindergarten or "early" first grade depends on whether the students are, in fact, in kindergarten or first grade programs. The Legislature has provided State funding for preschool for children with disabilities, and for children in kindergarten through grade twelve. See, e.g., A.R.S. 15-901 (definitions applicable to funding formula). The

Legislature has not, however, expressly addressed funding for students in programs labeled "early" kindergarten, or "early" first grade.⁽²⁾ Thus, determining how districts must count students in such programs for the purposes of receiving State funding requires an analysis of the substance of the particular program, measured against State standards and district curriculum. See *State v. Cid*, 181 Ariz. 496, 499, 892 P.2d 216, 219 (App. 1995) (related statutes should be read together).

Through various statutes the Legislature has established a system of standards and promotion in which each grade is designed to prepare the child for the next, and teachers are responsible for deciding, based on district criteria, whether to promote a student to the next grade or retain a student. See A.R.S. § 15-701 (school district curriculum must meet State standards; guidelines for decisions regarding promotion of students); *Ariz. Dep't of Educ., Arizona Academic Standards & Accountability* <http://www.aazdes.gov/standards/>. This system provides for one year of each grade, unless a child is retained based on the individual needs of that child.

Under such a system, if an "early" kindergarten program is designed for the students to complete the district's kindergarten curriculum and advance to first grade, then it is a kindergarten program and the students in such a program are counted as half-time students for the purposes of State funding. See A.R.S. § 15-901(A)(2)(a)(i) (funding for kindergarten students). If, however, the program is not designed to complete the kindergarten curriculum but rather prepares children for kindergarten, then it is a preschool program, rather than kindergarten, and the Legislature has not provided for State funding through the formula for students in such programs.⁽³⁾

A similar analysis applies to "early" first grade programs. The statutes do not contemplate a step between kindergarten and first grade. For the purposes of State funding, transitional or early first grade must be classified as either first grade -- which receives full-time funding -- or kindergarten -- which receives only half-time funding. If the program is designed to satisfy the State's standards and the district's curriculum for first grade and advance the children to second grade, it is a first grade. However, if it is designed to complete the kindergarten curriculum and advance the children to first grade, it is a kindergarten for the purposes of State funding.

By giving school districts governing boards discretion to grant early admission into kindergarten to a student who turns five between September 1 and January 1 of the school year, the Legislature has not authorized districts to develop special programs that precede kindergarten and receive State funding through the formula for those programs. See A.R.S. § 15-821. The same is true regarding the legislative authorization for districts to admit students into first grade who turn six between September 1 and January 1. Instead, through A.R.S. § 15-821, the Legislature has merely authorized early admission into kindergarten and first grade programs based on the best interests of a particular child. A half-time program preceding kindergarten may be beneficial as may a full-time program preceding first grade, but the Legislature has not provided State funding for such programs.

Conclusion

State school funding for a program labeled "early" kindergarten or "early" first grade depends on the program's curriculum and compliance with State standards. An early kindergarten program that, under the district's curriculum, prepares students for kindergarten is not eligible for funding through the formula. Similarly, an early first grade program that, under the district's curriculum, prepares children for first grade is a kindergarten program for the purposes of the State school finance formula.

1. The Legislature has also established grant programs aimed, at least in part, at certain preschool children. For example, the block grant for early childhood education programs "is to promote improved pupil achievement by providing flexible supplemental funding for early childhood programs, including preschool programs for economically disadvantaged children, and programs that serve all public school pupils statewide who are in kindergarten programs and grades one, two and three." A.R.S. § 15-1251(A). *Id.* The preschool programs funded through this block grant must, among other requirements, be restricted "only to preschool children eligible for free or reduced price lunches under the national school lunch and child nutrition acts." A.R.S. § 15-1251(C)(1). Another grant program is the "family literacy program," which is "designed to promote the acquisition of learning and reading skills by parents and their preschool children in a shared instructional setting." A.R.S. § 15-191.

2. Even though the Legislature has not used the labels "early" kindergarten or "early" first grade to describe programs, school districts may develop such programs to meet their obligation to educate children within the district or through their authority to provide community education. *See* A.R.S. §§ 15-341 (duties of governing board), -701(B)(curriculum); -1142 (community school programs); Ariz. Att'y Gen. Op. I81-014 (school district authority to offer preschool programs).

3. Although the students in such programs are not counted for the purposes of calculating a district's average daily membership, the programs may be eligible for State funds from the early childhood education block grant (A.R.S. § 15-1251(C)) or the family literacy program (A.R.S. § 15-191).

To: The Honorable Jane Dee Hull , Governor
The Honorable Betsey Bayless, Secretary of
State
The Honorable Brenda Burns, President of the
Senate
The Honorable Jeff Groscost, Speaker of the
House of Representatives
The Honorable Lisa Graham Keegan,
Superintendent of Public Instruction
The Honorable Jack Brown, Minority Leader,
State Senate
The Honorable Bob McLendon, Minority Leader
House of Representatives
Charmion Billington, Senate Secretary
Norm Moore, House Chief Clerk
The Honorable Jean Hough McGrath, Arizona
State Representative

September 15,2000

Re:School District Expenditures for
Membership Duties
100-022
(R00-021)

Questions Presented

You have asked: (1) whether school boards have statutory authority to use public funds to pay for district administrators or board members to join private civic organizations; and (2) whether Article IX, § 7 of the Arizona Constitution ("the Gift Clause") permits such payments.

Summary Answers

The Legislature has not authorized school districts to pay dues for district employees and board members to join private civic organizations. Because of the lack of statutory authority for these expenditures, this Opinion does not address your second question concerning the constitutionality of such expenditures.

Background

School districts have "only such powers as are granted to them by the [L]egislature." *Tucson Unified Sch. Dist. No. 1 v. Tucson Educ. Ass'n*, 155 Ariz. 441, 442, 747 P.2d 602, 603 (App. 1987). A school board "can exercise only those powers which are expressly or impliedly granted." *Id.* at 443, 747 P.2d at 604. The Legislature has set out the responsibilities of school boards including, for example, constructing, improving and furnishing school buildings, insuring school property, prescribing curriculum, acquiring "school furniture, apparatus, equipment, library books and supplies," and hiring and supervising necessary personnel. See A.R.S. § 15-341. The Legislature has provided that school boards "shall . . . [u]se school monies received from the state and county school apportionment exclusively for payment of salaries of teachers and other employees and contingent expenses of the district." A.R.S. § 15-341. Another statute describes what the school board "may" do, such as, for example, expel students for misconduct, provide transportation, provide housing for teachers in rural areas, and "annually budget and expend monies for membership in an association of school districts in this State." A.R.S. § 15-342. These statutes describe and limit school districts' expenditures of public funds. In addition to the requirements set forth by statute, all expenditures of public funds must comply with the Gift Clause of the Arizona Constitution. See Ariz. Const. art. IX, § 7.

You have asked about the authority of school districts to pay membership dues for non-school-related civic organizations, which your opinion request defined as groups such as the Chamber of Commerce, Kiwanis, or Rotary Club.

Analysis

School boards may expend funds for a particular purpose if they have express or implied legislative authority to do so. See *Tucson Unified Sch. Dist.*, 155 Ariz. at 443, 747 P.2d at 604.

The only mention of membership dues in the statutes governing schools is the authorization for districts to pay dues "for membership in an association of school districts within this state." A.R.S. § 15-342(8). Thus, the Legislature has not expressly authorized districts to pay membership fees in private civic organizations, such as those mentioned in your opinion request.

There is also no implied authority. "Contingent expenses of the district" under A.R.S. § 15-341(A)(18) must relate to action "expressly authorized in the statute." *Campbell v. Harris*, 131 Ariz. 109, 112, 638 P.2d 1355, 1358 (App. 1981) (school board lacked authority to pay for private counsel to defend person's right to serve on school board). The statutes concerning the authority of school district governing boards focus on the districts' responsibility to educate children. See generally A.R.S. §§15-341, -342. As the Arizona Supreme Court has noted:

School districts are created by the state for the sole purpose of promoting the education of the youth of the state. All their powers are given them and all the property which they own is held by them in trust for the same purpose, and any contract of any nature they may enter into, which shows on its face that it is not meant for the educational advancement of the youth of the district but for some other purpose, no matter how worthy in its nature is *ultra vires* and void.

Prescott Community Hosp. Comm'n v. Prescott Sch. Dist. No. 1, 57 Ariz. 492, 494, 115 P.2d 160, 161 (1941). Although not expressly authorized by statute, dues for organizations that directly concern education or aspects of managing a public school district may be justified to the extent they enhance the district's ability to fulfill its statutory responsibilities. However, the connection between membership dues for private civic organizations with a more general purpose (such as the Chamber of Commerce, Kiwanis, and Rotary Clubs you identified in your opinion request) and a district's statutory responsibilities for educating children is too attenuated to conclude the Legislature impliedly authorized those expenditures.

Thus, there is no express or implied statutory authority for school districts to pay for dues to private civic organizations.⁽¹⁾

Conclusion

School boards generally lack the statutory authority to expend funds for the membership fees in private organizations for employees and board members.

Janet Napolitano
Attorney General

1. This Opinion does not address whether membership dues in local civic organizations could be considered a fringe benefit that may be included in a district employee's contract. See A.R.S. § 15-502(A).

To: Howard L. Brown

September 15, 2000
Re: Use of Private Contractor to Provide
School District Teachers and
Administrators
100-021
(R00-045)

Mangum, Wall, Stoops & Warden, P.L.L.C.

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), this Opinion revises the opinion you submitted for our review regarding a proposal that Chinle Unified School District is considering to contract with a private business that would provide the district with teachers and administrators.

Question Presented

Does a school district governing board have statutory authority to contract with a private company to select, train, supervise, evaluate, and discipline teachers and administrators?

Summary Answer

School district governing boards do not have express or implied statutory authority to contract with a private company to select, train, supervise, evaluate, and discipline the district's teachers and administrators. ⁽¹⁾

Background

The district is considering a private company's proposal to provide the district with administrators and teachers to fill full time, permanent positions within the district. ⁽²⁾ According to the opinion submitted for review, instead of hiring teachers and administrators directly, the district would enter into a contract with the company, after an appropriate procurement process, and the company would provide the district with teachers and administrators. Under the proposal, the school district would pay the contractor a fee, and the contractor would pay the employees their salaries or wages and any other employment benefits. Although the district would have the right under the proposed contract to reject a teacher or administrator selected by the contractor, the contractor would be responsible for recruiting, hiring, training, evaluating, replacing, supervising, disciplining, and firing the contractor's teachers and administrators who are placed in a district.

Analysis

"School boards have only the authority granted by statute which must be exercised in the mode and within the limits permitted by the statute." *School Dist. No. 69 v. Altherr*, 10 Ariz. App. 333, 338, 458 P.2d 537, 542 (1969). Title 15, Article 3 of the Arizona Revised Statutes sets forth the powers and duties of school district governing boards. See A.R.S. §§ 15-341 through -350. Those statutes enumerate specific powers of governing boards, such as purchasing school sites, disciplining students, and adopting chemical abuse policies. A.R.S. §§ 15-341(A)(10), (14); -345. Nowhere do the statutes grant governing boards express authority to contract with a private company to provide teachers or administrators.

Accordingly, the only way the proposal would be legal is if the statutes grant school district governing boards the implied authority to delegate these responsibilities to third parties. "[I]f the necessary authority is not expressly provided in the statute, it must be impliedly provided." *Berry v. Foster*, 180 Ariz. 233, 235, 883 P.2d 470, 472 (App. 1994). However, implied authority should not be construed beyond statutory bounds. See, e.g., *id.* (statute

authorizing board to "prescribe rules for its own government" did not grant implied authority for the board to impose a procedure to investigate or censure other board members); *Campbell v. Harris*, 131 Ariz. 109, 112, 638 P.2d 1355, 1358 (App. 1981) (statute giving school district right to sue and be sued did not confer implied right to sue regarding non-statutory rights); *Carlson v. School Dist. No. 6*, 12 Ariz. App. 179, 468 P.2d 944 (1970) (statute allowing general salary reduction for teachers did not grant board implied authority to reduce individual teacher's salary).

Generally, the Legislature has authorized governing boards to "at any time employ and fix the salaries and benefits of employees necessary for the succeeding year." A.R.S. § 15-502(A). The Legislature has also charged governing boards to "provide for adequate supervision over pupils in instructional and noninstructional activities by certificated or noncertificated personnel." A.R.S. § 15-341(A)(17).

In addition to these general statutes establishing the governing board's responsibility over school district personnel and the supervision of the students, there are specific provisions governing teachers. The Legislature has established statutory tenure provisions that school district governing boards must honor for teachers employed by a school district for a specified period of time. A.R.S. § 15-538.01. There are also specific procedures that school district governing boards must follow when dismissing or suspending a certificated teacher. A.R.S. §§ 15-539 through -543.

The Legislature recently enacted legislation that, like those other statutes, support the conclusion that teachers work *for* the school districts and are accountable to the governing board of the district. The recent legislation exempted from the tenure statutes retired teachers who meet certain criteria and return to work for the district. A.R.S. § 38-766.01. This legislation was an effort to address the problem of a shortage of certified teachers by allowing school districts to hire retired teachers without jeopardizing the teachers' retirement benefits. See 2000 Ariz. Sess. Laws ch. 132 (codified, in part, as A.R.S. § 38-766.01); ARIZONA STATE SENATE STAFF, 44TH Legis. 2d Reg. Sess., FACT SHEET FOR SB 1463 (May 22, 2000) (discussing current and projected shortages of teachers); MINUTES OF SENATE COMMITTEE ON FINANCIAL INSTITUTIONS AND RETIREMENT, 44th Legis., 2nd Reg. Sess. 9-12 (Ariz. 2000). Unlike the proposed business arrangement in your opinion letter, this recent legislation contemplated a direct contractual relationship between the retired teachers who are returning to work and the district. Thus, nothing in the statutes implies districts may bypass the statutory tenure provisions and other statutes governing the supervision and discipline of teachers by contracting with a private company.

There are also specific statutory provisions regarding the employment and supervision of administrators. Governing boards may hire a superintendent or a principal and the term of employment "may be for any period not exceeding three years." A.R.S. § 15-503(B). The board must also "[p]rescribe and enforce policies and procedures for disciplinary action" for administrators. A.R.S. § 15-341(24). As is true of teachers, nothing in these statutes suggests that administrators may work for a private company rather than the school district.

Contrary to the conclusion in the district's opinion submitted for review, A.R.S. § 15-343 does not apply to teachers and administrators. Section 15-343 allows a governing board to "employ professional personnel deemed necessary *for making surveys and recommendations* relating to the curricula, physical plant and other requirements of the district." A.R.S. § 15-343(A) (emphasis added). On its face, this statute does not apply to teachers. Nor does it apply to administrators who are specifically addressed elsewhere in the statutes. See *School*

Dist. No. One v. Lohr, 17 Ariz. App. 438, 439-40, 498 P.2d 512, 513-14 (1972) (finding that then-existing statute allowing boards to employ professional personnel for "for making surveys and recommendations relating to the curricula, physical plant and other requirements of the district" did not provide implied authority for schools to employ legal counsel).

In sum, the relevant statutes distinguish teachers and administrators from other positions within the district and do not support interpretations that would permit school district governing boards to delegate the responsibility for selecting, supervising, and disciplining these educators to a private third party. *Cf. Godbey v. Roosevelt Sch. Dist. No. 66*, 131 Ariz. 13, 20, 638 P.2d 235, 242 (App. 1981) (school boards should not delegate 'legislative or judicial' decisions); *Tucson Unified Sch. Dist. No. 1 v. Tucson Educ. Ass'n*, 155 Ariz. 441, 747 P.2d 602 (App. 1987) (school board cannot delegate its power to prescribe and enforce rules to an arbitrator). Teachers and administrators work for the district, not a private company hired by the district. A legislative change is necessary if a different result is desired, and such a policy decision should address other issues discussed in the opinion submitted for review such as retirement benefits, tort liability, and responsibility for employee background checks.

Conclusion

A school district governing board does not have the express or implied statutory authority to contract with a private contractor to provide the district's teachers and administrators.

Janet Napolitano
Attorney General

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1. The opinion submitted for review discussed a number of other issues such as the impact of such an employment arrangement on retirement benefits, the tort liability of the district for injuries sustained by an employee of the contractor working at the district, and the responsibility for background checks of employees of the contractor. Because schools do not have statutory authority to use a private service to supply teachers and administrators, this Opinion does not reach those issues.

2. The district's opinion submitted for review focused on teachers and administrators provided by the company, rather than other employees. Likewise, this Opinion addresses only contracting with a company that would provide a district with teachers and administrators.

To: The Honorable Chris Cummiskey

September 11, 2000
Re: Use of City or County Funds to
Educate the Public on Ballot Measures

Arizona State Senate

I00-020
(R00-027)

Question Presented

You have asked: (1) whether a city or county may spend general fund monies to educate its citizens on the possible impact of ballot measures, without advocating for or against the measure; and (2) whether a city or county may spend general fund monies for those purposes before a measure has qualified for the ballot.

Summary Answers

The Legislature has prohibited cities and counties from using resources "for the purpose of influencing the outcome of elections." Arizona Revised Statutes ("A.R.S.") §§ 9-500.14, 11-410. These statutes prohibit general fund expenditures that support or oppose measures that have not yet qualified for the ballot as well as measures that have qualified for the ballot. Whether the prohibitions in A.R.S. §§ 9-500.14 and 11-410 extend to educational materials that do not expressly advocate for or against a measure requires analysis of the specific materials and the circumstances relating to their distribution to determine whether the materials are "for the purpose of influencing the outcome of election."

Background

In 1996, the Legislature prohibited the use of city, town, county, and school district resources to influence the outcome of elections. See 1996 Ariz. Sess. Laws ch. 286 (codified in part as A.R.S. §§ 9-500.14, 11-410, 15-511). The statute governing cities, A.R.S. § 9-500.14(A), provides:

A city or town shall not use its personnel, equipment, materials, buildings or other resources for the purpose of influencing the outcomes of elections. Notwithstanding this section, a city or town may distribute informational reports on a proposed bond election as provided in section 35-454. Nothing in this section precludes a city or town from reporting on official actions of the governing body.

(Emphasis added.) Other statutes approved in the same bill place an identical restriction on the use of county and school district resources to influence elections. See A.R.S. §§ 11-410 (counties), 15-511 (school districts).⁽¹⁾

Before the 1996 legislation, the principal statute directly addressing the political subdivisions' use of resources to influence elections required the State Board of Education to adopt rules concerning this subject that would apply to school districts. See former A.R.S. § 15-511 (repealed by 1996 Ariz. Sess. Laws ch. 286). The 1996 statutes purportedly codified the Department of Education rule then in effect and extended its application to other political subdivisions. *Hearing on SB 1247 Before the House of Representatives Comm. on Government Operations*, 42nd Legis., 2nd Reg. Sess. 10 (Ariz., March 6, 1996).⁽²⁾ The 1996 legislation also addressed bond election procedures and, according to testimony in Senate hearings on the measure, it was part of "an ongoing effort to reform bond procedures." *Hearing on SB 1247 Before the Senate Comm. on Government Reform*, 42nd Legis., 2nd Reg. Sess. 3 (Ariz. February 6, 1996).

Other statutes require cities, towns and counties to provide certain election information to voters. For example, a jurisdiction having a bond election must mail informational pamphlets to the residence of each registered voter within the political subdivision. A.R.S. § 35-454(A). The Legislature specified the information that must be included in this pamphlet.⁽³⁾ *Id.* For primary and general elections, jurisdictions must mail sample ballots to households. A.R.S. §§ 16-461 (sample primary ballots), -510 (general election sample

ballots). For local initiative and referendum measures, the city or county distributes publicity pamphlets describing the measures, including arguments for and against the proposals that citizens have submitted. A.R.S. § 19-141(A), (B).

Analysis

1. Sections 9-500.14 and 11-410 Limit the Ability of Cities and Counties to Use General Fund Monies to Educate Voters about Ballot Measures.

Sections 9-500.14 and 11-410, A.R.S., prohibit the use of any city or county resources "for the purpose of influencing the outcomes of elections."⁽⁴⁾ The phrase "for the purpose of influencing the outcomes of elections" is drawn from state and federal election laws defining campaign contributions and expenditures. See A.R.S. §§ 16-901(5), -901(8) ; 2 U.S.C. § 431(8). The campaign finance laws establish contribution limits and disclosure requirements for contributions and expenditures that are "for the purpose of influencing elections." See A.R.S. §§ 16-901 through -925. While the Legislature did not incorporate the complex campaign finance regulatory scheme into its statutes limiting the use of local governmental resources, some of the principles from campaign finance law help guide interpretations of the prohibitions in A.R.S. §§ 9-500.14 and 11-410. Under federal campaign finance law, the test of whether something has the purpose of influencing an election is an objective test, rather than a test "based on the subjective state of mind of the actor." *Federal Election Comm'n v. Ted Haley Congressional Comm.*, 852 F.2d 1111 (9th Cir. 1988) (holding that post-election loan guarantees were campaign contributions). In addition, campaign expenditures "for the purpose of influencing elections" do not include "non-partisan activity designed to encourage individuals to vote or to register to vote." A.R.S. § 16-901(8)(b).

Applying these principles from campaign finance law, the Legislature has prohibited cities and counties from using general fund monies to advocate for or against a measure that will be on the ballot. The only "educational" materials regarding ballot issues that are clearly permitted are those authorized by statute, such as the bond informational pamphlet, sample ballots, and publicity pamphlets. Informational materials that do not advocate for or against a measure, but are not specifically required by statute, would require case-by-case evaluation to determine whether they are, based on all relevant circumstances, materials to influence the outcome of an election in violation of statute. This analysis requires "careful consideration of such factors as the style, tenor and timing of the publication." *Stanson v. Mott*, 551 P.2d 1, 12, 130 Cal. Rptr. 697, 708 (1976) (analyzing distinction between unauthorized campaign expenditures and authorized informational activities by public entity).

The statutory prohibition in A.R.S. §§ 9-500.14 and 11-410 does not "bar knowledgeable public agencies from disclosing relevant information to the public, so long as such disclosure is full and impartial and does not amount to improper campaign activity." *Id.* Thus, a city or county may use its resources to respond to citizen inquiries that may concern election issues, but it must do so in a neutral manner that does not urge support or opposition to a measure. Similarly, A.R.S. §§ 9-500.14 and 11-410 do not prohibit the use of city or county facilities for non-partisan forums that educate voters about issues or candidates. Nor do they prohibit a public entity from making its buildings and facilities available to partisan groups on the same basis and conditions as other groups. *Cf.* A.R.S. § 15-1105 (governing use of school property); Ariz. Att'y Gen. Op. 186-024 (analyzing constitutional aspects of regulating political activity on public property).

The statutes also provide "[n]othing in this section precludes a [city, town or county] from reporting on official actions of the governing body." A.R.S. §§ 9-500.14(A) and 11-410(A). This provision makes it clear that if, for example, a city council or county board of supervisors proposes a measure that will appear on the ballot for the voters' consideration, A.R.S. §§ 9-500.14 and 11-410 do not preclude the use of public resources to inform people of that official action. However, this provision must be read in a manner consistent with the general prohibition against using public resources to influence an election. Thus, a local governing body may not adopt a resolution supporting or opposing an initiative or referendum and then under the guise of

"reporting on official actions" mail brochures to all residents. Any official action supporting or opposing an initiative or referendum necessarily requires the use of public resources and its purpose is to influence the election by having the public entity formally take a position on a matter that is coming before the public for a vote. Such official action supporting or opposing ballot measures, other than those the governing body itself is referring to the voters, are prohibited by A.R.S. §§ 9-500.14 and 11-410. Otherwise, any broader reading of the last sentence would create a loophole that would permit campaign activity by the public body through passing resolutions and then communicating those resolutions to the voters.

Although the governing body cannot take formal positions on ballot measures, individual members of those governing bodies may express their views on public policy issues. As one court commented, "the effective discharge of an elected official's duty would necessarily include the communication of one's considered judgment of . . . [a] proposal to the community which he or she serves." *Smith v. Dorsey*, 599 So. 2d 529, 541 (Miss. 1992). Elected officials "acting in their official capacity shed no First Amendment rights in their advocacy of policies." *Id.* Although individual elected officials of cities and counties may advocate for or against matters that may be on the ballot, they cannot use public resources to support their efforts because of the prohibitions in §§ 9-500.14 and 11-410. Moreover, city and county policy-makers may use city or county resources to assess the potential impact of a proposed ballot measure on their jurisdictions, but they cannot use public resources to disseminate information about the measure in a manner that violates A.R.S. § 9-500.14 and 11-410.

In sum, A.R.S. §§ 9-500.14 and 11-410 do *not* prohibit

- .elected officials from speaking out individually regarding measures on the ballot;
- .the use of public resources to respond to questions about ballot measures, although responses should provide factual information that suggest neither support nor opposition to the measure;
- .the use of public resources to investigate the impact of ballot measures on a jurisdiction;
- .the use of public resources to prepare and distribute the election information required by statute; and
- .the preparation and dissemination of materials "reporting on official actions of the governing body."

2. Timing of Expenditures.

You also asked if the prohibitions in A.R.S. §§9-500.14 and 11-410 apply to expenditures before a measure qualifies for the ballot. Under campaign finance laws, the requirements to disclose expenditures and contributions and to form political committees apply before a measure qualifies for the ballot. See A.R.S. § 16-901(5) (contribution), -901(8) (expenditure), -901(19) (political committee). The definition of expenditure, for example, expressly includes payments "supporting or opposing the circulation of a petition for a ballot measure, question or proposition." A.R.S. § 16-901(8). The definition of contribution includes the same language. A.R.S. § 16-901(5). In addition, any group proposing a ballot measure must register as a political committee. A.R.S. § 19-111(C); see *also* A.R.S. § 16-901(19) (political committee includes group that engages in political activity in support of or opposition to an initiative or referendum and that applies for a serial number and circulates petitions). These statutes recognize that political activity to influence the outcome of a ballot measure begins before a measure qualifies for the ballot. Similarly, the prohibitions in A.R.S. §§ 9-500.14 and 11-410 apply before a measure qualifies for the ballot.

Conclusion

Sections 9-500.14 and 11-410, A.R.S., prohibit cities and counties from using their resources, including spending general fund monies, to influence the outcome of elections. Even educational materials that do not expressly advocate for or against a ballot issue may fall within this prohibition, depending on the specific facts and circumstances. The limitations in A.R.S. §§ 9-500.14 and 11-410 apply before a measure qualifies for the ballot.

Janet Napolitano
Attorney General

1. Although this Opinion focuses on the statutes applicable to cities and counties, the same analysis applies to A.R.S. § 15-511(A) concerning school districts.
2. Although the legislative history suggests the language in the current statutes was based on a former Department of Education rule, the statutory language differs from the rule. In part, the rule stated that "consistent with constitutional provisions regarding public monies, the school district may not use its equipment, materials, buildings or other resources to present or engage in express advocacy to influence the outcome of any election," with exceptions for leases of school property under A.R.S. § 15-1105 and informational reports on overrides. *See* former Arizona Administrative Code ("A.A.C.") R7-2-1201 (repeal effective Feb. 20, 1997). The rule also provided "nothing in this rule shall preclude school districts from reporting on official actions of the governing board or producing and distributing impartial information on elections other than school district budget override elections." *Id.*
3. The pamphlet includes: amount of bond authorization, maximum interest rate of the bonds, estimated debt retirement schedules for the proposed bond authorization, the current amount of bonds outstanding, showing both principal and interest payments and the estimated tax rates, source of repayment, estimated issuance costs, estimated tax rate impact on the average assessed valuation of both owner-occupied residential property and commercial and industrial property for the current year, current outstanding general obligation debt and constitutional debt limitation, the purpose for which the bonds are to be issued, polling location, and the hours when polls will be open. A.R.S. § 35-454(A).
4. The Arizona case law regarding using public resources to influence elections is limited. In *Sims v. Moeur*, 41 Ariz. 486, 19 P.2d 679 (1933), the Arizona Supreme Court approved the Governor's removal of certain Industrial Commission members for their use of State Compensation Fund monies to prevent an initiative repealing workers' compensation laws from being placed on the ballot and to urge voters to defeat the measure. *Id.* at 503, 19 P.2d at 685. The Court upheld the removal after finding the record showed inefficiency and malfeasance in office. *Id.* at 503-4, 19 P.2d at 685. Courts in other jurisdictions have limited public expenditures promoting or opposing ballot issues but recognized the government's ability to provide impartial information to its citizens regarding elections. *See, e.g., Stanson v. Mott*, 551 P.2d 1, 130 Cal. Rptr. 697 (1976); *Citizens to Protect Public Funds v. Board of Educ. of Parsippany-Troy Hills TP.*, 98 A.2d 673, 179-80 (N.J. 1953); *Palm Beach County v. Hudspeth*, 540 So. 2d 147 (Fla. App. 1989); *see also Smith v. Dorsey*, 599 So. 2d 529, 549 (Miss. 1992) .

To: The Honorable Betsey Bayless

August 11, 2000
Re: Constitutionality of the Arizona Open
Primary Law

Secretary of State

100-019
(R00-038)

Question Presented

You have asked whether Arizona's open primary law is constitutional in light of the recent United States Supreme Court decision in *California Democratic Party v. Jones*, ___ U.S. ___, 120 S.Ct. 2402 (June 26, 2000).

Summary Answers

The Supreme Court's ruling in *California Democratic Party v. Jones* does not invalidate Arizona's open primary law.

Background

In 1998, Arizona voters amended our State Constitution to allow voting in the primary election by voters who are registered as "no party preference," independent, or members of parties that are not represented on the ballot to vote in primary elections. Ariz. Const. art. VII, § 10; Arizona Secretary of State, 1998 Ballot Propositions for the General Election of November 3, 1998 at 26-32 (1998) (Proposition 103) ("1998 Publicity Pamphlet"). Before this constitutional amendment, Arizona had a "closed primary" in which only members of parties represented on the ballot could participate. As amended by Proposition 103, Article VII, § 10 of the Constitution provides:

The Legislature shall enact a direct primary election law, which shall provide for the nomination of candidates for all elective State, county and city offices, including candidates for United States Senator and for Representative in Congress. *Any person who is registered as no party preference or independent as the party preference or who is registered with a political party that is not qualified for representation on the ballot may vote in the primary election of any one of the political parties that is qualified for the ballot.*

(Emphasis added.)⁽¹⁾ The Legislature subsequently amended the statutes to allow any Proposition 103 voter to designate, at the time of voting or requesting an early ballot, one of the parties that will be on the ballot and to receive the ballot for that party. A.R.S. §§ 16-467, -542. The 2000 primary will be the first primary election conducted under Arizona's new open primary law.

In *Jones*, ___ U.S. ___, 120 S.Ct. 2402, the United States Supreme Court ruled that California's blanket primary law violated the political parties' First Amendment rights of association. You have asked whether Arizona's open primary law is constitutional in light of *Jones*.

Analysis

In *Jones*, the Supreme Court invalidated California's blanket primary system, in which any voter could vote for any candidate in the primary election, regardless of party affiliation. Under California's blanket primary law, each voter received a ballot that listed every candidate, regardless of party affiliation, and the voter could then vote for the candidates of his or her choice. *Jones*, at 2406. The candidate of each party receiving the most votes advanced to the general election as the nominee of that party. According to the Supreme Court, the blanket primary "in effect, . . . simply moved the general election one step earlier in the process." *Id.* at 2411.

The Supreme Court concluded that the blanket primary law imposed a severe burden on a party's rights of

association. The Court was particularly concerned about the ability of a party's opponents to select a party's nominee, noting that with a blanket primary, "the prospect of having a party's nominee determined by adherents of an opposing party is far from remote - indeed it is a clear and present danger." *Id.* at 2410. The Court was also troubled that the blanket primary would change the parties' message. *Id.* at 2411. The Court noted that the purpose of California's blanket primary initiative "was to favor nominees with 'moderate' positions." *Id.* at 2411.

In light of the heavy burden on the rights of political parties, the blanket primary was valid only if "it [was] narrowly tailored to serve a compelling state interest." *Id.* at 2412. The Court found that none of the asserted state interests justified the heavy burden on the parties' rights and, therefore, the California law was unconstitutional.⁽²⁾ The Supreme Court also indicated in *Jones* that a "narrowly tailored" means of furthering the asserted State interests without burdening the rights of the political parties would be a purely non-partisan primary election in which the top "vote getters" advance to the general election. *Jones* at 2414. The Court, however, did not conclude that a non-partisan primary is the only viable alternative to a closed primary system.

In *Jones*, the Court acknowledged that open primaries differ from blanket primaries in that in open primaries voters must select the ballot of one party and can only vote for candidates of that party. *Id.* at 2409, n 6. Moreover, the Court expressly noted that in *Jones* it was not deciding the constitutionality of open primaries in which a voter is limited to one party's ballot.⁽³⁾ *Id.* at 2409, n 8. Because the Supreme Court expressly limited its holding in *Jones* to the blanket primary at issue in that case, *Jones* does not invalidate Arizona's open primary law.

Not all burdens on political parties are subject to the strict scrutiny test applied in *Jones*. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). The Supreme Court previously established that if the burden on a political party is not severe, the state is not required to show that its law is narrowly tailored to serve a compelling state interest. Rather, a state showing of an important regulatory interest "will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Id.* at 358 (citations omitted). The state's asserted regulatory interests need only be "sufficiently weighty to justify the limitation" imposed on the party. *Id.* at 363. "No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Id.* at 358.

Arizona's open primary law does not burden the political parties to the degree the blanket primary analyzed in *Jones* did. Unlike the law analyzed in *Jones*, Arizona's open primary law was not designed to change the message of parties -- it was designed to allow voting by certain registered voters who were excluded from the closed primary. It also does not pose the same risk of party opponents selecting a party nominee because it applies only to independents and others who could not vote in the closed primary system. The open primary law does not alter how members of parties represented on the ballot participate in the primary election; they must vote the ballot of their party. Indeed, various party leaders supported Proposition 103 as a means of increasing voter participation without harming political parties. See 1998 PUBLICITY PAMPHLET, PROP. 103 at 27-29; cf. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) (Connecticut closed primary law violated Republican Party's First Amendment right of association where party rule allowed independents to vote). Moreover, by requiring Proposition 103 voters to designate a particular party for the purpose of voting in a primary, these voters are, in a sense, "affiliating" with the party, unlike the blanket primary voters in *Jones*. See *Jones* at 2409, n. 8.

Because Arizona's open primary law does not severely burden the rights of political parties, Arizona's law should be subject to the less stringent standard applied in *Timmons*, rather than the strict scrutiny used in *Jones*. Under *Timmons*, "important regulatory interests" justify reasonable, nondiscriminatory restrictions. *Timmons*, 520 U.S. at 358. Arizona's open primary promotes voter participation by extending voting rights to Proposition 103 voters. Arizona's open primary law also promotes fairness by ensuring that voters who help

pay for publicly-financed primaries are permitted to vote in the elections. In addition, the open primary promotes the legitimacy of the elections by ensuring that *all* registered voters have an opportunity to vote. Although the Supreme Court in *Jones* rejected some of these interests as justification for the blanket primary, the Court made it clear that the state interests must be analyzed, not in the abstract, but in the context of a specific law. These important -- even compelling -- state interests justify the burden that is placed on political parties through Arizona's narrow open primary law.

Conclusion

Because of the differences between Arizona's open primary law and California's blanket primary, the Supreme Court ruling in *Jones* does not invalidate Arizona's open primary law.

Janet Napolitano
Attorney General

1. For convenience, this Opinion refers to people registered as "no party preference," independents or members of parties that have not qualified for the ballot collectively as "Proposition 103 voters."
2. The Court rejected seven asserted state interests: (1) "producing elected officials who better represent the electorate;" (2) "expanding candidate debate beyond the scope of partisan concerns;" (3) ensuring "that disenfranchised persons enjoy the right to an effective vote;" (4) "promoting fairness;" (5) "affording voters greater choice;" (6) "increasing voter participation;" and (7) "protecting privacy." *Id.* at 2412-13. Rather than analyze these issues in the abstract, the Court analyzed the interests of fairness, voter choice, voter participation and privacy as "addressed by the law at issue." *Id.* at 2413.
3. According to the dissent, the district court indicated that three states had blanket primaries, 21 open primaries, and 8 "semi-closed" primaries in which independents may participate. *Jones* at 2420 (J. Stevens, dissenting).

To: Mr. F. William Griffeth

June 27, 2000

Chari Arizona State Governing Committee for
Tax Deferred Annuities and Deferred
Compensation Plans

Re: Indemnification of Members of the
Governing Committee for Tax Deferred
Annuities and Deferred Compensation
Plans

100-018
(R00-020)

Question Presented

You have asked whether members of the Governing Committee for Tax Deferred Annuities and Deferred Compensation Plans (the "Governing Committee") are covered by the State's self-insurance program for acts performed in the course and scope of their duties.

Summary Answers

Members of the Governing Committee are State officers or employees, and, therefore, they should be covered by the State's self-insurance program for acts performed in the course and scope of their duties on behalf of the Governing Committee.

Background

The Governing Committee is responsible for overseeing tax deferred compensation and annuity programs for State employees. A.R.S. § 38-871. Specifically, the Governing Committee:

- .investigates and approves tax deferred compensation and annuity programs;
- .enters into agreements with life insurance companies, bank trustees or custodians, and investment counseling firms;
- .arranges for consolidated billing and efficient administrative services to ensure that the tax deferred compensation and annuity programs operate with only incidental expense to the State;
- .arranges for financial and performance auditing of the programs; and
- .promulgates regulations concerning the solicitation of employees for deferred compensation and annuity programs.

Id.

The members of the Governing Committee include: (1) three State employees appointed by the Governor; (2) the Director of the Department of Administration ("DOA") or that person's appointee; (3) the Superintendent of the State Banking Department or that person's appointee; (4) the Director of Insurance or that person's appointee; and (5) the Director of the State Retirement System.

Your question concerns whether the State's self-insurance program covers members of the Governing Committee. DOA is required to "obtain insurance against loss, to the extent . . . necessary and in the best interests of the State." A.R.S. § 41-621(A). This statutory responsibility is met by the State's self-insurance program implemented by the Risk Management Division of DOA. See Arizona Administrative Code ("A.A.C.") R2-10-101 through 2-10-207.

Analysis

Under A.R.S. § 41-621(A)(3), the State's self-insurance program covers "the State and its departments, agencies, boards and commissions and all officers, agents and employees thereof and such others as may be necessary to accomplish the functions or business of the State and its departments, agencies, boards and commissions. . . ." State officers, agents and employees are covered for acts and omissions in the course and scope of their employment or authority. *Id.*

The term "State" as used in A.R.S. § 41-621 includes "the branches of state government and the respective offices, divisions, departments and entities into which state government is divided." See Ariz. Att'y Gen. Op. 190-009. Various factors determine whether an entity is a State department, agency, board, or commissions under A.R.S. § 41-621, including whether the entity: (1) is established by Arizona statute or constitution; (2) is controlled by the State, through one of its three branches (legislative, executive or judiciary); and (3) works for the State as a whole rather than for a limited constituency within the State. *Id.*

The term "officer" or public officer," means:

the incumbent of any office, member of any board or commission, or his deputy or assistant exercising the powers and duties of the officer, other than clerks or mere employees of the officer.

A.R.S. §38-101(3).

Similarly, an "employee" is:

an officer, director, employee or servant, whether or not compensated or part time, who is authorized to perform any act or service, except that employee does not include an independent contractor. Employee includes non-compensated members of advisory boards appointed as provided by law.

A.R.S. § 12-820.

Here, the Governing Committee is created by statute to perform specific functions related to the operation of State government. Therefore, the Governing Committee is a State entity covered by the State's self-insurance program, and the members of the Governing Committee are officers or employees within A.R.S. § 41-621. Thus, to the extent that members of the Governing Committee act within the course and scope of their employment or authorization for the Governing Committee and no exceptions for coverage apply, they should be covered by the State's self-insurance program.⁽¹⁾

The Risk Management Division of DOA determines who is covered under A.R.S. § 41-621, and to what extent they are covered on any particular claim. *Id.* If the Governing Committee, or any member, receives notice of a claim or is served with a lawsuit for any actions taken on behalf of the Governing Committee, the notice of claim or complaint and associated paperwork should be immediately referred to Risk Management as described in the applicable regulations. See A.A.C. R2-10-101 through 108; A.A.C. R2-10-201 through 207.

Conclusion

Because the Governing Committee is a State entity, and because members of the Governing Committee are State officers or employees, the members of the Governing Committee should be covered by the State's self-insurance program for acts or omissions in the course and scope of their duties performed on behalf of the Governing Committee. In the event that a claim is asserted against the Governing Committee or a member thereof, the claim information should be forwarded immediately to Risk Management for processing.

1. *See, e.g.*, A.R.S. § 41-621(L)(1) (excluding coverage for acts determined by a court to be a felony).

To: Dr. Philip E. Geiger

June 27, 2000
Re: Transfer of Students FIRST Funds by
State Treasurer

Executive Director Arizona School Facilities
Board

I00-017
(R00-030)

Questions Presented

You have asked the following questions about the duties of the State Treasurer to transfer funds to the School Facilities Board ("SFB"):

1. Should the references in Arizona Revised Statutes ("A.R.S.") § 42-5030.01(B) to instructions from the SFB to the State Treasurer pursuant to A.R.S. § 15-2002(A)(11) be read to refer to instructions that the SFB provides pursuant to A.R.S. § 15-2002(A)(10)?
2. Is an additional legislative appropriation necessary before the State Treasurer can transfer monies to the three Students FIRST funds as directed in A.R.S. § 42-5030.01(B)?

Summary Answers

1. The references in A.R.S. § 42-5030.01(B) to A.R.S. § 15-2002(A)(11) should be read to refer to A.R.S. § 15-2002(A)(10).
2. Existing law directs the State Treasurer to transfer the amounts calculated by the SFB and no additional legislative appropriation is necessary.

Background

The Adoption of Students FIRST.

Article XI, Section 1 of the Arizona Constitution requires the State to finance a general and uniform system of public education. *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994). The Arizona Supreme Court has held that to meet the constitutional obligation to provide a general and uniform school system: (1) the State must establish minimum adequate facility standards and provide funding to ensure that no district falls below them; and (2) the funding mechanism that the State chooses must not itself cause substantial disparities between school districts. *Hull v. Albrecht*, 192 Ariz. 34, 37, 960 P.2d 634, 637 (1998) ("*Albrecht II*"); *Hull v. Albrecht*, 190 Ariz. 520, 950 P.2d 1141 (1997) ("*Albrecht I*"). In response to the Supreme Court's decisions, the Legislature in 1998 enacted Students FIRST. This legislation created the SFB, which is responsible for administering the State's school capital funding program. After certain amendments were made to Students FIRST in July 1998, the Supreme Court ordered the then pending school finance litigation terminated because there were no further constitutional issues before the court. *Hull v. Albrecht*, No. CV-98-0238-SA (Sup. Ct. Ariz. July 20, 1998).

Under Students FIRST, the SFB is charged with establishing minimum adequacy standards for school facilities and distributing funds from three different sources to: (1) bring existing facilities up to standards (the "Deficiencies Correction Fund"); (2) maintain all facilities at the adequacy level (the "Building Renewal Fund"); and (3) construct new facilities for growing school districts (the "New School Facilities Fund").⁽¹⁾ To determine the amount of funding each school district is eligible to receive, the SFB generally must follow statutorily prescribed formulas. For example, to determine whether a school district has a square footage deficiency that would entitle the district to funds either from the Deficiencies Correction Fund or the New School Facilities Fund, the SFB must follow a formula that considers the amount of existing square footage in the district and the number of students served by the district. A.R.S. §§ 15-2011, -2041. To determine the amount of funding each school district is entitled to receive from the Building Renewal Formula, the SFB follows a statutory formula that considers the age of the school buildings, their square footage, and any completed building renovations. A.R.S. § 15-2031.

Two aspects of the use of the Students FIRST funds are not governed by statutory formulas: distributions from the Deficiencies Corrections Fund for conditions that fall below State standards and distributions from the New School Facilities Fund for the acquisition of land for new school sites. Nonetheless, the Legislature established statutory limits and guidelines concerning the amount of funds that the SFB can distribute for those two purposes. See A.R.S. §§ 15-2011 (eligibility for Deficiencies Correction Fund monies), -2041 (funding for land for new schools).

Transferring Funds to the Students FIRST Funds.

By December 1 of each even-numbered year, the SFB reports to the Joint Committee on Capital Review ("JCCR") the estimated amounts the SFB determines will be necessary to fulfill the requirements of the three Students FIRST funds for the following two fiscal years. ⁽²⁾ A.R.S. § 15-2002(A)(10). Section 15-2002(A)(10), A.R.S., requires the SFB to instruct the State Treasurer by January 1 of each year as to the amounts of the transaction privilege tax to be credited to the three Students FIRST funds in the following fiscal year. Under A.R.S. § 42-5030.01(B), the State Treasurer is required to annually credit to the Students FIRST Funds "the amount that the . . . [SFB] instructs the State Treasurer pursuant to section 15-2002, subsection A, paragraph 11."

Analysis

A. The Requirement in A.R.S. § 42-5030.01 to Transfer Funds Refers to the SFB's Instructions Pursuant to A.R.S. § 15-2002(A)(10), Despite the Mistaken Cross Reference to § 15-2002(A)(11).

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the Legislature. *Phoenix Newspapers, Inc. v. Superior Court*, 180 Ariz. 159, 161, 882 P.2d 1285, 1287 (App. 1993). To determine legislative intent, consideration must be given to the words, context, subject matter, effects and consequences, reason and spirit of the law. In addition, the statutory provisions must 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). Statutory interpretations that lead to absurd results which could not have been contemplated by the Legislature should be avoided. *Id.* at 177, 696 P.2d at 729. In applying these standards here, the references to A.R.S. § 15-2002(A)(11) in A.R.S. § 42-5030.01 should be read to refer to A.R.S. § 15-2002(A)(10) for two reasons.

First, interpreting the cross-reference to refer to paragraph 11 would lead to an absurd result. Section 42-5030.01 states that the State Treasurer is to credit amounts to the Students FIRST funds based on the SFB's instructions pursuant to paragraph 11 of 15-2002(A). However, paragraph 11 does not mandate the SFB to give the State Treasurer any instructions, but rather describes the SFB's obligations to set standards relating to the Arizona School for the Deaf and Blind. Instead, paragraph 10 of A.R.S. § 15-2002(A) refers to instructions from the SFB to the State Treasurer about the monies needed for the Students FIRST funds. Thus, the reference in A.R.S. § 42-5030.01 logically refers to paragraph 10, despite the incorrect reference to paragraph 11.

Second, when read in historical context, the cross-reference to paragraph 11 appears to be a simple mistake in drafting amendments to the statutes. When the Legislature added the reference to paragraph 11 in § 42-5030.01, paragraph 11 of A.R.S. § 15-2002(A) contained the language that is now in paragraph 10. See 1999 Ariz. Sess. Laws ch. 3, § 2 (passed with emergency clause and signed by the Governor on March 1, 1999). The error resulted when the Legislature deleted a paragraph from A.R.S. § 15-2002(A) so that former subsection 11 became current subsection 10. Those who drafted that change simply did not make the required corresponding change in the cross-reference in A.R.S. § 42-5030.01(B). See 1999 Ariz. Sess. Laws ch. 299, §32. The failure to later correct the cross reference in A.R.S. § 42-5030.01 to correlate with the renumbering of A.R.S. § 15-2002(A) does not undermine the Legislature's obvious intent to refer to subsection 10 instead of 11. See *Gates v. Arizona Brewing Co.*, 54 Ariz. 266, 271, 95 P.2d 49, 51 (Ariz. 1939) (in interpreting statute, court will use word obviously intended instead of word used by mistake).

B. The Legislature Has Authorized the State Treasurer to Credit Monies to the Students First Funds in the Amounts Calculated by the SFB.

To finance Students FIRST, the Legislature established a system in which the SFB calculates the amount needed for the next two fiscal years based on the formulas and standards the Legislature established for each of the three Students FIRST funds. A.R.S. § 15-2002(A)(10). By January 1 of each year, the SFB is to "instruct the state treasurer as to the amounts under the transaction privilege tax to be credited in equal quarterly installments for the following state fiscal year." *Id.* The SFB is required to provide advance notice to the JCCR, a legislative committee, and must provide the report it submits to the State Treasurer to the Speaker of the House of Representatives, President of the Senate, and the Governor, thereby ensuring continued legislative oversight of the school funding program.

The Legislature has expressly directed that "each fiscal year . . . the state treasurer shall credit" to the three Students FIRST Funds "state general fund revenues collected pursuant to this chapter [transaction privilege taxes] in the amount that the school facilities board instructs the state treasurer pursuant to § 15-2002, subsection A, paragraph 11." A.R.S. § 42-5030.01(B). This is a clear legislative directive for the State Treasurer to credit to the appropriate Students FIRST funds the amounts specified by the SFB. Thus, additional legislative action is not required for the Students FIRST funds to receive the necessary funding.

Some of the Students FIRST funds include language suggesting annual appropriations. For example, the statute governing the Deficiencies Correction Fund provides that "[t]his state shall annually appropriate monies to the deficiencies correction fund established in this section in order to correct existing deficiencies of all schools in this state by June 30, 2003." A.R.S. § 15-2021(F). In addition, the Building Renewal Fund statutes refer to the SFB's distribution of monies "appropriated by the legislature

from the building renewal fund to school districts. . . ." A.R.S. § 15-2031(E). However, each of the Students FIRST funds expressly provide that the funds consist of monies appropriated by the Legislature *and monies credited to the fund pursuant to 42-5030.01*. A.R.S. §§ 15-2021(A), -2031(A), -2041(A) (emphasis added). These statutes, therefore, clearly indicate that, although the Legislature may provide additional monies through specific appropriations, the funds are to receive the monies the Treasurer credits to the funds under A.R.S. § 42-5030.01, without additional legislative action. The Legislature has, in effect, already exercised its appropriation authority by structuring the statutes so that the Treasurer automatically credits monies to the Students FIRST Funds each year. See *Rios v. Symington*, 127 Ariz. 3, 8, 833 P.2d 20, 25 (1992) (specific funds created by Legislature constituted appropriations); *Winds v. Frohmler*, 38 Ariz. 557, 560, 3 P.2d 275, 276 (1931) ("no specific language is necessary to make an appropriation, for the test is . . . whether or not the people have expressed an intention that the money in question be paid").

Conclusion

The reference in A.R.S. § 42-5030.01(B) to paragraph 11 of A.R.S. § 15-2002(A) should be read to refer to paragraph 10 of that subsection. In addition, the Students FIRST legislation does not require an additional legislative appropriation in order for the State Treasurer to credit the three funds that are administered by the SFB.

Janet Napolitano
Attorney General

1. Collectively, these three funds are referred to as the Students FIRST funds.
2. By December 1 of each odd-numbered year, the SFB updates the JCCR on the estimated amounts the SFB believes will be necessary to fulfill the requirements of the three Students FIRST funds for the following fiscal year. A.R.S. § 15-2002(A)(10). JCCR is a committee of legislators, established by statute, that has responsibilities relating to State capital expenditures. See A.R.S. §§ 41-1251, -1252.

To: David K. Byers

June 22, 2000

Re: Surcharges on Monetary
Assessments Imposed for Juvenile
Offenses

Administrative Director of the Courts

100-016
(R99-063)

Questions Presented

Whether courts must assess and collect State penalty assessments (also known as surcharges) under Arizona Revised Statutes ("A.R.S.") §§ 12-116.01 and -116.02 on monetary assessments imposed for juvenile offenses.

Summary Answers

State penalty assessments under §§ 12-116.01 and -116.02 do not apply to monetary assessments imposed on juveniles for delinquent or incorrigible acts pursuant to A.R.S. §§ 8-341(G)(2)(I) or (J), or -321(F)(7). State penalty assessments, however, do apply to monetary assessments imposed against juveniles for: (1) driving under the influence; (2) civil or misdemeanor violations of motor vehicle statutes; (3) civil or misdemeanor violations of game and fish statutes; and (4) violations of local ordinances concerning parking, stopping, or standing.

Background

Arizona statutes require courts to impose and collect penalty assessments on: every fine, penalty and forfeiture imposed and collected by the courts for criminal offenses and any civil penalty imposed and collected for a civil traffic violation and fine, penalty or forfeiture for a violation of the motor vehicle statutes, for any local ordinance relating to the stopping, standing or operation of a vehicle or for a violation of the game and fish statutes in title 17.

A.R.S. §§ 12-116.01(A), -116.01(B), -116.02. Your opinion request asks about the application of the State penalty assessment to juvenile offenses. A.R.S. § 8-202(A). Juvenile offenses are generally denominated "delinquent acts" or "incorrigible acts." A "delinquent act" is defined as an act by a juvenile which if committed by an adult would be a criminal offense or a petty offense, a violation of any law of this state . . . or a violation of any law which can only be violated by a minor and which has been designated as a delinquent offense, or any ordinance of a city, county or political subdivision of this state defining crime.

A.R.S. § 8-201(10). An incorrigible juvenile is a child who "[c]ommits any act constituting an offense which can only be committed by a minor and which is not designated as a delinquent act." A.R.S. § 8-201(15)(e). Generally, if a juvenile court finds a juvenile to be delinquent, the court may order the juvenile "to pay a reasonable monetary assessment." A.R.S. § 8-341(G)(2). Similarly, a court may order an incorrigible child to pay a monetary assessment. A.R.S. § 8-341(I). Monetary assessments may also be imposed through diversion programs for juveniles accused of committing delinquent or incorrigible acts. A.R.S. § 8-321(F)(7).

The Legislature has also specifically addressed penalties and procedures for some juvenile offenses. Although the juvenile court has jurisdiction over civil traffic violations committed by juveniles, A.R.S. § 8-202(B), the presiding judge of a county may decline jurisdiction over these matters, and in those situations "juvenile civil traffic violations shall be processed, heard and disposed of in the same manner and with the same penalties as adult civil traffic violations." A.R.S. § 8-202(D). In addition, several offenses that are not classified as felonies may be heard by juvenile hearing officers designated by the presiding juvenile court judge. A.R.S. § 8-323(B). These include violations of Title 28, the "purchase, possession or consumption of spiritous liquor," violations of boating or game and fish laws, violations of "[a]ny city, town or political subdivision ordinance," and violations of curfew laws, truancy laws, laws against graffiti, and laws against possessing or purchasing tobacco. A.R.S. § 8-323(B). A juvenile who violates the above offenses may be ordered to pay "the monetary assessment or penalty that is applicable to the offense . . . plus lawful surcharges and assessments payable to the public agency processing the violation." A.R.S. § 8-323(E)(5). If no monetary assessment or penalty is specified, the juvenile may be ordered to pay "not more than one hundred fifty dollars plus lawful surcharges and assessments payable to the public agency processing the violation." A.R.S. § 8-323(E)(5).

Analysis

The State penalty assessments apply to financial penalties imposed for the following: (1) criminal offenses; (2) civil traffic violations; (3) violations of the motor vehicle statutes; (4) violations of any local ordinance relating to the stopping, standing, or operation of a vehicle; and (5) violations of the game and fish statutes in title 17. A.R.S. §§ 12-116.01(A), -116.01(B), -116.02(A). To determine whether the State penalty assessment applies to juvenile offenses, each category of offense subject to the penalty assessment

requires separate analysis.

1. Criminal Offenses

The Legislature did not expressly apply the State penalty assessments under §§ 12-116.01 and -116.02 to penalties assessed for delinquent acts or incorrigible acts. Even though delinquent acts include acts that would be criminal offenses if committed by an adult, A.R.S. § 8-201(10), an adjudication for a delinquent act is not a conviction for a criminal offense.⁽¹⁾ See A.R.S. § 8-207(A). Similarly, incorrigible acts are not criminal offenses. A.R.S. § 8-201(15). Therefore, juvenile adjudications are not criminal offenses subject to the State penalty assessments.

The language in the statutes governing juvenile adjudications further supports the conclusion that the State penalty assessments do not generally apply to these proceedings. The language in A.R.S. §§ 8-341(G)(2), (J) and (I), permits the court to order a "monetary assessment" for a juvenile adjudicated delinquent or incorrigible, but does not mention additional surcharges or assessments. *Cf. State v. Roscoe*, 185 Ariz 68, 71, 912 P.2d 1297, 1300 (1996) (when statute expressly includes certain items it excludes items not mentioned). Similarly, the language of A.R.S. § 8-321(F)(7) provides that juveniles who are diverted from prosecution may be ordered to pay monetary assessments for delinquent or incorrigible acts, but does not mention additional surcharges or assessments. For these reasons the State's surcharge on criminal offenses does not apply to juvenile proceedings.

2. Civil Traffic Offenses

The Legislature authorized the presiding judge of juvenile court to decline jurisdiction in civil traffic cases and, under these circumstances, juvenile civil traffic violations "shall be processed, heard and disposed of in the same manner and with the same penalties as adult civil traffic violations." A.R.S. § 8-202(D). This means that juveniles would be subject to the State penalty assessment, just as adult offenders are. See also A.R.S. § 28-121(C) (requiring the court to impose surcharges pursuant to A.R.S. §§ 12-116.01 and -116.02 on violations of title 28). In addition, civil traffic violations may be heard by designated juvenile hearing officers under A.R.S. § 8-323, and that statute expressly provides for payments of surcharges and assessments. A.R.S. § 8-323(E)(5). For these reasons, civil traffic violations committed by juveniles are subject to the State surcharges.

3. Violations of Motor Vehicle Statutes, Game and Fish Statutes and Certain Local Ordinances

The State penalty assessment also expressly applies to violations of motor vehicle statutes, game and fish statutes, and local ordinances concerning parking, stopping, or standing. See A.R.S. §§ 12-116.01, -116.02. If those violations involve civil offenses or misdemeanors, they are also subject to A.R.S. § 8-323, which authorizes designated hearing officers to hear certain civil and misdemeanor offenses committed by juveniles. Because A.R.S. § 8-323(E) expressly permits an order requiring a juvenile to pay the "lawful surcharges and assessments payable to the public agency processing the violation," the State penalty assessment applies to any offense within A.R.S. §§ 12-116.01, -116.02 that is also subject to A.R.S. § 8-323. Therefore, misdemeanor and civil violations by juveniles of motor vehicle statutes, game and fish statutes, and local ordinances concerning parking, stopping or standing are subject to the State surcharges. 4. Driving Under the Influence Offenses Subject to A.R.S. § 8-343

"Violations of motor vehicle statutes" that are subject to the State penalty assessment under A.R.S. §§ 12-116.01 and -116.02, include driving while under the influence offenses pursuant to A.R.S. §§ 28-1381, -1382, -1383. The Legislature has established specific requirements for juvenile adjudications for driving under the influence, and the statute governing those offenses provides that violators must pay "any applicable surcharges and assessments." A.R.S. § 8-343(D). Therefore, juvenile violators of A.R.S. §§ 28-1381, -1382, and -1383 are subject to the surcharge established in A.R.S. §§ 12-116.01 and -116.02.

Conclusion

Because delinquent or incorrigible acts are not criminal offenses, penalty assessments do not apply to monetary assessments ordered pursuant to most juvenile adjudications. However, the State penalty assessment applies to civil traffic violations, and misdemeanor or civil violations of the motor vehicle statutes, local ordinances relating to stopping, standing or parking vehicles, and game and fish statutes. The State penalty assessments also apply to juveniles adjudicated for driving under the influence.

Janet Napolitano
Attorney General

1. A juvenile prosecuted as an adult and convicted is subject to the penalty assessments because the case involves a "criminal offense." See A.R.S. §§ 8-327, 13-921 (criminal prosecutions of juveniles).

To: David K. Byers

June 22, 2000

Re: Surcharges on Local Administrative
Fees and Forfeitures

Administrative Director of the Courts

I00-015
(R99-045)

Questions Presented

You have asked whether municipal courts must assess and collect surcharges pursuant to Arizona Revised Statutes ("A.R.S.") §§ 12-116.01 and -116.02 on local administrative and case processing fees that a charter city imposes for parking violations.

Summary Answers

The entire amount a municipality assesses for a parking violation is subject to the State surcharges, regardless of the label a local jurisdiction places on the payment; therefore, a municipality must collect the State surcharge on local administrative and case processing fees imposed for parking violations.

Background

A. The State Surcharges on Fines, Penalties, and Forfeitures.

In 1968, the Arizona Legislature began imposing "penalty assessments," or surcharges, on specified fines, penalties, and forfeitures to generate revenue for various programs. 1968 Ariz. Sess. Laws ch. 209, § 1 (former A.R.S. § 41-1726) (10 percent penalty assessment on criminal fines, penalties, and forfeitures, to finance a peace officers' training fund). Over the years, the Legislature expanded the types of fines, penalties, and forfeitures subject to assessment, increased the amount of assessments, and diversified the matters financed by the assessments. See, e.g., 1982 Ariz. Sess. Laws ch. 330, § 3 (former A.R.S. § 41-2403) (increasing penalty assessment to 37 percent, financing the criminal enhancement fund). Assessments have also been increased by voter initiative. See A.R.S. § 16-954(C) (enacted by Proposition 200, as approved by voters in 1998 general election).

The penalty assessment generates revenue that supports various State programs. See A.R.S. §§ 16-954(C) (using penalty assessment to fund clean elections program for the public financing of certain campaigns), 41-2401(D) (allocating assessment money to the Department of Juvenile Corrections, the Peace Officers' Training Fund, the Prosecuting Attorneys' Advisory Council, the Arizona Supreme Court, the Department of Public Safety, the Department of Law, the Department of Corrections, the Arizona Criminal Justice Commission, the State General Fund and various other funds established by statute). The jurisdiction imposing the fine, penalty, or forfeiture is required to collect these State penalty assessments and transmit them to the State Treasurer for distribution to the various programs as directed by statute. A.R.S. §§ 12-116.01(G), (H), -116.02.

Currently, Arizona law requires penalty assessments totaling more than 75 percent on:

every fine, penalty and forfeiture imposed and collected by the courts for criminal offenses and any civil penalty imposed and collected for a civil traffic violation and fine, penalty or forfeiture for a violation of the motor vehicle statutes, for any local ordinance relating to the stopping, standing or operation of a vehicle or for a violation of the game and fish statutes in title 17.

A.R.S. §§ 12-116.01(A), (B), -116.02. In a recent case, *State of Arizona v. City of Phoenix*, CV 96-21242 (Maricopa County Super. Ct. Oct. 10, 1999), the superior court determined that these penalty assessments apply to local parking violations.

B. Administrative Fees Imposed by Charter Cities.

In 1995, this Office concluded that charter cities may establish fees to be collected by city courts, if their charters or ordinances authorize them to do so. Ariz. Att'y Gen. Op. 195-018. Thus, a charter city may denominate as a fee a portion of the money collected for parking infractions and use the fee as directed by the city's charter. Although charter cities may establish court fees, if so authorized by their charters or ordinances, other cities and towns generally cannot because the Legislature has not authorized them to do so. *Id.*

Analysis

Legislative language "is the best and most reliable index of a statute's meaning." *State v. Jones*, 188 Ariz. 388, 392, 937 P.2d 310, 314 (1997). The Legislature imposed the state penalty assessment on every "fine," "penalty," or "forfeiture" imposed as a result of

specified civil or criminal violations. A.R.S. §§ 12-116.01, -116.02. Although the relevant statutes do not define the terms "fine," "penalty," or "forfeiture," when terms are undefined in statute they should be given their natural and obvious meanings. *Jones*, 188 Ariz. at 392, 937 P.2d at 314.

The Arizona Supreme Court has described a fine as "a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor." *Frazier v. Terrill*, 65 Ariz. 131, 136, 175 P.2d 438, 441 (1946). A penalty has been described as "an elastic term with many different shades of meaning involving the idea of punishment, corporal or pecuniary, or civil or criminal, although its meaning is generally confined to pecuniary punishment." *Chalmers v. City of Tucson*, 171 Ariz. 162, 164, 829 P.2d 846, 848 (App. 1991) (citing *Allred v. Graves*, 134 S.E.2d 186 (1964)). Consistent with these descriptions, Webster's Dictionary defines the terms fine, penalty and forfeiture as follows:

fine . . . a sum . . . imposed as punishment for a crime -- distinguished from forfeiture or penalty.

forfeiture . . . something (as property or money) lost as a forfeit [misdeed, crime, harm].

penalty . . . punishment for crime or offense . . . a sum of money recoverable by the state . . . for the less serious offense *no mala in se*.

Webster's Third International Dictionary 852, 891, 1668 (1993).

The use of the phrase "every fine, penalty and forfeiture" suggests that the Legislature intended the surcharge to apply broadly to the amounts owed as a result of certain violations of the law. The amount generally assessed for violating a local parking ordinance falls squarely within this concept, regardless of whether part of the amount is labeled an "administrative fee." Indeed, traffic fines often are used to defray certain administrative costs associated with the violation. See *State v. Walker*, 159 Ariz. 506, 508, 758 P.2d 668, 670 (App. 1989) (characterizing monetary consequences of traffic infractions as "remedial civil sanctions . . . to defray the enforcement costs of investigating, monitoring and prosecuting civil lawbreakers"). Thus, whether a jurisdiction labels the amount a violator must pay a "fine" or an "administrative fee" does not affect the calculation of the State surcharge.

In some contexts, courts have distinguished moneys paid as penalties from certain administrative fees. Specifically, the time payment fee the Legislature imposed on a penalty, fine, or sanction is procedural and is not a penalty for the purposes of determining whether the prohibition against ex post facto application of laws applies. *State v. Weinbrenner*, 164 Ariz. 592, 593, 795 P.2d 235, 236 (App. 1990). In reaching this conclusion, the court noted that the time-payment fee benefits defendants "who cannot afford to pay their penalties up front, by providing a mechanism through which the privilege of payment over time can be exercised." *Id.* at 594, 795 P.2d at 237. Following this reasoning, administrative fees that, like the time payment fee, are related to a specific service a particular defendant may receive are distinguishable from an administrative fee that is routinely assessed based on a violation of law. Cf. *State v. Beltran*, 170 Ariz. 406, 408, 825 P.2d 27, 29 (App. 1992) (surcharge on criminal fine subject to ex post facto prohibition).

The purpose of the surcharge statute further supports the conclusion that the entire amount owed is subject to the surcharge, regardless of the label. See *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994).⁽¹⁾ The State penalty assessments also generate revenue for specified State programs. If the label governed the calculation of the State penalty assessment, charter cities could, if authorized by their charters or ordinances, impose small fines and separate amounts for administrative expenses to drastically reduce the State penalty assessment. An undue emphasis on labels would undermine the Legislature's effort to broadly impose penalty assessments on monies collected for specified violations. It could also result in inconsistent application of the penalty assessment in different jurisdictions because some jurisdictions have the ability to impose separate administrative fees but others do not. Thus, whether a city imposes a single amount labeled a "fine" that punishes the person for a parking violation and also covers related administrative expenses or instead imposes a small fine, in addition to a separate administrative fee, does not affect the calculation of the penalty assessment.

In sum, based on the broad statutory language and the purpose of the penalty assessment statutes, municipal courts must collect the penalty assessment on local administrative fees generally imposed for parking violations. However, they need not collect the penalty assessment for administrative fees that pay for specific services and are not assessed for every violation, such as, for example, a late payment fee or dishonored check fee.

Conclusion

The State penalty assessment applies to all amounts generally collected for a parking violation, regardless of the label. Thus, municipal courts must assess and collect State penalty assessments on administrative or case processing fees that are routinely collected along with amounts designated as the fine.

Janet Napolitano
Attorney General

1. Under federal bankruptcy law, a debt for a "fine, penalty, or forfeiture" is non-dischargeable provided that it is "payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss" 11 U.S.C. § 523(a)(7). In that context, "fine, penalty or forfeiture" has been broadly interpreted to further the purpose of the bankruptcy laws. *See, e.g., Kelly v. Robinson*, 479 U.S. 36, 54-55 (1986) (concluding fine, penalty or forfeiture includes restitution); *In re Thompson*, 16 F.3d 576 (4th Cir. 1994) (fine, penalty, or forfeiture includes prosecution costs in a criminal case); *Williams v. Motley*, 925 F.2d 741, 745 (4th Cir. 1991) (fine, penalty, or forfeiture includes a fee on uninsured motorists to defray administrative costs for serving notice).

To: The Honorable Jack A. Brown

June 22, 2000

Re: Senate Confirmation of Public
Officers Nominated by the Governor

Minority Leader, Arizona State Senate

I00-014
(R97-036)

Questions Presented

Arizona Revised Statutes ("A.R.S.") § 38-211 governs the nomination of State officers who require Senate confirmation. The statute provides that "in no event" shall a nominee serve longer than one year without Senate confirmation. You have asked whether this one-year limitation applies to an officer whose term has ended and who has been renominated by the Governor for an additional term, but who has not yet received Senate confirmation.

Summary Answers

The one-year limitation in A.R.S. § 38-211(E) applies to a public officer who is renominated by the Governor to serve an additional term. Thus, an officer who is renominated must leave office if the Senate does not confirm that nomination within one year from the date of renomination.

Background

Section 38-211, A.R.S., describes the requirements relating to Senate confirmation of public officers who are appointed by the Governor. This process typically applies to the heads of State agencies and members of State boards and commissions. See, e.g., A.R.S. § 41-2803(A) (director of the Department of Juvenile Corrections); A.R.S. § 37-285(C) (grazing land valuation commission members).⁽¹⁾

An appointment subject to A.R.S. § 38-211 is not complete until the Senate has consented. See *McCall v. Cull*, 51 Ariz. 237, 244-45, 75 P.2d 696, 699 (1938) (when a position requires the Governor's nomination and the Senate's consent, the nominee is not legally entitled to the office until the Senate confirms the appointment). The Legislature has, however, specified certain situations in which a nominee may begin to perform the duties of an office while awaiting Senate confirmation. For example, if the outgoing incumbent is unable to continue in office, the nominee must assume and discharge the duties of the office pending Senate confirmation. A.R.S. § 38-211(B). In addition, if an office is vacant and the Senate does not act on a nomination made during a regular session of the Legislature, the nominee is entitled to serve in an interim or acting capacity subject to confirmation during the next legislative session. *Id.* Although nominees may, under some circumstances, begin serving while awaiting confirmation, the Legislature has provided that "in no event shall a nominee serve longer than one year after nomination without [S]enate consent." A.R.S. § 38-211(E).

A separate but related statute, A.R.S. § 38-295, requires an incumbent officeholder whose term has expired to continue to discharge his or her duties until a successor has been properly confirmed and appointed. This statute seeks to prevent vacancies by having someone always in the office to discharge its duties. *Graham v. Lockhart*, 53 Ariz. 531, 536, 91 P.2d 265, 267-68 (1939).

When the Governor renominates an incumbent for another term in the same office, the incumbent is both a holdover under A.R.S. § 38-295 and a nominee under A.R.S. § 38-211 ("holdover nominee"). Your question concerns the application of the one-year time limit in A.R.S. § 38-211(E) to a holdover nominee.

Analysis

A. All Unconfirmed Nominees for Public Office, Including Holdover Nominees, Are Limited to One Year in Office from the Date of the Nomination or Renomination.

Under A.R.S. § 38-211(E), "*in no event* shall a nominee serve longer than one year after nomination without [S]enate consent." (Emphasis added.) Although § 38-211 does not define "nominee" or "nomination," terms that a statute does not specifically define are to be given their ordinary meaning. A.R.S. § 1-213; *Sierra Tucson, Inc. v. Pima County*, 178 Ariz. 215, 219, 871 P.2d 762, 766 (App. 1994). The ordinary meaning of "nominee" is "a person named or proposed for an office, duty, or position." Webster's Third New International Dictionary 1535 (1993).⁽²⁾ "To nominate" means "to propose by name for office as a preliminary to appointment upon approval or confirmation by some person or body." *Id.* at 1534-35. "To renominate" an individual for a term of office means "to nominate again or anew, especially for a term of office in immediate succession." *Id.* at 1922. Under these definitions, when the Governor nominates a person for a particular office, that person is a "nominee" within the meaning of A.R.S. § 38-211(E) even if the person has already completed a term in the same office.

In addition, the Legislature expressly made the holdover statute, A.R.S. § 38-295, subject to the requirements of § 38-211. Section 38-295(B), A.R.S., provides:

Every officer shall continue to discharge the duties of the office, although the term has expired, until a successor has qualified. The discharge of the duties of office for appointments requiring Senate confirmation shall be governed by § 38-211.

Thus, holdover nominees are subject to the one-year limitation in A.R.S. § 38-211(E). The statutory language does not support a contrary conclusion that would permit a holdover nominee to discharge the duties of an office indefinitely pending Senate confirmation, while a first-time nominee would be limited to one year.⁽³⁾ Although the Legislature could have differentiated between first-time nominees and people who are renominated, it did not. Instead, by the specific terms of A.R.S. §§ 38-295 and -211(E), the Legislature limited all nominees to one year of interim service in office pending Senate confirmation. Therefore, where the Senate fails to act on a gubernatorial nomination (or renomination) within one year, the nominee's authority and duty to serve in office ceases and the position becomes vacant. See A.R.S. § 38-291(11) ("An office shall be deemed vacant from and after the . . . [f]ailure of a person to be elected or appointed to the office").

B. The Historical Development of the Statutes Governing the Nomination and Appointment Process Supports the Conclusion That A.R.S. § 38-211(E) Applies to Holdover Nominees.

In your opinion request, you asked if the Legislature's 1989 amendments affect the application of the one-year time limit to holdover nominees. The legislative history, including the 1989 amendments, further indicates that the one-year limit applies to holdover nominees. *Cf. Brodsky v. Phoenix Police Department Retirement Sys. Bd.*, 183 Ariz. 92, 95, 900 P.2d 1228, 1231 (App. 1995) (statute's history and development may help determine statute's current meaning).

In 1978, the Legislature added a one-year limitation to both §§ 38-211(B) and -295(B). See 1978 Ariz. Sess. Laws ch. 81, §1 and 2. Section 38-295(B) then read as follows:

Every officer shall continue to discharge the duties of the office, although the term has expired, until a successor has qualified. *If the officer is presently serving in the position to which nominated and the Senate rejects such nomination or fails to take formal action within one year of submission of such nomination, such officer will no longer be allowed to serve and the position shall immediately be declared vacant.*

Id. (emphasis added). The language added to § 38-211(B) in 1978 provided that a nominee shall not "serve longer than one year after nomination without Senate confirmation." *Id.* This Office construed the one-year

time limit in A.R.S. § 38-211 as applying to those nominees who had not held the office in question immediately before being nominated and the one-year time limit then in A.R.S. § 38-295 as applying to holdover nominees. See Ariz. Att'y Gen. Op. I84-042.

In 1989, the Legislature again amended both A.R.S. § 38-211 and A.R.S. § 38-295. 1989 Ariz. Sess. Laws ch.250, §§ 4, 5. Those amendments maintained the one-year time limit in A.R.S. § 38-211. *Id.* §4. The Legislature also deleted the one-year limitation in A.R.S. § 38-295, but added language to that statute making it clear that appointees subject to Senate confirmation are governed by A.R.S. § 38-211. *Id.* §5. Thus, the 1989 amendments consolidated the one-year time limits that had been in separate but related statutes into the one-year time limit in A.R.S. § 38-211(E). See ARIZONA HOUSE OF REPRESENTATIVES COMMITTEE ON GOVERNMENT OPERATIONS, BILL SUMMARY FOR SB 1311, 39th Legis., 1st Reg. Sess. (1989) (noting bill conformed the procedures in A.R.S. § 38-295 to those in A.R.S. § 38-211 for appointments requiring Senate confirmation). In sum, the history of A.R.S. §§ 38-211 and -395 demonstrates that the Legislature intended these two statutes to be read together, and that holdover nominees, which before 1989 had been governed by a one-year limit found in A.R.S. § 38-295, are now subject to the one-year limitation in A.R.S. § 38-211.

Conclusion

By its terms, A.R.S. § 38-211(E) limits the length of service of any unconfirmed nominee to one year after nomination. A holdover nominee whom the Governor has renominated for an additional term in office is a nominee within the meaning of § 38-211(E) and is therefore prohibited from continuing to serve for more than one year from the date of his or her renomination, absent Senate confirmation.

Janet Napolitano
Attorney General

1. Because you have asked about incumbents holding over past the expiration of their terms, this Opinion focuses upon those officials with terms of office specified by law.
2. For statutory construction purposes, "[a] dictionary may define a word's natural and obvious meaning." *State v. Jones*, 188 Ariz. 388, 392, 937 P.2d 310, 314 (1997).
3. Note, however, that because § 38-211(E)'s one-year limitation only begins when a person is renominated, a holdover who automatically continues in office pursuant to § 38-295(B) for a time before being renominated may legally continue in office for more than a year after his or her term expires.

To: Candyee B. Pardee

June 20, 2000

Re: Decisions Concerning Relatives of
School Board Members

Chief Dupty County Attorney
Gila County Attorney

100-013
(R00-026)

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), this Office revises the opinion you prepared for the superintendents of the Hayden-Winkelman School District No. 41 and the Young Public School District No. 5.

Questions Presented

1. Whether a school board member may participate in filling a secretarial position for which his or her first cousin has applied. ⁽¹⁾
2. Whether a school board member may vote on budgetary issues related to his or her child who works as a teacher's aide within the district.

Summary Answers

1. A school board member may participate in filling a secretarial position for which his or her first cousin has applied.
2. For reasons unique to school district governing board members, a school district governing board member may participate in budgetary decisions regarding that board member's child who is employed by the district, unless the child is a dependent as defined in A.R.S. § 43-1001. If the child of the governing board member is the board member's "dependent," then the board member must not participate in any decisions in which the child has a substantial interest.

Background

In both the Hayden-Winkelman School District and the Young Public School District, questions have arisen concerning the application of Arizona's conflict of interest laws and anti-nepotism laws to various decisions that involve school board members who have relatives who either are employed by the school district or are seeking employment in the school district. In one situation, for example, an applicant for a secretarial position is the first cousin of a board member. In another, a school board member's child works as a teacher's aide in the district.

Under Arizona's anti-nepotism statute, it is unlawful

for an executive, legislative, ministerial or judicial officer to appoint or vote for appointment of any person related to him by affinity or consanguinity within the third degree to any clerkship, office, position, employment or duty in any department of the State, district, county, city or municipal government of which such executive, legislative, ministerial or judicial officer is a member, when the salary, wages or compensation of such appointee is to be paid from public funds or fees of such office. . . .

A.R.S. § 38-481.

In addition to the anti-nepotism statute, which applies to hiring decisions, the conflict of interest statutes further limit the involvement of public officers or employees in decisions affecting relatives. See *generally* A.R.S. §§ 38-501 through -511. In general, the conflict of interest statutes apply to decisions in which a public officer or employee or his or her relative has a "substantial interest." A.R.S. § 38-503(A), (B). A

substantial interest is "any pecuniary . . . interest, either direct or indirect, other than a remote interest." A.R.S. § 38-502(11). The statute lists ten qualifying "remote interests." A.R.S. § 38-502(10). When a substantial interest exists, the public officer or employee must disclose the interest in the manner specified in statute and refrain from voting or otherwise participating in any manner in the matter. A.R.S. §§ 38-502(3), -503(A), (B) The relatives subject to the conflict of interest statutes generally include: "the spouse, child, child's child, parent, grandparent, brother or sister of the whole or half blood and their spouses and the parent, brother, sister or child of a spouse." A.R.S. § 38-502(9). For school board members, however, the Legislature has provided that a "remote interest" includes "that of a public school board member when the relative involved is not a dependent, as defined in § 43-1001, or a spouse." A.R.S. § 38-502(10)(h). Under A.R.S. § 43-1001, "dependent" has "the same meaning as prescribed by § 152 of the Internal Revenue Code."⁽²⁾

In addition, in Title 15, the Legislature has established other requirements unique to school district governing board members. For example, the Legislature has prohibited any dependent, as defined in A.R.S. § 43-1001, of a governing board member from being employed in that school district, "except by consent of the board." A.R.S. § 15-502(C). Also, "no employee of a school district or the spouse of such employee may hold membership on a governing board of a school district by which such employee is employed." A.R.S. § 15-421(D). The Legislature also provided:

Notwithstanding any other provision of law, a governing board member is eligible to vote on any budgetary, personnel or other question which comes before the board, except:

1. It shall be unlawful for a member to vote on a specific item which concerns the appointment, employment or remuneration of such member or any person related to such member who is a spouse or a dependent as defined in § 43-1001.
2. No member may vote on the employment of a person who is a member of the governing board or who is the spouse of a member of the governing board and whose membership on the board and employment are prohibited by § 15-421, subsection D.

A.R.S. § 15-323(A).

Analysis

A. A School Board Member May Participate in Decisions Relating to Hiring a Relative, Unless the Relative Is the Board Member's Spouse or Dependent.

For most public officers in Arizona, the anti-nepotism statute governs whether they may participate in decisions to hire or appoint relatives. A.R.S. § 38-481. That statute prohibits any "executive, legislative, ministerial or judicial officer" from being involved with decisions to hire or appoint a relative within the third degree of consanguinity or affinity.⁽³⁾ *Id.* The term "executive, legislative, ministerial or judicial officer" includes

all officials of the state, or of any county or incorporated city within the state, holding office either by election or appointment, and the heads of the departments of state, county or incorporated cities, officers and boards of managers of the universities.

A.R.S. § 38-481(C).

Until 1977, the anti-nepotism statute included "public school trustees" as officers subject to the anti-nepotism statute, but in that year the Legislature struck "public school trustees" from the statute and adopted different restrictions for school board members. See 1977 Ariz. Sess. Laws ch. 164. These restrictions applicable to

school board members are now found in A.R.S. § 15-323, and under that statute a school board member may vote on any hiring decision, unless it involves that board member's spouse (who, under A.R.S. § 15-421(D), cannot be employed by the district) or a dependent of that board member (and dependents may only be employed by the district with board approval under A.R.S. § 15-502(C)). See Ariz. Att'y Gen. Op. I85-006 (concurring in county attorney opinion that school board member is not precluded from participating in an employment decision regarding a relative who is neither the spouse nor a dependent of the member). Thus, a school board member may participate in hiring decisions that involve that board member's first cousin.⁽⁴⁾

B. A School Board Member May Participate in Decisions Concerning the Salary of a Child Who Is Employed by the District, Unless the Child Is a Dependent as Defined in A.R.S. § 43-1001.

A public officer's participation in compensation decisions is governed by the conflict of interest statutes, A.R.S. §§ 38-502, -503. These statutes prohibit public officials from participating in decisions in which a relative covered by these statutes has a substantial interest. *Id.*

A "substantial interest" is "any pecuniary or proprietary interest, either direct or indirect, other than a remote interest." A.R.S. § 38-502(11). A "remote interest" includes "that of a public school board member when the relative involved is not a dependent, as defined in § 43-1001, or a spouse." A.R.S. § 38-502(10)(h).⁽⁵⁾ This is consistent with the language in A.R.S. § 15-323(A), which allows school board members to participate "on any budgetary, personnel or other question" unless it involves a spouse or dependent. A.R.S. § 15-323(A). Therefore, under A.R.S. §§ 15-323 and 38-502(10)(h), a school board member may participate in salary decisions concerning his or her child who is employed by the district, unless that child is the board member's dependent.

Conclusion

A school district governing board member may participate in decisions that involve hiring or compensating a relative, unless that relative is a spouse or dependent.

Janet Napolitano
Attorney General

1. Your opinion also addressed this issue with regard to a second cousin and a grand niece of board members. Although this Opinion focuses on first cousins, the same analysis applies to the other relatives.
2. The Internal Revenue Code defines "dependent" as "any individual [listed in the statute] over half of whose support, for the calendar year . . . , was received from the taxpayer . . ." IRC § 152(a).
3. As you correctly noted in your opinion, for the purposes of the anti-nepotism statute, the civil law method applies to determine the degree of relationship. See *Graham County v. Buhl*, 76 Ariz. 275, 263 P.2d 537 (1953). This calculation begins with the relative in question, traces up to the common ancestor and then back down to the public official. Using this method, first cousins are related to the fourth degree, which is outside the anti-nepotism statute. See A.R.S. § 38-481.
4. Although your opinion reached the same conclusion by relying on the anti-nepotism statute, this Opinion revises the analysis to apply the more specific A.R.S. § 15-323(A).
5. The Legislature added this provision specifically applicable to school board members to the definition of "remote

interest" in the same 1977 legislation that amended the anti-nepotism statute to eliminate the reference to "public school trustees." *See* 1977 Ariz. Sess. Laws ch. 164.

To: Donald M. Peters

May 17, 2000

Re: Special Education Services For
Home-Schooled Students

Miller, LaSota & Peters, P.L.C.

I00-012
(R00-015)

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), you submitted for review an education opinion you provided to the Scottsdale Unified School District No. 48 ("District"). This Office concurs with your conclusion that a school district is not required to provide special education services to home-schooled student and issues this Opinion to provide guidance to others concerning this subject.

Question Presented

Is a school district required to provide special education services to home-schooled students who reside within the district's boundaries?

Summary Answers

Neither Federal nor State law requires Arizona school districts to provide special education services to home-schooled students.⁽¹⁾

Background

Under the Individuals with Disabilities Education Act ("IDEA"), the federal government provides funding to states for the education of students with disabilities. See 20 U.S.C. §§ 1400 -1412. Congress enacted the IDEA, in part, "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. . . ." 20 U.S.C. § 1400(d)(1)(A). To qualify for federal funding under the IDEA, states must meet various federal requirements that relate to the IDEA's purpose of ensuring the availability of free appropriate public education for children with disabilities. 20 U.S.C. § 1412. The federal requirements include, for example, establishing "child find" programs to identify, locate and evaluate children with disabilities, developing individualized education programs for children with disabilities, and educating children with disabilities "[t]o the maximum extent appropriate" with children who are not disabled. 20 U.S.C. §§ 1412(a)(3)-(5). Arizona receives funding under the IDEA, and, therefore, this State must comply with that law's requirements. In addition, Arizona law expressly incorporates IDEA requirements. See, e.g., A.R.S. §§ 15-235(F), -744(11), (27), (28), -766(E).⁽²⁾

Consistent with the IDEA, Arizona law requires that public schools -- district schools and charter schools -- provide special education services to children with disabilities. See, e.g., A.R.S. §§ 15- 183(E)(7) (requiring charter schools to comply with state and federal laws regarding special education services for children with disabilities), -764 (establishing requirements concerning special education services in school districts). Public schools must provide special education services "at no cost to the parents of children with disabilities." A.R.S. § 15-763. The statutory formula for determining the amount of State aid a district receives includes weights for students with disabilities, thus providing increased State funding for students with disabilities enrolled in public schools. A.R.S. §§ 15-901(2)(a), -943, -971.

The District's question concerns its obligations under these State and federal laws with regard to children who reside in the district but are home-schooled. Under Arizona law, parents have the choice of sending their children to public or private schools, or providing an education to their children in a home-school setting. See A.R.S. § 15-802. Several parents home schooling their children have requested that the District provide their children special education services, but these children are not enrolled in the District.

Analysis

Neither the IDEA nor its regulations address services to home-schooled children. See 20 U.S.C. § 1400 - 1412; 34 C.F.R.Pt. 300. In contrast, the IDEA has specific provisions regarding services for students with disabilities enrolled in private schools. See 20 U.S.C. § 1412(a)(10); 34 C.F.R. § 300.450. In 1999, the United States Department of Education clarified the rights of home-schooled children under the IDEA in the following comment published in the *Federal Register*:

Definition of "Private School Children with Disabilities"

Comment: Several commenters asked that the Department clarify whether children with disabilities who are home-schooled are included in the definition of "private school children with disabilities."

Discussion: State law determines whether home schools are "private schools." If the State recognizes home schools as private schools, children with disabilities in those home schools must be treated in the same way as other private school children with disabilities. If the State does not recognize home schools as private schools, children with disabilities who are home-schooled are still covered by the child find obligations of SEAs [State Educational Agencies] and LEAs [Local Educational Agencies], and these agencies must insure that home-schooled children with disabilities are located, identified and evaluated, and that FAPE [free appropriate public education] is available if their parents choose to enroll them in public schools.

64 Fed. Reg. 12602 (1999) (discussing 34 C.F.R. § 300.450). Thus, if State law recognizes home schools as private schools, the IDEA provisions that apply to private schools also apply to home-schooled children. Arizona law, however, does not recognize "home-schools" as "private schools." Section 15-802(F), A.R.S., defines "home school" and "private school" separately:

1. "Home school" means a school conducted primarily by the parent, guardian or other person who has custody of the child or instruction provided in the child's home.
2. "Private school" means a nonpublic institution, *other than the child's home*, where academic instruction is provided for at least the same number of days and hours each year as a public school. (emphasis added).

Because, under Arizona law, home schools are not private schools, the IDEA provisions regarding students with disabilities in private schools do not apply to home-schooled students, and nothing in the IDEA requires a school district to provide special education services to home-schooled students residing within the district's boundaries.⁽³⁾

Although school districts are not required, under federal law, to provide special education services to home-schooled children, districts are required to identify, locate and evaluate children with disabilities within their district. 20 U.S.C. § 1412(a)(3)(A)(child find obligations). If, however, parents choose to home-school their children, rather than enroll them in a public school, federal law does not require that the school districts provide special education services to those children.

Similarly, Arizona law does not require districts to provide special education services to children who are home-schooled. The district must "[p]rovide special education and related services for all children with disabilities and make such programs and services available to all eligible children with disabilities who are at least three . . . but less than twenty-two years of age." A.R.S. §15-764(A)(1). In addition, the district must develop "policies and procedures for providing special education to all children with disabilities within the district. . . ." A.R.S. § 15-763. These statutes require districts to make available special education services and to have procedures for providing these services to the children in their district, but they do not require districts to provide special education services to children who are home-schooled. When the Legislature has intended home-schooled children to participate in district programs, it has done so expressly. *Cf.* A.R.S. §

15-802.01 (eligibility of home-schooled children to participate in interscholastic activities). The Legislature has not required that school districts provide home-schooled children with special education services if those children are not enrolled in the district.

The funding under both the IDEA and State law also supports the conclusion that districts are not required to provide special education services to home-schooled children. Although federal law provides funding, under certain circumstances, to students in private schools, it provides no funding for home-schooled children (unless, unlike Arizona, a home school is considered a private school). Similarly, State education funding is based on enrollment -- only children enrolled at the public school at least one-quarter time are included in the funding calculation. See A.R.S. §§ 15-769, 901(2)(a), -943, -971. Therefore, districts receive no funding to provide special education services to children who are home-schooled. Although State law does not prohibit districts from providing special education services to children who are not enrolled in the district, State law neither requires nor funds such services. See Ariz. Att'y Gen. Op. 184-085 (district may provide special education services to child not enrolled in district).

Conclusion

Under federal and Arizona law, a school district must provide special education services for students with disabilities enrolled in the district schools. School districts are not statutorily required, and do not receive funding, to provide such services to home-schooled students who reside in the district but are not enrolled in its schools.

Janet Napolitano
Attorney General

1. Your opinion also addressed whether, if districts must provide special education services to home-schooled children, the State of Arizona must provide funding for those services. Because this Opinion concludes districts are not required to provide special education services to home-schooled children, this Opinion does not address the funding issue.
2. The Legislature amended many of the statutes regarding special education in 2000 Ariz. Sess. Laws, ch. 236, which passed with an emergency clause. This Opinion refers to the statutes as amended in this recent legislation.
3. The IDEA does not require a school district to pay the cost of providing special education services to a child with disabilities attending a private school if the district "made a free appropriate public education available to the child and the parents elected to place the child in . . . [the] private school or facility." 20 U.S.C. § 1412(a)(1)(C)(i). Thus, even if State law treated home schools as private schools, district schools would not necessarily be required to provide special education services to all home-schooled children under the IDEA.

To: A. Hal Key, Jacqueline E. Schafer

May 9, 2000

Uniform Plumbing Code Commission

Re: State Plumbing Code

Arizona Department of Environmental Quality

100-011
(R00-006)

Question Presented

You submitted a joint opinion request asking the following:⁽¹⁾

1. Enforcement. What board, department or agency administers and enforces the State Plumbing Code ("Code"); whether the Arizona Department of Environmental Quality ("ADEQ")

has authority to administer or enforce the Code; and whether a city, town or county may enforce the Code without a delegation from ADEQ pursuant to Arizona Revised Statutes ("A.R.S.") §§ 49-106 or -107.

2. Relationship Between Code and ADEQ-Administered Laws. Whether the Code or an ordinance adopting the Code pre-empts or supersedes any laws ADEQ administers; and whether the Code can conflict with other State or local laws that address the same subject.

3. Authority of the Arizona Uniform Plumbing Code Commission ("Commission").

Whether the Commission's authority extends to:

(a) the types of wastewater and reclaimed wastewater systems covered by Appendices G, I and J of the 1994 Uniform Plumbing Code ("UPC");

(b) evaluation of site conditions and testing and evaluation of soil absorption characteristics in connection with the design and siting of systems for sewage treatment and effluent disposal to ensure environmental protection;

(c) adoption of locational setbacks established for the purpose of ensuring environmental and public health protection from the discharge of an on-site wastewater treatment and disposal system; and,

(d) selection of an on-site wastewater treatment and disposal system to ensure environmental protection when the site and soil conditions do not allow the installation of a private sewage disposal system in accordance with the specific standards provided in Appendices G or I.

4. Adoption of Local Ordinances. Whether municipalities and counties have a deadline for adopting the Code by ordinance.

5. Variances. What procedures cities, towns or counties must follow to grant variances to the Code; whether variances are limited in any way by laws administered and enforced by ADEQ; and whether the Commission can authorize ADEQ to grant variances to the Code.

Summary Answers

1. Enforcement. Municipalities and counties enforce the Code. No State agency, including ADEQ, may enforce the Code. Local governments do not need a delegation of authority from ADEQ to enforce the Code.

2. Relationship Between the Code and ADEQ-Administered Laws. The Code does not supersede any laws ADEQ administers. The Code must be read in conjunction with other legal requirements.
3. Scope of Commission's Authority. The Commission's statutory authority extends to any subject in the UPC. The Commission may modify UPC provisions as it deems appropriate.
4. Deadline for Adopting Local Ordinances. Municipalities and counties should adopt the Code as an ordinance within six months after adoption by the Commission.
5. Variances. A city, town, or county may grant variances to the Code on an individual project basis. Any variances must be consistent with all other applicable laws. The Commission does not have the authority to allow ADEQ or any other State agency to grant variances to the Code.

Background

In 1997, the Legislature established the Commission to "promote statewide, uniform plumbing standards." 1997 Ariz. Sess. Laws ch. 112, § 6 (the "Act"). The Legislature required the Commission to adopt the Code through the State rule-making process by May 1, 1998, and to adopt periodic amendments to the Code. A.R.S. § 41-619(B). The Act provided that "the initial State plumbing code adopted by the . . . [C]ommission shall be based on the 1994 Uniform Plumbing Code and its appendices and installation standards promulgated by the International Association of Plumbing and Mechanical Officials." 1997 Ariz. Sess. Laws ch. 112, § 7(B). The legislation required counties and municipalities to adopt the Code by ordinance.

According to your opinion request, in December 1997, the Commission began drafting rules based on the UPC. When the Governor's Regulatory Review Council ("GRRC") reviewed the Commission's rule package, ADEQ raised questions concerning that agency's regulatory authority over issues addressed in Appendices G, I and J, which deal with gray water systems for single family residences, private sewage disposal systems, and reclaimed waters systems for nonresidential buildings, respectively. GRRC initially approved the Code, except for Appendices G, I and J. See Arizona Administrative Code ("A.A.C.") R4-48-101, -102. According to your opinion request, GRRC referred Appendices G, I and J to the Commission for additional work, and the Commission formed a subcommittee to work with ADEQ to resolve issues concerning those appendices. As a result of the subcommittee's work, rules regarding Appendices G and J were subsequently adopted as part of the Code. See A.A.C. R4-48-125, R4-48-128. Your opinion request addresses legal issues that arose in the course of the subcommittee's work.

Analysis

1. Municipalities and counties enforce the Code; ADEQ does not.

Although the Commission must adopt and amend the Code, A.R.S. § 41-619(B)(3), (4), (F), the Legislature did not give the Commission enforcement authority. Moreover, neither the Act nor any other statute gives ADEQ or any other State agency the authority to enforce the Code.⁽²⁾ Instead of establishing an enforcement mechanism at the State level, the Act requires municipalities and counties to adopt the Code by ordinance. 1997 Ariz. Sess. Laws ch. 112, § 7(A). The absence of any state-level enforcement mechanism and the requirement that counties and municipalities adopt the Code by ordinance indicate the Legislature intended that municipalities and counties enforce the Code. Local governments typically enforce the ordinances they adopt. See, e.g., *City of Tucson v. Rineer*, 193 Ariz. 160, 166, 971 P.2d 207, 213 (App. 1998) (noting that City of Tucson charter gives mayor and council the power to adopt and enforce by ordinance all measures necessary for promotion of "health, comfort, safety, life, welfare and property" of inhabitants). The Act also gave cities, towns and counties the authority to grant variances from the Code, see A.R.S. § 41-619(C),

which also suggests that those local governments are responsible for enforcing the Code.

In addition, a municipality or county does not need a delegation from ADEQ pursuant to A.R.S. §§ 49-106 or -107 to enforce the Code.⁽³⁾ Although local governments are responsible for administering the Code, ADEQ may also have regulatory responsibility over some of the subjects that are addressed in the Code. If ADEQ has delegated enforcement responsibility to a local jurisdiction pursuant to A.R.S. §§ 49-106 or -107, that local government would be responsible for enforcing both bodies of law. If not, the local jurisdiction enforces the Code, and ADEQ enforces the laws within its jurisdiction.

2. The Code Does Not Preempt or Supersede Any ADEQ Regulatory Responsibilities or Authority.

Even though the Code and certain ADEQ regulatory responsibilities concern the same subjects, the Code does not supersede ADEQ's authority. Courts attempt to give full force to all statutes and construe them "in a manner that 'will best serve the legislature's purposes, policies, and goals' apparent from the whole body of relevant law." *Achen-Gardner, Inc. v. Superior Court*, 173 Ariz. 48, 54, 839 P.2d 1093, 1099 (1992). Courts will not presume the Legislature intended to supersede or impliedly repeal an earlier statute. *Id.*

The Legislature's express purpose for creating the Commission is to "promote statewide, uniform plumbing standards." 1997 Ariz. Sess. Laws ch. 112, § 6. The Act does not indicate or imply any legislative intent to supersede ADEQ's statutory authority that focuses on environmental protection. Therefore, the Act does not supersede any statutes governing ADEQ or the rules promulgated to carry out those responsibilities.

In addition, the statutes governing ADEQ and the Act do not conflict. The Commission is to establish uniform plumbing standards based initially on the UPC; ADEQ is charged with protecting the environment, and, to that end, has specific responsibilities on various subjects. Appendices G, I and J of the UPC concern gray water systems for single family residences, private sewage disposal systems and reclaimed water systems for nonresidential buildings. These issues are also within ADEQ's regulatory authority. For example, among other responsibilities, the Legislature has required ADEQ to adopt and enforce rules regarding "sanitary engineering and other facilities for disposing of solid, liquid and gaseous deleterious matter" and regarding sewage systems, including "minimum standards for the design [and operation of] . . . sewage collection systems." A.R.S. § 49-104(B)(10),(13); see also A.A.C. R18-9-801 through R18-9-819. ADEQ also enforces the Aquifer Protection Permit ("APP") program that protects Arizona's groundwater. A.R.S. §§ 49-241 through -252.

The Commission should ensure that the provisions of the Code are consistent with the related statutes and regulations ADEQ administers. Although the Legislature required that the Code be "based on" the UPC, it did not require that the Commission simply adopt the UPC, and it did not restrict the Commission's ability to modify the UPC as the Commission deems appropriate. Indeed, if the Legislature simply wanted to require the adoption of the UPC, the Commission would have been unnecessary. Therefore, in developing and amending the Code, the Commission should focus on its specific legislative purpose -- which is to establish uniform plumbing standards -- and should accomplish this task in a manner that is consistent with other State laws, respecting the expertise and responsibilities of ADEQ and other agencies on matters within their jurisdiction. Similarly, ADEQ must recognize the Commission's statutory responsibility for developing uniform plumbing standards for the State.

If, however, the Code and ADEQ regulations conflict in areas within ADEQ's specific statutory responsibility, ADEQ's authority prevails over the Code. See *Pima County v. Heinfeld*, 134 Ariz. 133, 134, 654 P.2d 281, 282 (1982) (specific statute governs over more general one).⁽⁴⁾ The resolution of specific conflicts that may arise will depend on the applicable statutory authority.

You also asked whether the Commission must reference any ADEQ administered or enforced laws within the Code. Nothing requires the Commission to cross reference other laws within the Code; however, nothing prohibits the Commission from doing so. All related laws remain applicable and must be construed together, regardless of whether the Code directly references them.

3. The Commission Has Authority Over Subjects Covered by the UPC and Its Appendices.

The Legislature required that the initial Code be "based on the 1994 uniform plumbing code and its appendices and installation standards, promulgated by the International Association of Plumbing and Mechanical Officials." 1997 Sess. Laws, ch. 112, § 7(B). Licensing is the only subject the Legislature expressly prohibited the Commission from addressing A.R.S. § 41-619(B)(3), and licensing is not covered by the 1994 UPC. Thus, any subject covered by the 1994 UPC is within the Commission's statutory authority. *Boyce v. The City of Scottsdale*, 157 Ariz. 265, 267, 756 P.2d 934, 936 (App. 1988) (powers and duties of administrative agencies are limited by statute).

Your opinion request specifically asked about the Commission's jurisdiction regarding: the subjects covered by Appendices G, I and J; evaluations of site conditions, testing and evaluating soil characteristics; design and siting of sewage disposal systems to ensure environmental and public health protection; and setbacks for onsite wastewater treatment and disposal systems to ensure environmental and public health protection. The Commission may address these subjects in the Code because they are addressed in the UPC. Specifically, Appendix I provides that the appropriate private sewage disposal system is determined based on "location, soil porosity, and groundwater level." UPC Appendix I, § 1. See also UPC Appendix G, § 1(B) (parallel provision regarding residential gray water system). In addition, Appendix I establishes requirements for the location of private sewage disposal systems. See UPC Appendix I, § I(f), Table I-1. Because the UPC addresses site conditions, soil characteristics, and design, and location of sewage systems, the Commission may address these issues; however, the Commission should focus on its express statutory responsibility, which is to promote uniform plumbing standards. In addition, because the Legislature has specifically given ADEQ responsibilities regarding sewage systems, the Commission rules on this subject should not conflict with ADEQ rules on this subject. See A.R.S. §§ 49-104(10), (13), -361, 362. If there is a conflict, the ADEQ's more specific authority would govern over the Code.

Your opinion request also asks about the Commission's authority to select onsite wastewater treatment and disposal systems where conditions do not meet the specific standards provided for in the UPC. Because the Commission may modify the UPC as it deems appropriate, the Commission may adopt standards concerning the subject matter governed by the UPC but that differ from the UPC. Again, however, to the extent ADEQ also has regulatory responsibility over wastewater treatment and disposal systems, the Commission's rules should not conflict with ADEQ rules in this area and, if there are conflicts, ADEQ's more specific statutory responsibilities would govern over the Code.

4. Municipalities and Counties Should Adopt the Code within Six Months after the Commission Adopts the Code.

The Act required the Commission to adopt the Code by May 1, 1998, and all municipalities and counties to adopt the Code by August 1, 1998. 1997 Ariz. Sess. Laws ch. 112, §§ 4, 7. The Commission did not adopt the Code until 1999, and as a result local governments could not adopt the Code by the August 1, 1998 deadline. The Act also provided, however, that "any subsequent amendments to the . . . Code adopted by the . . . Commission . . . , shall be adopted by all municipalities and counties within six months after the Commission's adoption." 1997 Ariz. Sess. Law ch. 112, § 7(A). This provision recognizes that the Commission might take actions after the initial statutory deadline of May 1, 1998. Accordingly, local governments should adopt within six months any provisions of the Code that the Commission adopts after May 1, 1998; however, an ordinance adopted after six months is not invalid. See *Watahomigie v. Board of Water Quality Appeals*, 181 Ariz. 20, 32, 887 P.2d 550, 562 (App. 1994) ("shall" in statute states a preference

for acting by a certain date, but rules adopted later not invalid).

5. A City, Town, or County May Grant Variances to the Code on an Individual Project Basis; ADEQ Is Not Authorized to Grant Variances to the Code.

Cities, towns or counties "may grant variances to the . . . [C]ode on an individual project basis." A.R.S. § 41-619(C). The Act does not establish procedures for granting variances; therefore, the local governments authorized to grant variances determine the applicable procedures. To the extent the variances impact other laws, such as those administered by ADEQ, the local jurisdiction must comply with all applicable laws when determining whether to grant a variance for a project. In addition, the Act did not authorize any other entity, including ADEQ, to grant variances; therefore, the Commission does not have the authority to allow ADEQ to grant variances.

Conclusion

Although developed and adopted as a rule at the State level, the Code will be enforced at the local level as an ordinance. Municipalities and counties will enforce the Code as they do other ordinances, and no separate delegation of authority from ADEQ is necessary. Municipalities and counties should adopt the Code, and any amendments, within six months after adoption by the Commission.

The Commission's statutory authority to adopt the Code extends to all provisions, appendices, and standards in the UPC. The Code, however, does not preempt or supercede any other statutory or regulatory requirements. Rather, the state plumbing code must be read in conjunction with other legal requirements. If conflicts arise in areas in which ADEQ has specific statutory authority, those environmental laws prevail over the Code.

In addition, a city, town, or county may grant variances to the Code on an individual project basis, and such variances must comply with all other applicable laws. The procedure for granting ordinances is determined at the local level, and the Commission does not have the authority to allow ADEQ to grant variances to the Code.

Janet Napolitano
Attorney General

1. Your opinion request listed fifteen separate questions. Where appropriate, this Opinion consolidates questions that address similar issues.

2. The State Plumbing Code itself incorporates by reference the UPC with some modifications. A.A.C. R4-48-101, -102. The UPC provides that it shall be administered and enforced by the "administrative authority," and defines "administrative authority" as the individual, official, board, department or agency established and authorized by a State, county, city or other political subdivisions created by law to administer and enforce the provisions of the plumbing code as adopted or amended. This definition shall include the administrative authority's duly authorized representative. Uniform Plumbing Code, ch. 2, part. 202.0, Definition of Terms. The Code did not amend this definition. Thus, the Code itself does not identify the particular entity that will enforce it.

3. Section 49-106, A.R.S., provides in part: The rules adopted by the department apply and shall be observed throughout this state, or as provided by their terms, and the appropriate local officer, council or board shall enforce them. . . .

Section 49-107(A), A.R.S., provides:

The director may delegate to a local environmental agency, health department or municipality or a county board of health . . . any functions, powers or duties which the director believes can be competently, efficiently and properly performed by the local agency if the local agency accepts the delegation and agrees to perform the delegated functions, powers and duties according to the standards of performance required by law and prescribed by the director.

4. Another principle applied when there is an irreconcilable conflict between statutes is that the more recently-enacted statute controls. *See Mead, Samuel & Co. v. Dyar*, 127 Ariz. 565, 568, 622 P.2d 512, 515 (App. 1980). However, a later general statute does not prevail over a more specific statute enacted earlier. 2A Norman J. Singer, Sutherland on Statutes and Statutory Construction § 51.05 (5th ed. 1992).

To: David R. Schwartz, Susan Plimpton Segal

May 4, 2000

Udail, Shumway, Blackhurst, Allen & Lyons, PC
Gust Rosenfeld P.L.C.

Re: School District Early Retirement
Plans
I00-010
R00-016 - R00-022

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), Mr. Schwartz recently submitted for review an opinion prepared for the governing board of the Glendale Elementary School District ("Glendale") concerning that district's early retirement plan ("ERP"). Ms. Segal submitted for review an opinion to the Deer Valley Unified School District ("Deer Valley") concerning ERPs. Because the subject matter of Mr. Schwartz's and Ms. Segal's opinions is similar, this Opinion addresses them together. This Opinion revises both opinions and clarifies the legal requirements for school district ERPs.

Question Presented

1. May ERP benefits be paid over the course of more than one year?
2. May school district governing boards offer employees ERP benefits for more than one year without requiring continued employment of the retiree?⁽¹⁾

Summary Answers

1. Yes. The benefits provided by a school district pursuant to an ERP may extend beyond one year, as long as the terms of the ERP require annual renewals to ensure adequate funds are available to make the required payments.
2. Yes. A retiree need not continue working in order to receive the benefits included in an ERP, as long as the school district has received adequate consideration for the promised benefits.

Background

A. District ERPs.

According to the opinion to Deer Valley submitted for review, district ERPs offer a package of benefits to induce district employees to retire early. These programs allow the district to reduce its personnel costs when filling the positions previously held by employees who accept early retirement. The opinion to Deer Valley notes that some district ERPs require former employees to work during the years they receive ERP benefits, and others do not impose an ongoing work requirement.

The Glendale opinion submitted for review provides more detail about that district's ERP. That district has offered its employees an ERP since the mid-1980s. Although some of the benefits provided by Glendale's ERPs have changed over the years, each of the ERPs:

1. has been available only to employees with at least 15 years of service;
2. required employees to provide notice of intent to participate by a specific date;
3. required approval by the governing board of each participant in the ERP;
4. has been subject to budget limitations;
5. required agreement by participants that they will not work full-time for the district after retiring; and,

6. has been subject to applicable laws and regulations.

Beginning with the 1990-1991 school year, Glendale's ERP paid the difference between an early retiree's health and dental insurance costs and the amount paid by the Arizona State Retirement System ("ASRS") until the retiree reached age 65. The ERP did not require the early retirees to perform any additional work in order to earn this benefit or any of the other benefits provided by the ERP. In considering amendments to the ERP for the 2000-2001 school year, the Glendale attorneys, relying on past opinions issued by this Office, advised the district that ERP benefits could be given only to retirees who performed services on a part-time basis for the district during the year in which the benefits were paid.

B. Statutory Authority Regarding ERPs and Prior Interpretations of That Authority.

The statutes that govern the authority of school districts do not specifically address ERP benefits. However, this Office has previously determined that school districts may offer benefits

to their employees pursuant to an ERP. Ariz. Att'y Gen. Ops. 184-097, 186-096, 187-009. In those Opinions, this Office concluded that:

- .the "consideration" the district receives for its paying ERP benefits is measured by the rights forfeited by the employee taking early retirement;
- .under A.R.S. § 15-502(A), teacher employment contracts must be for no longer than one year;
- .a school district must pay any ERP benefits during the employee's last year of employment; and
- .age-based criteria must not be used in order to comply with prohibitions against age discrimination.

See *id.* In addition, this Office has recommended that fringe benefits, including ERP benefits, be incorporated in district employment rules and regulations. Ariz. Att'y Gen. Op. 184-097.

These conclusions are based on a handful of statutes and cases that do not themselves expressly address ERPs. Section 15-502(A), A.R.S., authorizes school district governing boards to "employ and fix the salaries and benefits of employees necessary for the succeeding year." This Office's past opinions on ERPs have also cited A.R.S. § 15-905(N), which requires, with limited exceptions, that school district expenditures be for purposes included in the district's yearly budget. The other relevant statute is A.R.S. § 15-906, which establishes procedures to ensure school districts pay all liabilities due at the end of a fiscal year.

This Opinion re-examines the statutory and constitutional requirements for ERPs to provide guidance for school districts establishing and implementing these programs. This Opinion focuses on two issues: (1) whether districts may provide ERP benefits over time to early retirees without requiring that they continue to work for the district while receiving benefits; and (2) the district's responsibility to ensure that the public receives adequate consideration in the ERP. Deer Valley and Glendale should reconsider their recommendations regarding their district ERPs in light of the analysis and guidance provided in this Opinion.

Analysis

A. Prior Attorney General Opinions Properly Determined That Districts May Offer ERPs.

In prior Opinions regarding ERPs, this Office properly determined that (1) districts may offer ERPs as fringe benefits pursuant to A.R.S. § 15-502(A); (2) ERP benefits must be commensurate with the value of the employment rights an employee is forfeiting; (3) ERP benefits must be included in an eligible employee's

employment contract during that employee's final year of district employment; and (4) districts must not use age-based criteria to determine ERP eligibility.⁽²⁾ Ariz. Att'y Gen. Op. 184-097. This Office also recommended that districts include ERPs in district rules and regulations. *Id.* This Opinion reaffirms these conclusions.

B. School District Governing Boards May Offer Their Employees ERPs That Provide for the Payment of Benefits Over Time.

One requirement described in earlier Attorney General Opinions, however, needs modification. Earlier Attorney General Opinions concluded that the district must pay any amounts it owes under an ERP during the last year of the participating employee's employment with the district. See, e.g., Ariz. Att'y Gen. Ops 184-097 and 186-096. This interpretation prohibits districts from providing installment payments - including payment for medical and dental benefits - over time to retirees, unless those payments are provided through an annuity paid for during the employee's final year. See Ariz. Att'y Gen. Op. 186-096 (annuity may be purchased for retiree "if agreed upon by the teacher and the District in the last year's contract and so long as the cost for such annuity is paid for in the applicable fiscal year"). To overcome the one-year limitation, some school districts have provided medical benefits or some other benefits in future years, but have imposed a minimal work requirement for "retirees" in those years. In that way, the "retirees" remain district employees and continue to provide the district some consideration for the benefits received.

Three reasons have been given for prohibiting districts from paying ERP benefits over time: (1) A.R.S. § 15-502, governing fringe benefits for district employees; (2) the district budget statutes, particularly A.R.S. §§ 15-905 and -906; and (3) the principle that governing boards cannot bind future boards. For the reasons described below, this Opinion concludes that school districts may pay for ERP benefits over time. This is consistent with the statutory language and allows districts more flexibility to structure ERPs to suit local needs. It also eliminates the need for ERP participants to continue working in the retirement years they receive ERP benefits.

1. Section 15-502(A) Does Not Prohibit Payments Over Time.

Section 15-502(A), A.R.S., authorizes school district governing boards to "employ and fix the salaries and benefits of employees necessary for the succeeding year." As Attorney General Opinions have correctly concluded, an ERP is a fringe benefit a district may offer its employees. Ariz. Att'y Gen. Op. 184-097. Although A.R.S. § 15-502(A) requires the district to "fix the salaries and benefits of employees necessary for the succeeding year," it does not impose any requirements regarding the time frame over which the district may provide or pay benefits for such employees. Instead, the time frame for paying those benefits is properly a matter for the local school district governing board to determine in its discretion. Although the governing board must ensure that the school district receives adequate consideration from its employees, it is not statutorily required to pay early retirement benefits all in one year.

At least one Opinion from this Office reached a similar conclusion. In 1983, an Attorney General's Opinion stated that school districts may pay insurance premiums for employees for a period of time exceeding one year after they retire, provided that the benefit is part of the employees' current contracts with the school district, "ma[king] it part of the consideration for which the employee is working." Ariz. Att'y Gen. Op. 183-051. Thus, the interpretation of Section 15-502(A) adopted in this Opinion not only comports with the statutory language -- the school district governing board establishes the salaries and benefits of employees necessary for the succeeding year -- but also resolves some inconsistencies in prior Attorney General Opinions, allows districts flexibility when structuring ERPs, and avoids the somewhat contrived and widely varied work requirements that districts have imposed so they could make ERP payments over multiple years.

A district, however, generally cannot pay benefits that were not offered to retirees before they ended their employment with the district. The employee's early retirement was the consideration the district received in exchange for the ERP benefits promised when the employee retired. For existing retirees, additional and

adequate consideration would be required to justify the district's payment of any additional benefits that were not part of the ERP when the employee retired. See Ariz. Att'y Gen. Op. 183-051 (concluding that district could not pay newly adopted benefits to previous retirees).

2. If School Districts Pay for ERP Benefits Over Time, Future Boards Must Annually Review the Availability of Funds and Include Required Payments in the Budget for That Year.

Earlier Attorney General Opinions establishing the prohibition against payment of benefits over time have also relied on the school district budget statutes, A.R.S. §§ 15-905 and -906, to support that conclusion. Section 15-905, A.R.S., describes the annual budget process for school districts. That statute provides, in part, that:

[n]o expenditure shall be made and no debt, obligation or liability shall be incurred or created in any year for any purpose itemized in the budget in excess of the amount specified for the item irrespective of whether the school district at any time has received or has on hand funds in excess of those required to meet the expenditures, debts, obligations and liabilities provided for under the budget except expenditures from cash controlled funds as defined by the uniform system of financial records and except as provided in § 15-907 and subsection G of this section.

A.R.S. § 15-905(N). Under A.R.S. § 15-906, a school district having "levy fund liabilities payable on June 30" is required to file "an advice of encumbrance" with the county school superintendent. The county school superintendent may draw warrants against the amounts listed, and any obligations for unpaid amounts lapse after 60 days. A.R.S. § 15-906(C).

Although the language differs, these statutes serve a similar purpose to statutes such as A.R.S. § 35-154, which applies to State government. The Court of Appeals has concluded that A.R.S. § 35-154 requires a "fiscal out" clause that "operates as a condition subsequent, allowing the . . . [State] to avoid its obligations if the requisite funding is not forthcoming." *University of Arizona v. Pima County*, 140 Ariz. 184, 187-88, 722 P.2d 352, 355-56 (App. 1986) (concluding four-year contract for university basketball coach not prohibited by A.R.S. § 35-154). The Court of Appeals approvingly cited an Attorney General's Opinion concluding the State Board of Education could approve a contract binding a successor board so long as the contract included a release of the board's obligation if funds were unavailable. *Id.* at 186, 722 P.2d at 354 (citing Ariz. Att'y Gen. Op. 180-022).

Similarly, A.R.S. §§ 15-905 and -906, which address school district expenditures, do not prohibit payment of contracts over time, provided that the payments are included in a school district's yearly budget and are subject to available funding each fiscal year. *Cf.* ARIZ. CONST. art. IX, § 8.1 (allowing unified school district to become indebted as long as the debt does not exceed 30% of the district's real property tax base). Indeed, the procurement rules that apply to school districts specifically permit contracts for materials or services for a period of time up to five years, provided that payments under such contracts are subject to the availability of funds. Arizona Administrative Code R7-2-1093. In addition, under A.R.S. § 15-906, the district must pay any obligation that is due before the end of the appropriate fiscal year or include unpaid amounts on an "advice of encumbrance" form filed with the county school superintendent. This requirement does not prevent the district from paying for the ERP benefits over time, provided that the district pays the amount owed in any particular fiscal year by June 30.

Apart from the specific statutory requirements, the concept that a governing board cannot bind successor boards has also been a concern. School district governing boards are required to determine policy for their districts, consistent with state statutes and regulations. A.R.S. § 15-341(A). As public officers, school board members must fulfill their responsibilities in a manner that, in their judgment, serves the public interest. *School Dist. No. 69 v. Altherr*, 10 Ariz. App. 333, 338, 458 P.2d 537, 542 (1969) *overruled in part on other grounds by Board of Trustees v. Wildermuth*, 16 Ariz. App. 171, 492, P.2d 420 (1972). As applied to ERPs

and other employee benefits, this means a governing board may modify the school district's ERP prospectively to apply to employees not yet participating in the ERP as it deems appropriate. However, if a district has previously agreed to provide medical benefits or other benefits over time to employees who accepted a duly authorized ERP, the board must fulfill that previous commitment, unless funding is unavailable to do so.

In sum, if a school district governing board offers or "fixes" employment benefits in contracts, A.R.S. §§ 15-502(A), -905(N), and -906 do not invalidate those contracts even though the benefits earned are to be paid by the school district over more than one year. To the extent that previous Opinions of this Office conflict with this conclusion, this Opinion rejects the conclusions of those earlier Opinions.

C. The Gift Clause Requires That the District Receive Adequate Consideration, But Does Not Require Retirees to Perform Services for the District During the Year in Which They Receive Benefits.

Article IX, section 7 of the Arizona Constitution, commonly called "the Gift Clause," prohibits the State, counties, cities, towns, municipalities and subdivisions of the State from giving or making any "donation or grant, by subsidy or otherwise, to any individual, association or corporation." This provision applies to school districts because they are political subdivisions of the State. See *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 687 P.2d 354 (1984). In *Wistuber*, the Arizona Supreme Court held that the payment of public monies does not violate the Gift Clause if (1) the agreement pursuant to which the monies are paid serves a public purpose, and (2) there is valuable and valid consideration for the agreement. *Id.* at 348-49, 687 P.2d at 356-57. ERPs serve a public purpose. As explained in the Deer Valley opinion submitted for review, ERPs are beneficial to school districts because they allow them to replace higher paid employees with employees whose salaries are lower, thus saving the districts money. In addition, because ERP benefits are generally offered only to employees who have been with an organization for a certain number of years - in the case of the Glendale's ERP, for at least 15 years - employers may use ERPs in their efforts to recruit and retain qualified employees. See *McClead v. Pima County*, 174 Ariz. 348, 358, 849 P.2d 1378, 1388 (App. 1992) (cost of living adjustments provided to retirees did not violate the Gift Clause because the agreement served a public purpose).

To comply with the Gift Clause, the district governing board approving the ERP must ensure the public receives adequate consideration. The Supreme Court in *Wistuber* noted that even if the public receives some consideration, "the Constitution may still be violated if the value to be received by the public is far exceeded by the consideration being paid by the public." *Id.* at 349, 687 P.2d at 357. The court recognized that "in reviewing such questions, the courts must not be overly technical and must give appropriate deference to the findings of the governmental body." *Id.*

When employees choose to participate in any ERP, they give up their employment after several years of service. This is the consideration they offer. Under the tenure statutes, after three years of employment with the district, teachers are statutorily entitled to continued employment, pursuant to which they can be dismissed only for cause or as part of a district-wide reduction-in-force ("RIF"). See A.R.S. §§ 15-538.01 (district governing board must offer contract of employment to teachers with at least three years of experience); 15-544 (teachers with at least three years of experience who are dismissed because of a RIF are entitled to a preferred right of re-employment; limiting district actions in reducing salaries of teachers with at least three years experience). By choosing to participate in the ERP, employees give up those contract renewal and re-employment rights and voluntarily cease their employment before they otherwise would have. (3) The district should (3) consider the various benefits the district will receive from a program allowing early retirement, and seek to assure that those public benefits are reasonably proportionate to what the district will pay to provide the promised ERP benefits.

The Gift Clause does not require that employees accepting an ERP perform some additional service for the

district every year after taking early retirement. ERP participants have provided consideration for the promised ERP benefits through their long-term employment and their agreement to retire early. Therefore, unless made a term of an ERP, participants do not need to provide *additional* consideration by continuing to work after they have retired. As the Arizona Court of Appeals stated in *McClead*, "retirement benefits are not a gratuity but deferred compensation for services rendered." 174 Ariz. at 358, 849 P.2d at 1388. Although ERP benefits are not retirement benefits, they are benefits received based on past service and a forfeiture of employment rights, which are valuable consideration.

Conclusion

School districts may offer ERPs as benefits to employees under A.R.S. § 15-502(A). A district may provide the benefits under an ERP program over several years, if the governing board so chooses, provided that benefits in future years are subject to the availability of funds. The district, to comply with the Gift Clause of the Arizona Constitution, must also ensure that the public receives adequate consideration. The Gift Clause does not require that employees continue to work for the district every subsequent year in which they receive benefits under an ERP.

Janet Napolitano
Attorney General

1. Ms. Segal's opinion also discussed whether the doctrine of equitable estoppel would require school districts to comply with the terms of existing ERPs, but in light of the conclusions regarding the first two questions, this Opinion does not address the estoppel issue.
2. School districts participate in the Arizona State Retirement System established in Title 38, chapter 5, article 2. *See* A.R.S. § 38-711(12) (defining "employer"). ERPs are not retirement benefits, but rather are fringe benefits provided under A.R.S. § 15-502(A).
3. Although they do not have statutory rights to continued employment with the district after a number of years of employment, district employees who are not teachers nonetheless forfeit the ability to work for the district before they are eligible for retirement benefits under ASRS, and the consideration given for ERP benefits by these employees may therefore also be valuable. As with all employees who are offered ERP benefits that will be paid over the course of several years, whether the consideration given by the employees is sufficient for purposes of the Gift Clause depends on the specific facts of each case and should be assessed by school district governing boards in determining whether to offer such benefits to certain classes of employees.

To: Debra K. Davenport

May 2, 2000

Re: Applicability of Open Meeting Law to
Corporate Board of Directors of a
Charter School Operator

Auditor General

100-009
R99-013

Question Presented

Your predecessor asked under what circumstances, if any, the Open Meeting Law applies to a corporate board of directors of a charter school operator.

Summary Answers

Because Arizona's Open Meeting Law applies to a charter school governing board, the Open Meeting Law applies to a meeting of a charter school operator's corporate board of directors if (1) a quorum of the charter school governing board is present, and (2) there is discussion about matters that could foreseeably come to a vote before the charter school governing board.

Background

The Legislature created charter schools in 1994 as an alternative to traditional public schools. 1994 Ariz. Sess. Laws, 9th Special Session, ch. 2. The State Board of Education, the State Board for Charter Schools, and any school district governing board may sponsor a charter school by contracting with "a public body, private person or private organization." A.R.S. §§ 15-183(B), (C). The laws authorizing charter schools do not limit the type of private organization that may operate a charter school, and many charter schools are operated by corporations with boards of directors.

School district governing boards oversee traditional public schools. See Ariz. Const. art. XI, § 2. Similarly, the charter school laws require that the "charter" entered into between the sponsoring public agency and the operator of the school ensure that there will be "a governing body for the charter school that is responsible for the policy and operational decisions of the charter school." A.R.S. § 15-183(E)(8).⁽¹⁾ These charter school governing boards are public bodies subject to the Open Meeting Law, A.R.S. §§ 38-431 to -431.09. Ariz. Att'y Gen. Op. I95-10.

Analysis

Arizona's Open Meeting Law requires that public bodies conduct their business in public meetings. See A.R.S. §§ 38-431.01, -431.09. Because the Open Meeting Law applies only to meetings of public bodies, the issue here is whether a meeting of a corporate board of a charter school operator is ever a meeting of a public body.

Generally, a corporate board is not a "public body" under the Open Meeting Law. See *Prescott Newspapers, Inc. v. Yavapai Community Hosp. Ass'n*, 163 Ariz. 33, 38, 785 P.2d 1221, 1226 (App. 1989) (holding that a non-profit hospital association was not a public body subject to the Open Meeting Law). Therefore, normally a meeting of a corporate board of a charter school operator is not subject to the Open Meeting Law.

However, even though a private corporate board is not a public body subject to the Open Meeting Law, the charter school governing board is. See Ariz. Att'y Gen. Op. I95-10. Therefore, if a corporate board meeting is, for the purposes of the Open Meeting Law, a meeting of the charter school governing board, the Open Meeting Law applies.

Under the Open Meeting Law, a "meeting" is "the gathering of a quorum of members of a public body to propose or take legal action, including any deliberations with respect to such action." A.R.S. § 38-431(3). In 1975, this Office concluded that "legal action" subject to the Open Meeting Law includes "all discussions, deliberations, considerations or consultations among a majority of the members of a governing body regarding matters which may foreseeably require final action or a final decision of the governing body." Ariz. Att'y Gen. Op. 75-8. The court of appeals has expressly approved this broad definition of legal action for issues that are not the subject of an executive session. *Valencia v. Cota*, 126 Ariz. 555, 556-57, 617 P.2d 63, 64-5 (App.1980). Because the Open Meeting Law applies to all discussions by a quorum of a public body on matters that may ultimately come to a vote before that body, "the substance of the matters discussed and not the label given to the meeting or its location" determine whether the Open Meeting Law applies to a gathering of members of a public body. Ariz. Att'y Gen. Op. 179-4.

For these reasons, because the charter school governing board is a public body, the Open Meeting Law applies to all discussions among a quorum of a charter school governing board of matters "that foreseeably could come to a vote" by the charter school governing board -- no matter where these discussions occur and what the gathering is labeled. See *Valencia*, 126 Ariz. at 556-57, 617 P.2d at 64-5; Ariz. Att'y Gen. Op. 75-8. The scope of what may foreseeably come to a vote before the charter school governing board is found in A.R.S. § 15-183(E)(8), which gives the charter school governing board jurisdiction over all matters regarding "the policy and operational decisions of the charter school."

Therefore, if a quorum of a charter school governing board discusses charter school business at a corporate board meeting, that portion of the corporate board meeting is subject to the Open Meeting Law. Even if charter school governing board members are also members of the charter school operator's corporate board, they must comply with the Open Meeting Law if a quorum of charter school governing board members are present for a discussion of charter school business at a corporate board meeting. The charter school governing board's obligation to conduct its business as the Open Meeting Law requires does not vanish merely because its "meeting" occurs at a corporate board meeting. These principles governing deliberations by a quorum of a public body are not unique to charter school governing boards but apply to all public bodies subject to the Open Meeting Law.

To the extent the corporate board also discusses matters unrelated to the charter school, those board discussions are not subject to the Open Meeting Law because only matters that may foreseeably come before a vote of the charter school governing board must be discussed in public if a quorum of the charter school governing board is present. In addition, if a majority of the members of the charter school governing board are not present at a corporate board meeting, then that corporate board may discuss any matters relating to a charter school the corporation operates at that meeting because the Open Meeting Law does not apply to less than a quorum of a public body.

Conclusion

Corporate boards of charter school operators generally are not "public bodies" subject to Arizona's Open Meeting Law. However, because the Open Meeting Law applies to charter school governing boards, if a quorum of the charter school governing board discusses charter school business at a meeting of the corporate board of the charter school operator, the Open Meeting Law applies to that discussion.

Janet Napolitano
Attorney General

1. In its 2000 regular legislative session, the Legislature amended A.R.S. § 15-183(E)(8) by striking the charter school governing board's responsibility for "operational" decisions. See 2000 Ariz. Sess. Laws ch. 90. When this amendment becomes effective, charter school governing boards will be responsible only for policy decisions. This statutory change

does not alter the analysis of this Opinion.

To: The Honorable Ken Chevront

May 1, 2000

Re: Fund-raising by Legislators For
Political Organizations During Regular
Session

Arizona House of Representatives

I00-008
R00-011

Question Presented

You have asked whether, during a regular session, a State legislator may conduct fund-raising activities for a political organization that has been established pursuant to A.R.S. §§ 16-823 and -901(20).

Summary Answers

An analysis of all the statutes governing fund-raising activities demonstrates that members of the Legislature may participate in fund-raising activities for political organizations during a regular session, as long as the fund-raising complies with all limitations and requirements of Arizona's campaign finance laws, A.R.S. §§ 16-901 through -961. The prohibitions in A.R.S. § 41-1234.01 against lobbyists making campaign contributions to and lobbyists soliciting campaign contributions for legislators during the regular session do not limit fund-raising for political organizations, provided that the contributions are not earmarked for legislators in violation of A.R.S. § 16-907(B).

Background

A political organization is "an organization that is formally affiliated with and recognized by a political party including a district committee organized pursuant to § 16-823."⁽¹⁾ A.R.S. § 16-901(20). A political party is "the state committee as prescribed by § 16-825 or the county committee as prescribed by § 16-821 of an organization that meets the requirements for recognition as a political party pursuant to § 16-801 or § 16-804, subsection A." A.R.S. § 16-901(21). Under Arizona's campaign finance laws, a political organization is a specific type of political committee. A.R.S. § 16-901(19)(h). Thus, a political organization is a district party committee or some other political committee that is formally affiliated with a state or county committee of a political party. As a political committee, a political organization is subject to the requirements of Title 16, chapter 6, article 1 (A.R.S. §§ 16-901 through -925) concerning campaign contribution limits and disclosure requirements. Although political organizations are affiliated with political parties, political organizations are subject to some contribution limits that do not apply to political parties. See A.R.S. § 16-905(A)(2), (3), (B), (C), (E) (exempting political parties but not political organizations from certain contribution limits). A candidate's campaign committee is another type of political committee, which is subject to the same campaign finance laws. A.R.S. § 16-901(19)(a). Any candidate who receives contributions or makes expenditures of more than \$500 in connection with a campaign is required to designate a political committee for each election to serve as the candidate's campaign committee. A.R.S. § 16-903(A).

The laws regulating lobbyists prohibit them from making contributions to legislators during the regular session.⁽²⁾ A.R.S. § 41-1234.01. This prohibition became law in 1992 as part of a comprehensive overhaul of the laws regulating lobbyists. See 1991 Ariz. Sess Laws, 3rd S.S., ch. 2. Specifically, A.R.S. § 41-1234.01 provides as follows:

A. While registered under this article [Title 41, ch. 7, art. 8.1], a principal, public body, lobbyist, designated public lobbyist or authorized public lobbyist shall not make or promise to make a campaign contribution to or solicit or promise to solicit campaign contributions for:

1. A member of the legislature when the legislature is in regular session.

2. The governor when the legislature is in regular session or when regular session legislation is pending executive approval or veto.

B. Subsection A only prohibits campaign contributions by principals, lobbyists, designated public lobbyists or authorized public lobbyists and solicitation of campaign contributions by principals or lobbyists during anytime the legislature is in regular session but does not prohibit principals or lobbyists from raising monies for any other purpose during the regular session of the legislature.

A violation of this prohibition is a class 1 misdemeanor. A.R.S. § 41-1237(A).

Analysis

There is no law restricting legislators from raising contributions for political organizations during a legislative session or between sessions. The *only* limitation on campaign fund-raising during a regular session of the Legislature is in A.R.S. § 41-1234.01. That provision only precludes contributions to members of the Legislature when the Legislature is in regular session. There is no mention of contributions or fund-raising for political organizations or political parties. To the contrary, aside from contributions to actual members, lobbyists may "rais[e] monies for any other purpose during the regular session of the [L]egislature." A.R.S. § 41-1234.01(B).

The clear language of a statute is given its usual meaning, unless impossible or absurd consequences result. *Herberman v. Bergstrom*, 168 Ariz. 587, 589, 816 P.2d 244, 246 (App. 1991). The prohibition in A.R.S. § 41-1234.01 is limited to lobbyists making campaign contributions to legislators and soliciting contributions for legislators during regular session. Thus, the prohibition in A.R.S. § 41-1234.01 clearly applies to legislators' candidate campaign committees. However, it does not prevent legislators from soliciting contributions for political organizations during the regular session.

Although contributions to political organizations are generally outside the limitations in A.R.S. § 41-1234.01, contributions earmarked for legislators, in violation of A.R.S. § 16-907(B), can violate A.R.S. § 41-1234.01. Under A.R.S. § 16-907(B), "[e]xcept for a contribution to a candidate's campaign committee, an individual or political committee shall not give and a political party or other political committee shall not accept an earmarked contribution."⁽³⁾ A.R.S. § 16-907(B). Contributions from a lobbyist to a political committee during the regular session that are designated for a specific member or members of the Legislature in violation of A.R.S. § 16-907(B) would also violate A.R.S. § 41-1234.01. In that situation, although the contribution was to a political committee, because it is specifically directed to a member of the Legislature, it is prohibited by A.R.S. § 41-1234.01.

Conclusion

A legislator may conduct fund-raising activities for political organizations during session as long as the fund-raising activities comply with all campaign finance laws. The prohibitions set forth in A.R.S. § 41-1234.01 do not apply to fund-raising for political organizations unless such contributions are earmarked for legislators in violation of A.R.S. § 16-907(B).

Janet Napolitano
Attorney General

1. Under A.R.S. § 16-823, a political party "entitled . . . to representation on the ballot may establish a district party committee for any legislative district." A district party committee consists of "precinct committeemen residing in the district and elected pursuant to § 16-821." A.R.S. § 16-823(B).

2. For simplicity, the term "lobbyists" as used in this Opinion refers to registered lobbyists, their principals, designated public lobbyists and authorized public lobbyists as defined in A.R.S. § 41-1231. In addition, the prohibition in A.R.S. 41-1234.01 also applies to the Governor "when the legislature is in regular session or when regular session legislation is pending executive approval or veto." A.R.S. § 41-1234.01(A)(2).

3. A contribution is "earmarked" if there is "a designation, instruction or encumbrance that results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's campaign committee." A.R.S. § 16-901(6).

To: The Honorable Jeff Hatch-Miller

May 1, 2000

Re: Expenditures of an Elected Official's
Personal Money for Constituent
Communications

Arizona House of Representatives

100-007
R99-048

Questions Presented

You have asked whether (1) an elected official's direct payment from personal monies for a newsletter to constituents that does not have the purpose of influencing an election constitutes a "contribution" or "expenditure" within the meaning of Arizona Revised Statutes ("A.R.S.") § 16-901; and (2) an elected official may spend personal monies for a newsletter to constituents without paying for it through a campaign committee account and reporting the expenditure under campaign finance laws.

Summary Answers

An expenditure of an elected official's personal monies for a newsletter to constituents is within the campaign finance regulatory scheme and must be disclosed. All expenditures of an elected official's personal monies for a newsletter to constituents must be reported as an expenditure of that person's campaign committee.

Background

A. Constituent communication contributions and expenditures.

Arizona's campaign finance laws expressly define "contribution" to include "[m]oney or the fair market value of anything directly or indirectly given or loaned to an elected official for the purpose of defraying the expense of communications with constituents, regardless of whether the elected official has declared his candidacy." A.R.S. § 16-901(5)(a)(ii). A contribution, however, does not include "[m]oney or the value of anything . . . provided by the state or a political subdivision to an elected official for communication with constituents if the elected official is engaged in the performance of the duties of his office." A.R.S. § 16-901(5)(b)(ii).

Until 1991, expenditures and contributions for constituent communications incurred more than 60 days before an election were not subject to campaign contribution limits or to the campaign finance reporting requirements. Ariz. Atty Gen. Op. 188-007. In 1991, in response to concerns that the exemption for constituent communications created a loophole that was subject to abuse, the Legislature eliminated the sixty-day limitation. 1991 Ariz. Sess Laws ch. 241; see *Hearing on S.B. 1158 Before the Senate Judiciary Comm.*, Ariz. 40th Legis., 1st Reg.Sess. on March 4 and 5, 1991.

B. Personal Monies.

Under Arizona's campaign finance system, expenditures of personal monies in connection with a campaign must be reported along with other campaign expenditures. A.R.S. § 16-915(A)(2)(c).⁽¹⁾ In addition, if a candidate spends more than a specified dollar amount of personal monies on his or her campaign, he or she must give notice to the other candidates, and those candidates are not subject to contribution limits until they raise the same amount of money. A.R.S. § 16-905(F). Unless a candidate participates in Arizona's "clean elections" public financing system, personal monies are not subject to contribution limits.⁽²⁾ See A.R.S. § 16-905.

Analysis

A. Constituent Communication Contributions Are Subject to Campaign Finance Laws.

Arizona law generally defines "contribution" as any "gift, subscription, loan, advance or deposit of money or anything of value made for the purpose of influencing an election." A.R.S. § 16-901(5). In addition to the general definition of "contribution," the Legislature has also expressly specified that monies for constituent communications are contributions, except if those constituent communication expenses are paid for by the State or a political subdivision. A.R.S. §§ 16-901(5)(a)(ii) (including constituent communications as contributions), 16-901(5)(b)(ii) (exception for constituent communications paid for by State or political subdivisions). Under the statute, monies for these communications are contributions "regardless of whether the elected official has declared his candidacy." A.R.S. § 16-901(5)(a)(ii).⁽³⁾

If the Legislature had intended to adopt an ad hoc approach to constituent communications based on an evaluation of whether a specific correspondence had the purpose of influencing the outcome of an election, the Legislature would not have specified that monies received for constituent communications are "contributions." See A.R.S. § 16-901(5) (definition of contribution); *Champlin v. Sargeant*, 192 Ariz. 371, 374, 965 P.2d 763, 766 (1998) (statutes are to be interpreted to give every phrase meaning and not render any provision a superfluous). The specific legislative inclusion of constituent communications in the definition of contributions brings all donations for constituent communications within the campaign finance regulatory scheme, making them subject to contribution limits and disclosure requirements.

B. A Direct Payment from an Elected Official's Personal Money for a Newsletter to Constituents Requires Disclosure under Arizona's Campaign Finance Laws.

Arizona's campaign finance laws require that every candidate who receives or spends more than \$500 in connection with a campaign designate a political committee to serve as the candidate's campaign committee. A.R.S. § 16-903(A). If a candidate receives a contribution or makes a disbursement "in connection with the campaign" he or she is deemed to have done so as an agent for the campaign committee. A.R.S. § 16-903(E). A candidate's campaign committee is expressly required to report "the candidate's contribution or promise of personal monies." A.R.S. § 16-915(A)(2)(c). In addition, if a candidate contributes or promises personal monies

reaching specified amounts, he or she must disclose those amounts to other candidates within 24 hours, and the contribution limits for other candidates are lifted until they raise a like sum. A.R.S. § 16-905(F).

A basic principle of statutory construction requires that statutes relating to the same subject be read together and construed as whole. *State v. Sweet*, 143 Ariz. 266, 270, 693 P.2d 921, 925 (1985). Because amounts for constituent communications are contributions subject to disclosure requirements, an elected official must treat constituent communications expenditures as the official treats other expenditures that are within the scope of the campaign finance laws. This means the elected official must disclose the expenditures on his or her campaign committee reports.⁽⁴⁾ See A.R.S. § 16-915. Personal expenditures for newsletters to constituents would also be included in the calculation of expenditures of personal monies that may result in the lifting of the contribution limits of other candidates. See § A.R.S. 16-905(F).

Conclusion

Expenditures of personal monies for newsletters to constituents must be reported under the campaign finance laws because all private contributions and expenditures of monies to defray the expense of constituent communications are within the campaign finance regulatory scheme.

1. Arizona's campaign finance law treats monies from specified relatives as "personal monies." *See* A.R.S. § 16-901(10) (definition of "family contribution") and § 16-901(18) (definition of "personal monies").
2. Candidates choosing to participate in the clean elections public financing system are subject to additional restrictions. *See* A.R.S. § 16-947. Clean elections candidates for statewide office cannot use more than \$1,000 in personal monies, and clean elections candidates for the Legislature cannot spend more than \$500 in personal monies on their campaigns. A.R.S. § 16-941(A)(2). This amount is subject to adjustment every two years to account for inflation. A.R.S. § 16-959(A).
3. Similarly, the Legislature has specified that all donations to pay off debt are contributions. A.R.S. § 16-901(5)(a)(i). These donations, even though received after the election is over, are deemed to be contributions within the campaign finance system. *Id.*
4. The only exception would be for candidates who spend or receive less than \$500 and, therefore, are not required to form a candidate's campaign committee. A.R.S. § 16-903(A).

To: The Honorable Bill Brotherton

April 6, 2000

Re: Acquisition of Land for School Sites

Arizona House of Representatives

100-006

(R99-062)

Questions Presented

You have asked the following questions:

1. Does Arizona Revised Statutes ("A.R.S.") § 15-2041(F) require that a school district accept a donation of land for a school site instead of a donation of money when offered the choice by a potential donor?
2. If not, does a governing board's fiduciary duty require that it make decisions regarding potential gifts in the best interests of the school district?

Summary Answers

1. Section 15-2041(F), A.R.S., does not require that a school district governing board accept a donation of land instead of a donation of money.
2. In deciding whether to accept a donation of land or money, a school district governing board must act in the best interests of the public, focusing on its responsibility to promote education. This determination cannot be made in the abstract, but rather requires the governing board to analyze the specific facts of the transaction.

Background

Among other responsibilities, the School Facilities Board ("SFB") administers the New School Facilities Fund ("Fund"), which provides monies to school districts for constructing new school facilities and acquiring land for new schools. A.R.S. § 15-2041. School districts must develop and annually update a capital plan that includes "long term projections of the need for land for new schools." A.R.S. § 15-2041(B)(3). If the capital plan indicates a need for land within the next ten years, the district submits its plan to the SFB and requests the necessary funds. A.R.S. § 15-2041(C). The SFB is charged with distributing "monies needed for land for new schools so that land may be purchased at a price that is less than or equal to fair market value and in advance of the construction of the new school." A.R.S. § 15-2041(F). If a school district obtains a donation of land for an appropriate school site, thereby relieving the SFB of the need to fund the acquisition of a school site, the SFB will give the school district monies from the Fund equal to twenty percent of the fair market value of the donated land. *Id.* Your opinion request described two scenarios in which a developer may provide a school district with the resources for a new school site. In the first scenario, a developer simply donates a parcel of land to a school district for a new school. If that happens, and the SFB approves the site as appropriate for a new school, the SFB would give the school district twenty percent of the fair market value of the donated land. See A.R.S. § 15-2041(F). In the second scenario, the developer sets aside a parcel of land as a future school site (which the school district may purchase with funding from the SFB), and, in addition, the developer gives the school district a cash donation equal to the fair market value of the land. In both scenarios, the school district does not have to expend its own money to acquire the land, and the school district receives cash in addition to receiving the land.

The main differences between the two scenarios are the amount of cash the school district receives and the amount the SFB pays to fulfill its statutory responsibilities. If the school district accepts the cash donation, the district receives more cash than it does by accepting a donation of land, because it receives the full fair market value from the developer instead of twenty percent of that value from the SFB. However, when the school district accepts cash instead of a donation of land, the SFB pays more than it would have paid had

the school district chosen to accept a donation of land. In that situation, the SFB pays the fair market value for the purchase of the land, instead of paying the school twenty percent of the land's fair market value under A.R.S. § 15-2041(F).

The different scenarios also affect the disbursement of the proceeds from a sale of the property. If the property has been donated to the school district, the district retains any proceeds

if the property is sold. If the SFB purchased the land, the SFB receives any proceeds from the sale of the property. See A.R.S. § 15-2041(F).

Analysis

A. The Statutes Do Not Require Districts to Accept Donations of Land Instead of Donations of Money.

The jurisdiction and powers of any state agency are strictly limited by the terms of the statute that creates the agency. See, e.g., *Schwartz v. Superior Ct.*, 186 Ariz. 617, 619, 925 P.2d 1068, 1070 (App.1996). The statutes governing the SFB address only donations of land to districts. Specifically, A.R.S. § 15-2041(F) provides:

If a school district acquires real property by donation at an appropriate school site approved by the . . . [SFB], the [SFB] shall distribute an amount equal to twenty percent of the fair market value of the donated real property that can be used for academic purposes.

The other provisions addressing the SFB's acquisition of land for school sites establish:

- .The SFB shall distribute monies so that land for new schools may be purchased at a price that is less than or equal to fair market value and in advance of the construction of the new school. A.R.S. § 15-2041(F).
- .A school district shall request from the SFB monies for the acquisition of land if the school district's capital plan indicates a need for land within the next ten years. A.R.S. § 15-2041(C).
- .Monies provided for land shall be in addition to any monies provided for new school construction. A.R.S. § 15-2041(C).
- .The SFB may distribute monies for land to be leased for new schools if the duration of the lease exceeds the life expectancy of the school facility by at least fifty percent. A.R.S. § 15-2041(F).
- .The proceeds of any sale of land purchased or partially purchased with monies from the SFB shall be returned to the state fund from which it was appropriated and to any other participating entity on a proportional basis. A.R.S. § 15-2041(F).

These statutory provisions do not require a school district to accept a donation of land for a new school site. Accordingly, there is no requirement that a school district accept a donation of land for a school site in lieu of a donation of money.⁽¹⁾

B. The School District Must Make Decisions Regarding Donations in a Manner Consistent with Its Fiduciary Obligations.

In general, all public officials must make decisions based on the public interest. Ariz. Att'y Gen. Op. I84-159. School district governing boards must exercise their power in a manner that serves the purpose for which

they exist, which is to educate the youth of the district. *Prescott Community Hosp. Comm'n v. Prescott Sch. Dist. No. 1 of Yavapai County*, 57 Ariz. 492, 494, 115 P.2d 160, 161 (1941).

The school district must be guided by the best interests of the public in its decisions. This Office cannot opine as to what decision a board should make in the abstract, because each decision turns on its unique facts. See Ariz. Att'y Gen. Op. I98-006 at 2 n.2. The governing board must make this decision in a manner consistent with its public trust obligations based on the specific facts of the transaction.

Conclusion

A school district is not statutorily required to accept donations of land in lieu of donations of money. A school district governing board facing such a choice must make its decision consistent with its public responsibilities and based on the specific facts of the transaction.

Janet Napolitano
Attorney General

1. The practical effect of a school district foregoing a donation of land and accepting cash instead is that the State taxpayers end up paying for the purchase of the land for the school district, and these costs to the State could have been avoided if the developer had donated the site to the district. If a different outcome is desired, a legislative change is necessary.

To: Donald M. Peters

March 30, 2000
Re: Conditions Relating to Contributions
of Land or Money to Public Schools
100-005
(R00-010)

Miller, LaSota & Peters, P.L.C

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), this Opinion revises the opinion you prepared for the President of the Dysart Unified School District No. 89 Governing Board and submitted to this Office for review.⁽¹⁾

Questions Presented

1. Can the governing board of a school district legally make contractual promises to a private party regarding how schools will be built or operated in return for a contribution of money or land?
2. Can the governing board of a charter school legally make contractual promises to a private party regarding how a charter school will be built or operated in return for a contribution of money or land?
3. Can a private entity that is involved in the operations of an existing or proposed charter school make valid and binding contractual promises to another private party regarding how a charter school will be built or operated?

Summary Answers

1. A school district governing board cannot make contractual promises to a private party in exchange for a donation of money or land that are contrary to statutory or constitutional requirements or are inconsistent with the district's public trust obligations.
2. A charter school governing board cannot make contractual promises to a private party in exchange for a donation of money or land that are contrary to statutory or constitutional requirements or are inconsistent with the charter school's public trust obligations.
3. Because the charter school governing board is responsible for policy and operational decisions, it must authorize agreements concerning the operations of the charter school. Before a charter school is established, a charter school applicant may make agreements concerning a proposed charter school, but, those agreements must be consistent with the laws governing charter schools and with the charter school's public trust obligations.

Background

According to your opinion, as a result of recent rapid growth in the Dysart Unified School District ("District"), real estate developers have offered to donate land or cash to the school district.⁽²⁾ In return for these donations, certain developers have asked the District for contractual promises regarding how the school located on the donated land would be built or operated. When the District refused to make such contractual commitments, the developers withdrew their offers to donate land or money. In addition, the developers indicated that the same offer would instead be made to a charter school if the charter school would agree to the contractual conditions attached to the donation.

Analysis

A. A School District Governing Board's Ability to Make Contractual Promises to a Private Party in Exchange for a Donation of Money or Land Is Limited by the Laws Governing the District and by the District's Public

Trust Obligations.

School districts are legislative creations, and school boards must exercise authority within the limits established by statute. *Tucson Unified Sch. Dist. No. 1 v. Tucson Educ. Ass'n*, 155 Ariz. 441, 442-43, 747 P.2d 602, 603-04 (App. 1987). In addition, the Arizona Supreme Court has held that school districts owe trust obligations to the public.

School districts are created by the state for the sole purpose of promoting the education of the youth of the state. All their powers are given them and all the property which they own is held by them in trust for the same purpose, and any contract of any nature which they may enter into, which shows on its face that it is not meant for the educational advancement of the youth of the district but for some other purpose, no matter how worthy in its nature, is *ultra vires* and void.

Prescott Community Hosp. Comm'n v. Prescott Sch. Dist. No. 1, 57 Ariz. 492, 494, 115 P.2d 160, 161 (1941) (lease of school property to hospital was *ultra vires* and void). Therefore, although donors may generally attach conditions to their donations, *Dunaway v. First Presbyterian Church*, 103 Ariz. 349, 351-52, 442 P.2d 93, 95-96 (1968), the ability of school districts to agree to certain conditions is limited. In particular, any donation of land or money must be consistent with the laws governing school districts. Ariz. Att'y Gen. Op. 179-241; see also Ariz. Att'y Gen. Op. 188-056 (district may accept donation of land that reverts to donor if not used for school purposes within set period of time). Moreover, because of their obligations to serve the public interest, school district governing boards may not enter into agreements that restrict their ability to make future policy decisions in response to changing conditions. *School Dist. No. 69 v. Altherr*, 10 Ariz. App. 333, 338-39, 458 P.2d 537, 542-43 (1969), *overruled in part on other grounds by Marana Elementary Sch. Dist. No. 6 v. Wildermuth*, 16 Ariz. App. 171, 173, 492 P.2d 420, 422 (1972).

Your opinion indicated that one developer asked for a contractual term that gave enrollment preference to students living within the particular real estate development. A school district may not enter such an agreement. Pursuant to A.R.S. § 15-821, with limited exceptions, a district must admit students from within the district. Moreover, the governing board must fulfill this statutory responsibility in a manner that is in the best interests of children throughout the district. See *Dick v. Cahoon*, 84 Ariz. 199, 203, 325 P.2d 835, 837 (1958) (public officers must exercise discretion for the public interest, not the private interests of individuals or groups of persons). Based on the statutory obligation of districts to serve the entire district, and the prohibition against entering agreements that limit the policy-making ability of the school board, the district may not enter an agreement granting enrollment preferences to students in certain developments.

B. Charter Schools Cannot Make Contractual Promises to a Private Party in Exchange for Land or Money That Are Inconsistent with the Laws Governing Charter Schools or With Their Public Trust Obligations.

Charter schools are public schools, and their purpose is to educate Arizona's youth. See A.R.S. § 15-181(A). In addition, like traditional public schools, charter schools have governing bodies that are responsible for policy and operational decisions. A.R.S. § 15-183(E)(8). Like traditional public schools, charter schools are also supported by public funds. This Office has previously observed that, "State aid paid to charter schools for their educational services is substantially similar to the State aid paid to other public schools and the core requirements imposed on charter schools are also imposed on public schools" Ariz. Att'y Gen. Op. 198-003. Because charter schools, like district schools, are public schools "created by the State for the sole purpose of promoting the education of the youth of the State," charter schools owe trust obligations to the public. See *Prescott Community Hosp. Comm'n*, 57 Ariz. at 494, 115 P.2d at 161 (school district public trust responsibilities).

As statutory creations, charter schools cannot agree to conditions that violate statutory or constitutional requirements that apply to charter schools. See Ariz. Att'y Gen. Op. 179-241 (school districts may only agree to conditions that comply with State law). A charter school must also ensure that any agreements with third

parties comply with the terms of its charter. See A.R.S. § 15-183(E) (describing charter). In addition, as public schools with public trust obligations, charter schools are prohibited from entering into agreements that restrict their ability to make policy for the charter school in order to meet changing conditions. See *Altherr*, 10 Ariz. App. at 338-39, 458 P.2d at 542-43.

The fact that some charter schools are operated by private entities does not alter this analysis. Cf. *Hertz Drive-Ur-Self System, Inc. v. Tucson Airport Authority*, 81 Ariz. 80, 83-84, 299 P.2d 1071, 1073 (1956) (private corporation serves public rather than private function in operating airport). All 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). All charter schools may contract, sue and be sued, and hold property. A.R.S. § 15-183(H), (U). Thus, charter schools are distinct legal entities, with legal responsibilities independent of their public or private operators. Cf. *Jarvis v. Hammons*, 32 Ariz. 124, 129, 256 P. 362, 364 (1927), *on reh'g*, 32 Ariz. 318, 257 P. 985 (1927) (concluding that school districts are distinct legal entities).⁽³⁾

The specific example cited in your opinion - an agreement to give an enrollment preference to students living within a particular real estate development - would violate A.R.S. § 15-184(A), which requires charter schools to admit all eligible pupils who submit a timely application, unless the school is filled to capacity.⁽⁴⁾ Therefore, charter schools, like school districts, cannot enter into such agreements.

C. The Charter School Governing Board Must Make Decisions Consistent With the Laws Governing Charter Schools.

A charter school's governing board is the only entity that may make decisions regarding the design or operation of an existing charter school. See A.R.S. § 15-183(E)(8) (governing body is responsible for school policy and operations). The charter school governing board must make decisions for the charter school that are consistent with the laws governing charter schools and the charter school's obligation to act in the public interest. A charter school applicant may make agreements before the charter school is formed. See A.R.S. 15-183(A) (charter school application may include a financial plan and a description of the school's facility). However, those agreements must be consistent with the laws governing charter schools and with the charter school's obligation to act in the public interest.

Conclusion

Because district schools and charter schools are public schools financed by public funds that provide education for the children in this State, both owe trust obligations to the public. School districts and charter schools are prohibited from making promises, contractual or otherwise, to private parties that are inconsistent with the laws that govern them or with their obligations to serve the public interest.

Janet Napolitano
Attorney General

1. Your opinion raised a number of issues that are not addressed here because they are not necessary for the analysis.
2. Section 15-2041(F), A.R.S., provides an incentive to school districts that acquire land by donation from private parties. In those circumstances, the School Facilities Board must pay the school district twenty per cent of the donated land's fair market value, which the district can use for academic purposes.
3. Section 15-183(B), A.R.S., provides that "[t]he sponsor of a charter school may contract with a public body, private person or private organization for the purpose of establishing a charter school pursuant to this article." Pursuant to this statute, if the State Board of Education, the State Board for Charter Schools, or a school district chooses to act as a

sponsor for a charter school, the sponsoring entity may contract with any one of the listed entities - a public body, a private person, or a private organization - for the formation of a charter school. This provision does not, as your opinion suggests, provide for a discretionary contract that may or may not be formed by the sponsor and the public body, private person or private organization. Instead, the "contract" contemplated by A.R.S. § 15-183(B) is the actual charter, the issuance of which creates the charter school.

4. There are a few, limited exceptions to this requirement. Pupils who attended the charter school the previous school year and their siblings are given an enrollment preference, and a school-district-sponsored charter school must give preference to those students who reside within the sponsoring district's boundaries. A.R.S. § 15-184(A).

To: Sheldon R. Jones

March 16, 2000
Re: Importation of Citrus for Packing in
Arizona
100-004
(R99-018)

Arizona Department of Agriculture

Question Presented

You have asked whether the Arizona Department of Agriculture ("Department") can prohibit the importation of citrus that does not meet Arizona's citrus grades and standards when the citrus is brought to Arizona for packing in Arizona facilities to be shipped out of state for sale.

Summary Answer

Because the Department can adequately protect Arizona's interests by inspecting citrus for compliance with Arizona's standards when the citrus is packed in this State, the Department cannot require that citrus meet Arizona's standards before it is imported for packing. This Opinion does not in any way limit the Department's authority to prohibit the entry of citrus because of health or safety concerns.

Background

Citrus produced or sold in Arizona is subject to a system of uniform grades and standards that is intended to enhance its quality and marketability. Arizona Revised Statutes ("A.R.S.") §§ 3-441 to -466. According to your opinion request, several citrus importers wanted to import citrus into Arizona to be processed and packed in established Arizona facilities for subsequent sale out of state. Your letter indicated that the Department would have inspected the citrus at the border to ensure that it did not harbor plant pests or diseases that would threaten Arizona agriculture. However, the Department did not intend to inspect this citrus to ensure that it conformed to Arizona's uniform grades and standards before it reached the packing facilities. Instead, the Department intended to do so during the packing process.

According to the Department, citrus grown and harvested in several different states is frequently packed in one central location. The packing process involves washing, grading, and packing citrus by size in cartons. Before the citrus is packed, it is generally in bulk and neither washed nor graded. The State's standardization and inspection processes are integrated into the packing process.

Analysis

Arizona law prohibits the packing, selling, moving, loading, or shipping of citrus that does not conform to the uniform grades and standards regardless of whether the citrus is moving in domestic, interstate, or foreign commerce. A.R.S. § 3-461(A).⁽¹⁾ It also prohibits the importation for sale within the State of citrus that fails to meet Arizona's grades and standards. A.R.S. § 3-458(A). However, the statutes do not prevent a citrus grower "from selling or delivering . . . fruit unpacked and unmarked, as part of the crop in bulk, to a packer for grading, packing or storage." A.R.S. § 3-460(1).

Arizona's laws governing the importation of citrus must be interpreted in a manner consistent with the Constitution. See *State v. Getz*, 189 Ariz. 561, 565, 944 P.2d 503, 507 (1997) (when possible, statutes should be interpreted in a manner that is constitutional). The Commerce Clause gives Congress the exclusive authority "[t]o regulate Commerce with foreign nations, and among the several States." U.S. Const. Art. I, § 8, cl. 3. Even when Congress has not acted, the United States Constitution limits the extent to which state regulation can impact interstate and foreign commerce. *Wardair Canada, Inc. v. Florida Dep't of*

Revenue, 477 U.S. 1, 7-8 (1986); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977).

Congress has not enacted any legislation that would preempt a state regulatory scheme requiring that out-of-state citrus comply with the State's uniform grades and standards before it could be imported into the State for packing. In the absence of such preemptive legislation, the United States Supreme Court applies two tests to determine whether the Commerce Clause invalidates a state regulatory scheme.⁽²⁾ First, a state scheme is per se invalid under the Commerce Clause if it directly regulates or discriminates against interstate commerce or has the effect of favoring in-state economic interests over out-of-state ones. *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989). Arizona's citrus statutes are facially valid under this test because they apply to all citrus, regardless of its origin or its movement in domestic, interstate, or foreign commerce, and they do not discriminate against interstate commerce or favor in-state economic interests over out-of-state interests. See A.R.S. §§ 3-461(A) (requiring all citrus that is packed in Arizona, regardless of its origin, to meet the same standards); -458(C) (permitting citrus that has been grown in a State that has citrus standards equivalent to Arizona's, to be transported into and sold in Arizona upon proof of compliance with the other state's standards).⁽³⁾

Under the second test, a state regulatory scheme "that regulates even-handedly to effectuate a legitimate local public interest" and that has only incidental effects on interstate commerce may nevertheless be invalid if the burden that it imposes on interstate commerce "is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The extent of the burden that will be tolerated under this test depends upon the nature of the local interest involved and whether the State could promote the interest as effectively while imposing a lesser impact on interstate commerce. *Id.* at 142.

The purpose of Arizona's citrus statutes is to protect the reputation and marketability of Arizona-grown citrus. 1933 Ariz. Sess. Laws ch. 70, § 2; 1992 Ariz. Sess. Laws ch. 354, § 4. The Supreme Court has recognized that protecting and enhancing the reputation of growers within a State is a legitimate state interest. *Pike*, 397 U.S. at 143; see also *Sligh v. Kirkwood*, 237 U.S. 52, 61 (1915). In *Pike*, however, the Court ruled unconstitutional an order issued under Arizona's fruit and vegetable standardization laws that prohibited a company that grew cantaloupes in Arizona from packing the cantaloupes in its California packing plant. To comply with the order, the grower would have needed to invest \$200,000 to build another packing plant in Arizona. *Id.* at 144-45. The Court observed that state statutes that "requir[ed] business operations to be performed in the home State that could more efficiently be performed elsewhere" were per se invalid, even when the State was pursuing "a clearly legitimate local interest." *Id.* at 145. It therefore concluded that the restriction the order placed upon the grower's allocation of its interstate resources outweighed the local benefit of advancing the reputation of Arizona's growers by requiring that Arizona-grown cantaloupes be packed in Arizona. *Id.* at 146.

According to your opinion request, although the Department did not intend to inspect citrus for compliance with Arizona's standards before the citrus entered the State for packing, it planned to do so when the citrus was packed. The Department's approach properly recognizes the need to protect the State's legitimate interests and, at the same time, avoid imposing unnecessary burdens on interstate commerce. According to the Department, any citrus packed in Arizona is graded and sorted to comply with Arizona's standards, and processes to ensure compliance with these standards are an integral part of the packing process in Arizona. Requiring citrus imported for packing in Arizona to meet Arizona's standards before it enters the State means the citrus would have to be sorted and graded to meet Arizona's standards before it crosses the border. However, this additional work prior to packing in Arizona could be avoided if the imported citrus -- like citrus grown in-state -- is graded and sorted to meet Arizona's standards when it is packed.

In *Pike*, the Court prohibited Arizona from requiring work to be done in state that could be done more efficiently elsewhere. *Pike*, 397 at 142. Here, prohibiting the entry of certain citrus for packing in Arizona

would require work to be done out of state that could be done more efficiently in Arizona. Although the State has a legitimate interest in protecting the reputation and marketability of Arizona-grown citrus, the State cannot prohibit the importation of citrus for packing because it does not meet Arizona's standards when the citrus can be brought into compliance with Arizona's standards when it is packed. Instead, the Department is correct in allowing the entry of the citrus and ensuring it meets Arizona's standards when it is packed.

Conclusion

Because the Department can protect the State's interests by ensuring that citrus complies with Arizona's standards when it is packed, the Department cannot prohibit the importation of citrus for packing in Arizona because the citrus fails to satisfy Arizona citrus grades and standards. This does not limit the Department's ability to limit the entry of citrus for health or safety reasons.

Janet Napolitano
Attorney General

1. That statute provides in relevant part: § 3-461. Unlawful packing or sale of fruit
 - A. It is unlawful to pack or cause to be packed, to sell or offer for sale, to deliver for shipment, load, ship or transport for shipment, whether in domestic, interstate or foreign commerce, citrus fruit which does not conform to this article.
2. The Court has not clearly established a test for determining the limits that the *foreign* commerce clause imposes on state regulations in the absence of congressional action, but it has suggested that the test is stricter than the test that applies when only interstate commerce is impacted. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 438 n.9 (1980) (noting that "Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged") (citation omitted). Consequently, a state regulatory scheme that is invalid under the interstate commerce clause would also be invalid under the foreign commerce clause.
3. *Cf. Hunt*, 432 U.S. at 337 (finding that a North Carolina statute that "required all closed containers of apples shipped into or sold in the State to display either the applicable USDA grade or none at all" was, in practical effect, economic protectionism that favored North Carolina apples and that unconstitutionally discriminated against Washington State apples, which met standards higher than those that the USDA had established); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 350 (1951) (finding that a city ordinance that made it "unlawful to sell any milk as pasteurized unless it ha[d] been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison" plainly discriminated against interstate commerce).

To: Michael P. Austin

Director, Emergency Management Division Department of
Emergency and Military Affairs

February 2, 2000

Re: 100-003
(R99-061)

Question Presented

You have asked if time spent by volunteer State employees in training missions for search or rescue operations can be used to calculate workers' compensation benefits under the current version of Arizona Revised Statutes ("A.R.S.") § 23-901, despite a contrary conclusion in Arizona Att'y Gen. Op. I85-027 concerning an earlier version of this statute.

Summary Answer

Under A.R.S. § 23-901, time spent by volunteer State employees in training missions for search or rescue operations is eligible for inclusion in calculating workers' compensation benefits, and Ariz. Att'y Gen. Op. I85-027 is no longer correct to the extent it concludes otherwise.

Background

In 1985, the Arizona Attorney General issued an opinion concluding that time spent in training missions for search and rescue operations cannot be used to calculate workers' compensation benefits. Ariz. Att'y Gen. Op. I85-027. At the time, A.R.S. § 23-901, the statute defining who is eligible for workers' compensation benefits, did not include time spent by volunteer State employees in training exercises for search or rescue operations. *Id.* However, shortly after that opinion was issued, the Legislature amended A.R.S. § 23-901 to include search or rescue training operations. 1985 Ariz. Sess. Laws ch. 349, § 1. As a result of that change, the definition of "employee," "workman," "worker," and "operative" for the purposes of Arizona's workers' compensation laws now includes:

Personnel who participate in a *search or rescue operation or a search or rescue training operation* that carries a mission identifier assigned by the division of emergency management as provided in § 35-192.01 and who serve without compensation as volunteer state employees. The basis for computation of wages for premium purposes and compensation benefits is the total volunteer man-hours recorded by the division of emergency management in a given quarter multiplied by the amount determined by the appropriate risk management formula.

A.R.S. § 23-901(5)(M) (emphasis added).

The legislative history of the 1985 amendments to A.R.S. § 23-901 indicates that those changes were intended to supercede Ariz. Att'y Gen. Op. I85-027:

Attorney General's opinions issued in 1979 and 1985 stated that volunteers who participated in training and drills were not covered by workers' compensation. As a result, House Bill 2257 has been introduced to provide workers' compensation coverage to volunteers who participate in search and rescue training operations or emergency management training, exercises or drills.

Senate Staff, Fact Sheet for H. 2257, Prepared for the Senate Committee on Commerce and Labor, 37th Legis., 1st Reg. Sess. (Ariz. 1985); *see also Hearing on H.2257 Before the Senate Comm. on Commerce and Labor.*, 37th Legis., 1st Reg. Sess. (Ariz. April 3, 1985) (testimony of sponsor regarding purpose of the bill).

Analysis

The 1985 amendments to A.R.S. § 23-901 unambiguously declare that time spent in search or rescue

training exercises is to be considered in calculating workers' compensation benefits if the search or rescue training operation carries "a mission identifier assigned by the division of emergency management as provided in Section 35-192.01." A.R.S. § 23-901(5)(m). Although A.R.S. § 35-902.01 does not provide for mission identifiers, regulations promulgated by the Director of the Division of Emergency Management ("Division") authorize the Division to issue mission identifiers for search or rescue training operations. Arizona Administrative Code ("A.A.C.") R8-2-102(B)(1); see *also* A.A.C. R8-2-101(3) (definition of "mission"). As long as the Division issues a mission identifier for a search or rescue training operation, the activity should be included in the calculation of workers' compensation benefits. See A.R.S. § 23-901(5)(m).

Conclusion

Because of the 1985 amendments to the workers' compensation laws, time spent in search or rescue training missions should be included in the calculations of workers' compensation benefits. To the extent that Ariz. Att'y Gen. Op. I85-027 is inconsistent with this conclusion, it is no longer correct.

Janet Napolitano
Attorney General

To: The Honorable Elaine Richardson, Arizona State Senate
The Honorable Andrew Nichols, Arizona House of Representatives
The Honorable Carmine Cardamone, Arizona House of
Representatives

January 28, 2000

Re: I00-002(R99-
037)

Question Presented

Under what circumstances, if any, does Arizona Revised Statutes ("A.R.S.") § 28-704(A), which addresses traveling at such a slow speed that traffic is impeded, apply to the operation of bicycles on roadways?

Summary Answer

Bicyclists traveling slower than the normal speed of traffic on a roadway must comply with A.R.S. § 28-704(A) only if the lane in which the cyclist is riding is too narrow for a bicycle and vehicle to travel safely side by side as described in A.R.S. § 28-815(A)(4).

Background

Arizona law regulating traffic includes one article specifically addressing the operation of bicycles. A.R.S. Title 28, article 11. In this article, A.R.S. § 28-815 addresses where bicyclists moving slower than traffic must ride. Under A.R.S. § 28-815, a bicyclist "riding . . . on a roadway at less than the normal speed of traffic at the time and place and under the conditions then existing shall ride as close as practicable to the right-hand curb or edge of the roadway."⁽¹⁾ See also *Maxwell v. Gossett*, 126 Ariz. 98, 99, 612 P.2d 1061, 1062 (1980) (noting that earlier version of A.R.S. § 28-815 requires that "bicycles . . . be ridden on the right side of the road, or with the traffic"). There are four exceptions to this general rule: (1) if passing another bicycle or vehicle traveling in the same direction; (2) if preparing for a left turn; (3) "if reasonably necessary to avoid conditions, including fixed or moving objects, parked or moving vehicles, bicycles, pedestrians, animals or surface hazards;" or (4) "if the lane in which the person is operating the bicycle is too narrow for a bicycle and a vehicle to travel safely side by side within the lane." A.R.S. § 28-815(A)(1)-(4). Section 28-815, A.R.S., also expressly prohibits bicyclists from riding "more than two abreast except on paths or parts of roadways set aside for the exclusive use of bicycles." A.R.S. § 28-815(B). Another statute, A.R.S. § 28-812, establishes that bicyclists have "all of the rights" and are "subject to all of the duties" that apply to a driver of a "vehicle" under Title 28, chapters 3 (traffic and vehicle regulation), 4 (driving under the influence), and 5 (penalties and procedures for vehicle violations).⁽²⁾ This statute "generally applies the same traffic laws to riders of bicycles as it does to drivers of motor vehicles." *Maxwell*, 126 Ariz. at 100, 612 P.2d at 1063. The only exceptions to the application of other traffic laws to bicyclists are for "special rules in this article [Article 11] and . . . provisions . . . that by their nature can have no application." A.R.S. § 28-812.

You inquired specifically about the application of A.R.S. § 28-704(A) to bicyclists. This subsection prohibits a person from driving "a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with the law."⁽³⁾ A.R.S. § 28-704(A).

Analysis

Section 28-704, A.R.S., (1) prohibits a motor vehicle from going "at such a slow speed as to impede or block the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law;" (2) allows the director of the Department of Transportation or local authority to establish a minimum speed limit "below which a person shall not drive a vehicle except when necessary for safe operation or in compliance with law;" and (3) requires a person driving slower than the normal flow of traffic on a two-lane highway where passing is unsafe to pull off the road at the nearest turnout if five or more vehicles are lined up behind the slow-moving vehicle. A.R.S. § 28-704. Section 28-704(A), A.R.S., expressly applies only to motor vehicles, which does not include bicycles. See A.R.S. §§ 28-101(29) (definition of motor vehicle). However, because bicyclists are generally subject to all requirements imposed on other types of vehicles, A.R.S. § 28-704(A) would apply to bicyclists unless "special rules" for bicyclists in Title 28, article 11 apply, or if the provisions of A.R.S. § 28-704 "by their nature can have no application" to bicyclists. See A.R.S. § 28-812.

Section 28-815, A.R.S., is a "special rule" for bicyclists in Title 28, article 11 that establishes where a bicyclist is to ride when traveling "at less than the normal speed of traffic at the time and place and under the conditions then existing." It imposes a duty on bicyclists, subject to some exceptions, to ride "as close as practicable to the right-hand curb or edge of the roadway." A.R.S. § 28-815(A). Because A.R.S. § 28-815 establishes a special rule for bicyclists moving slower than other traffic, bicyclists subject to A.R.S. § 28-815 are not covered by A.R.S. § 28-704, which applies to slow-moving motor vehicles. See A.R.S. § 28-812; see also *City of Phoenix v. Superior Court*, 139 Ariz. 175, 178, 677 P.2d 1283, 1286 (1984) (specific statutory provisions control over

general provisions).

However, A.R.S. § 28-815, the statute governing bicyclists moving slower than traffic, exempts bicyclists when, among other things, "the lane . . . is too narrow for a bicycle and a vehicle to travel safely side by side." A.R.S. § 28-815(A)(4) (the "narrow road" exemption). A bicyclist covered by the narrow road exemption is no longer subject to the special rule imposed on bicyclists by A.R.S. § 28-815(A), and no statute in the article governing bicycles (Title 28, article 11) describes the legal responsibilities of the bicyclist under those circumstances. Thus, there is no "special rule" in the "bicyclist article" (article 11) that applies to this situation. Also, the requirements for slow motor vehicles in A.R.S. § 28-704 are not "by their nature" inapplicable to bicyclists. A bicyclist within the "narrow road" exemption from A.R.S. § 28-815 is, therefore, subject to the requirements of A.R.S. § 28-704.⁽⁴⁾ Applying A.R.S. § 28-704(A) to bicyclists within the narrow road exemption from A.R.S. § 28-815 prohibits the bicyclist in that situation from driving at such a slow speed "as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with law."

Conclusion

A.R.S. § 28-704(A) only applies to a bicyclist traveling on a roadway slower than the normal speed of traffic when the lane is too narrow for a bicycle and vehicle to travel side by side as described in A.R.S. § 28-815(A)(4). In other circumstances, bicyclists need only comply with the requirements of A.R.S. § 28-815.

¹. "Traffic" means "pedestrians, ridden or herded animals, vehicles and other conveyances either singly or together while using a highway for purposes of travel." A.R.S. § 28-601(26).

2. A "vehicle" is "a device in, on or by which a person or property is or may be transported or drawn on a public highway, excluding devices moved by human power or used exclusively on stationary rails or tracks." A.R.S. § 28-101(52).

3. A "motor vehicle" means either a self-propelled vehicle or, for the purposes of the laws regarding the motor vehicle fuel tax, "a vehicle that is operated on the highways of this state and that is propelled by the use of motor vehicle fuel." A motor vehicle [d]oes not include a motorized wheelchair or a motorized skateboard. A.R.S. § 28-101(29).

4. In a 1980 Arizona Supreme Court case concerning whether a bicyclist may ride in a crosswalk, Justice Hays noted in a concurring opinion that he was "disturbed" by the lack of clarity regarding the duties of bicyclists. *Maxwell*, 126 Ariz. at 100, 612 P.2d at 1064 (Hays, J. specially concurring). The statutory analysis required to answer the question raised in your opinion request further illustrates the difficulty in this area of law that prompted comments by Justice Hays.

To: The Honorable Betsey Bayless
Arizona Secretary of State

January 19, 2000
Re: I00-001(R99-051)

Questions Presented

You have asked the following questions about the reporting requirements in the Citizens Clean Elections Act ("Act"), Arizona Revised Statutes ("A.R.S.") §§ 16-940 to -961:

- (1) What amount of contributions may non-participating candidates for the Legislature and the Corporation Commission receive that would require those candidates to file original reports with the Secretary of State's Office under A.R.S. § 16-941(B)(2); and
- (2) if, by September 28, 1999, a non-participating candidate had received the amount of contributions requiring an original report, when would that candidate be required to file the report?⁽¹⁾

Summary Answer

(1) Before the primary election, a non-participating legislative candidate must file a report when that candidate's expenditures exceed \$7,000, and a non-participating Corporation Commission candidate must file a report when expenditures exceed \$28,000. After the primary election, reports are triggered when contributions less expenditures through the primary election exceed \$10,500 for non-participating legislative candidates and \$42,000 for Corporation Commission candidates. For elections after 2000, the amounts that establish reporting obligations will be adjusted for inflation under A.R.S. § 16-959.

(2) Contributions received as of September 28, 1999, will not trigger a reporting requirement because through the primary election, reports are triggered by expenditures, not contributions. After the primary election, reports are triggered by contributions less expenditures through primary election day.

Background

At the 1998 general election, Arizona's voters passed Proposition 200, which created the Act.⁽²⁾ The Act establishes public funding of legislative and statewide election campaigns for those political candidates who voluntarily participate in limiting campaign spending and fundraising. See Betsy Bayless, Secretary of State, Ballot Propositions For The General Election of November 3, 1998 at 84 (1998) (analysis by Legislative Council). Candidates who qualify for the clean elections program receive public funding for their campaigns, based on amounts specified in the Act. See A.R.S. §§ 16-951, -961(G), (H).

The Act also establishes reporting requirements, some of which apply to non-participating candidates. See A.R.S. §§ 16-941(B), -958(B). Non-participating candidates must comply with the Act's reporting requirements, as well as the campaign finance reporting requirements under A.R.S. § 16-913.⁽³⁾ The Act provides that such reports shall be filed with the Secretary of State in electronic format. A.R.S. § 16-958(E). The Citizens Clean Elections Commission ("Commission"), which is responsible for implementing the Act, uses the non-participating candidates' reports to determine whether participating candidates are entitled to receive additional public funding. See A.R.S. § 16-952.

Through the primary election, a non-participating candidate must file a report when "expenditures other than independent expenditures on behalf of the candidate, from the beginning of the election cycle to any date up to primary election day, exceed seventy percent of the original primary election spending limit applicable to a participating candidate seeking the same office." A.R.S. § 16-941(B)(2)(a). The Act refers to this as an "original report." A.R.S. § 16-958(A).⁽⁴⁾ For the 2000 elections, this report requirement applies to expenditures after November 3, 1998 (the date of the last general election, which begins the election cycle) and up to September 12, 2000 (the date of the primary election).

The timing for filing a report depends on when a non-participating candidate triggers the reporting requirement. Before the beginning of the primary election period (which, for the 2000 election, begins July 11, 2000), the report is due on the first of each month unless the candidate has not reached the amount requiring a report on that date.⁽⁵⁾ A.R.S. § 16-958(B)(1). After the primary election period begins, the report is due on the Tuesday after the candidate has reached the amount triggering a reporting requirement, except during the last two weeks before the primary election, when a report is due within one business day of triggering a reporting requirement. A.R.S. §§ 16-958(B)(2), (3).

After the primary election, the obligation to file an original report is based on total contributions less the candidate's expenditures through the primary election. A.R.S. § 16-941(B)(2)(b). An original report is required when "contributions to a candidate from the beginning of the election cycle to any date during the general election period, less expenditures made from the beginning of the election cycle through primary election day exceed seventy percent of the original general election spending limit" *Id.*⁽⁶⁾ The candidate must file this original report, and any supplemental report that may be required, on any Tuesday after the candidate has triggered a reporting requirement, except during the last two weeks before the general election when a report must be filed within one business day of triggering the reporting requirement. A.R.S. § 16-958(B).

Non-participating candidates file these reports with the Secretary of State. A.R.S. §§ 16-941(B)(2), - 958(A). The Secretary of State "immediately" notifies the Commission of the report and delivers a copy to the Commission. A.R.S. § 16-958(D). The Commission, in turn, provides a copy of the report to participating candidates opposing the candidate identified in the report. *Id.* The report must identify (1) the dollar amount being reported, (2) the candidate, and (3) the date. A.R.S. § 16-958(A).

Analysis

A. Through the Primary Election, Expenditures Trigger Reporting Requirements: After the Primary Election, Contributions Less Expenditures through the Primary Election Trigger the Reporting Requirements.

1. Primary Election Reports.

Through the primary election, a non-participating candidate must file an original report when expenditures from the start of the election cycle to any date up to primary election day exceed 70 percent of the original primary election spending limit. A.R.S. § 16-941(B)(2)(a). For the 2000 elections, the original primary election spending limit for a legislative candidate is \$10,000 (A.R.S. § 16-961(G)(1)), and for Corporation Commission candidates it is \$40,000 (A.R.S. § 16-961(G)(3)).⁽⁷⁾ Therefore, a non-participating candidate for the Legislature must file a report when expenditures up to primary election day exceed \$7,000 (70 percent of \$10,000), and non-participating Corporation Commission candidates must file when expenditures up to the primary election exceed \$28,000 (70 percent of \$40,000).

If non-participating candidates for those offices reach that expenditure level before the primary election, those candidates must file reports according to the schedule in A.R.S. § 16-958. If the reporting requirement is triggered "before the beginning of the primary election period," (which, for the 2000 election, means before July 11, 2000), the report is due the first of the month. A.R.S. § 16-958(B)(1). From the beginning of the primary election period (July 11, 2000), but not during the last two weeks before the primary election, the report is due on the first Tuesday after the candidate reaches the expenditure level triggering a report. A.R.S. § 16-958(B)(2). During the last two weeks before the primary election, a candidate must file a report within one day of reaching the expenditure level triggering a report. A.R.S. § 16-958(B)(3).

2. General Election Reports.

After the primary election, a non-participating candidate must file an original report when "contributions . . . from the beginning of the election cycle to any date during the general election period, less expenditures made from the beginning of the election cycle through primary election day . . . exceed seventy percent of the original general election spending limit." A.R.S. § 16-941(B)(2)(b). Although the Act does not specifically state that this report is only required after the primary election, this conclusion follows logically from the statutory language. A candidate cannot make the necessary calculation for this report until after the primary because the calculation requires contributions "to any date in the general election period," which begins the day after the primary (A.R.S. § 16-961(B)(5)), and "expenditures *through* the primary." *Id.*

The original general election spending limit is fifty percent greater than the primary election spending limit for that office. A.R.S. § 16-961(G), (H). Because the primary election spending limit for a candidate for the Legislature is \$10,000, A.R.S. § 16-961(G)(1), the original general election spending limit for a legislative candidate is \$15,000. Thus, if a non-participating legislative candidate's contributions to any point in the general election period less expenditures through primary election day exceed \$10,500 (70 percent of \$15,000), the legislative candidate must file a report with the Secretary of State.

The general election spending limit for Corporation Commission candidates is \$60,000, which is fifty percent greater than the \$40,000 primary spending limit. See A.R.S. § 16-961(G)(3), (H). If the candidate's contributions through any date in the general election period less expenditures through primary election day exceed \$42,000 (70 percent of \$60,000), the Corporation Commission candidate must file an original report with the Secretary of State. This report must be filed on the first Tuesday by which the candidate has reached the specified dollar amount and, within the last two weeks before the general election, must be filed within one business day after the candidate triggers the reporting requirement. A.R.S. § 16-958(B)(2), (3).

B. Contributions to a Non-Participating Candidate by September 28, 1999.

Do Not Trigger a Reporting Requirement.

As described above, contributions alone do not trigger reporting requirements under the Act because expenditures are always considered. Before the primary election, expenditures determine whether a non-participating candidate must file a report. See A.R.S. § 16-941(B)(2)(a). After the primary election, contributions to any point in the general election period less expenditures through the primary trigger a report. Contributions to a non-participating candidate through September 28, 1999 do not trigger a reporting requirement at that point because additional analysis of the candidate's expenditures, as described above, is necessary to determine whether the candidate must file a report and when that report is due.

Conclusion

For the 2000 election cycle, before the primary election, a non-participating candidate for the Legislature must file an original report when expenditures exceed \$7,000. A non-participating candidate for the Corporation Commission must file a similar report when expenditures before the primary exceed \$28,000. After the primary election, when total contributions to a non-participating legislative candidate less expenditures through the primary exceed \$10,500, the candidate must file a report. A non-participating Corporation Commission candidate must file this report when contributions less expenditures through the primary exceed \$42,000. For elections after 2000, these amounts will be adjusted for inflation pursuant to A.R.S. § 16-958.

Contributions as of September 28, 1999, do not establish a reporting obligation under the Act. Instead, through the primary election, the reporting requirement is determined by expenditures, and after the primary election, the reporting requirement is determined by contributions less expenditures through the primary election.

¹ A "non-participating" candidate is a candidate who is not participating in the clean elections public campaign funding program established by the Act. See A.R.S. § 16-961(C)(2).

2. The Governor proclaimed the Act valid on November 23, 1998. In addition, the provisions of the Act relevant to this Opinion were pre-cleared by the United States Justice Department on February 16, 1999. See 42 U.S.C. § 1973(c).

3. In an election year, A.R.S. § 16-913 requires that political committees file the following campaign finance reports: (1) a report filed by June 30, covering January 1 through May 31, (2) pre-election reports that are complete through the twentieth day before the primary election and general election, and (3) post-election reports that are complete through the twentieth day after the primary election day and general election day. For non-election years, a single campaign finance report is due no later than January 31 of the following year. A.R.S. § 16-913.

4. The Act also requires supplemental reports if additional unreported expenditures exceed ten percent of the original primary election spending limit or \$25,000, whichever is lower, before the general election period. A.R.S. § 16-958(A).

5. The primary election period is the nine-week period ending on the day of the primary election. A.R.S. § 16-961(B)(4). For the 2000 election cycle, that period runs from July 11, 2000, to September 12, 2000.

6. During the general election period, supplemental reports are required when expenditures or contributions exceed "ten percent of the original general election spending limit or twenty-five thousand dollars, whichever is lower." A.R.S. § 16-958(A).

7. The term "original" means the primary election spending limits adjusted for inflation every two years, as specified in A.R.S. § 16-959. A.R.S. § 16-961(I)(1). Because the Act was passed less than two years ago, the "original primary election spending limit" is the same as the "primary election spending limit."