

2005 AG Opinions

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STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

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| <p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>February 4, 2005</p> | <p>No. I05-001 (R04-038)</p> <p>Re: Identification Requirements For Voter Registration</p> |
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To: The Honorable Janice K. Brewer
Arizona Secretary of State

Question Presented

Under A.R.S. § 16-166(F)(1), as amended by Proposition 200, is an Arizona driver or nonoperating identification license issued after October 1, 1996, satisfactory evidence of United States citizenship for the purpose of registering to vote?

Summary Answer

Pursuant to A.R.S. § 16-166(F)(1), the number of a driver or nonoperating identification license issued in Arizona after October 1, 1996, is satisfactory evidence of United States citizenship to register to vote.

Background

A. Voter Registration Requirements in Proposition 200.

Arizona voters approved Proposition 200 in the general election of November 2004. The Proposition calls for (1) verifying the identity and eligibility of applicants for

state and local public benefits, and (2) requiring identification to register to vote and to receive a ballot.¹

Your question concerns the identification requirements of Proposition 200 when registering to vote. Proposition 200 amended A.R.S. § 16-166, a section of the Arizona Revised Statutes entitled “Verification of registration.” Section 16-166 now provides, in relevant part:

F. The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. Satisfactory evidence of citizenship shall include any of the following:

1. The number of the applicant’s driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant’s driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.

The other “satisfactory evidence” of citizenship specified in A.R.S. § 16-166(F) includes a copy of a birth certificate, passport copy, naturalization documents, other methods of proof established under the Immigration Reform and Control Act of 1986, and an Indian affairs card number, tribal treaty card number or tribal enrollment number. A.R.S. § 16-166(F)(2)-(5).

In addition to presenting the documentation required by A.R.S. § 16-166(F), a person registering to vote must sign a statement declaring that he or she is a United States citizen and acknowledging that executing a false registration is a class 6 felony. A.R.S. §

¹ Arizona could not implement the provisions relating to voting and voter registration in Proposition 200 until the U.S. Department of Justice precleared them as required under the federal Voting Rights Act. 42 U.S.C. § 1973c. The Department of Justice precleared those provisions on January 24, 2005.

16-152(A)(14), (18). It is a state and federal crime to falsely claim to be a United States citizen when registering to vote. A.R.S. § 16-152 (A)(18); 18 U.S.C. § 1015 (f).

B. Proof Required to Obtain an Arizona Driver License or Nonoperating Identification License.

Since July 1996, Arizona has required that a person establish that he or she is lawfully present in the United States in order to obtain an Arizona driver or identification license. 1996 Ariz. Sess. Laws, Ch. 230, §§ 5-7. (codified at A.R.S. §§ 28-3153(D), -3158(C)). The statutes prohibit the Department of Transportation from issuing or renewing a driver license or nonoperating identification license “for a person who does not submit proof satisfactory to the department that the applicant’s presence in the United States is authorized under federal law.” A.R.S. § 28-3153(D).

In addition, under a Motor Vehicle Division (“MVD”) policy, effective on or about October 8, 2000, noncitizens of the United States that can demonstrate lawful presence in this country are issued a Type F driver license. MVD can determine whether a person was issued a license with a Type F designation by accessing the internal records it maintains, but the designation is not apparent from the license face. You noted in your opinion request that people with a Type F driver license cannot register online through the EZ voter registration program administered by the Secretary of State and the Department of Transportation.

Analysis

Section 16-166(F)(1), A.R.S., establishes when a driver license number or nonoperating identification license number is satisfactory evidence of citizenship for the purpose of registering to vote in Arizona. When interpreting a statute, the primary goal is to effectuate the intent of its framers and, in the case of an initiative, the voters who

adopted it. *State v. Givens*, 206 Ariz. 186, 188, 76 P.3d 457, 459 (App. 2003). The language of a statute is the best indicator of its intent. *Id.*

In its first clause, A.R.S. § 16-166(F)(1) establishes that the number of a driver license or nonoperating identification license issued by the Department of Transportation in Arizona after October 1, 1996, shall be satisfactory evidence of U.S. citizenship for the purpose of registering to vote.² The next clause addresses driver licenses and identification from other jurisdictions. It permits the use of a license number issued by the “equivalent government agency” of another state, if the license confirms that the holder provided proof of U.S. citizenship. Under the statutory language, the requirement that “the agency indicates on the applicant’s driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship” modifies the phrase “equivalent government agency of another state.” Thus, the statute requires that a license from another jurisdiction indicate that the person provided satisfactory proof of United States citizenship in order for that license to be acceptable identification to register to vote in Arizona, but an Arizona driver license is acceptable as long as it was issued after October 1, 1996.³

² It is unclear why the authors of Proposition 200 chose October 1, 1996 as a cutoff date. One possibility is that they attempted to tie the voter identification rules of Proposition 200 to Arizona’s authorized presence law which took effect August 1, 1996. The Legislature also renumbered the relevant statutes in 1996, 1996 Ariz. Sess. Laws Ch. 76, and, in 1997, approved a comprehensive rewrite of Title 28. 1997 Ariz. Sess. Laws, Ch. 1. The rewritten version of the relevant statutes took effect October 1, 1997, exactly one year after the date specified in A.R.S. § 16-166(F)(1). *Id.*, §§ 188, 192, 194, 506.

³ The “last antecedent” principle of statutory construction also supports this reading of the statute. *See Tanner Companies v. Ariz. State Land Dep’t*, 142 Ariz. 183, 189, 688 P.2d 1075, 1081 (App. 1984) (a qualifying word or phrase is typically applied to the word or phrase that immediately precedes it).

The Legislative Council's analysis of Proposition 200 supports this construction. The Council's analysis is designed to "assist voters in rationally assessing an initiative proposal by providing a fair, neutral explanation of the proposal's contents and the changes it would make if adopted." *Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 590, 886 P.2d 1338, 1346 (1994). The analysis is included in the general election publicity pamphlet that is given to each voter, A.R.S. § 19-123(A)(4) and (C), and may be used to interpret an initiative. *Calik v. Kongable*, 195 Ariz. 496, 500, 990 P.2d 1055, 1059 (1999).

The Legislative Council informed voters that "Proposition 200 would require that evidence of United States citizenship be presented by every person to register to vote." *Arizona Secretary of State, Ballot Propositions and Judicial Performance Review* 43 (Nov. 2, 2004). Regarding the evidence that would satisfy Proposition 200, the Council advised:

Proposition 200 provides that for purposes of registering to vote, satisfactory evidence of United States citizenship includes:

- an Arizona driver or nonoperating identification license issued after October 1, 1996.
- a driver or nonoperating identification license issued by another state if the license indicates that the person has provided proof of United States citizenship.

Id. at 43-44. Voters were entitled to rely on this analysis in weighing the effects of Proposition 200. *Fairness & Accountability in Ins. Reform*, 180 Ariz. at 590, 886 P.2d at 1346.

The difficulty presented by the question you have raised is that a person need not be a United States citizen to obtain an Arizona driver license or identification card, even after October 1, 1996. The Department of Transportation verifies that a person is

lawfully present in the United States. A.R.S. §§ 28-3153(D), -3158(C). Thus, citizens of other nations who are lawfully present in the United States are eligible for Arizona driver licenses and identification cards. Moreover, an Arizona license does not indicate a person's citizenship on its face.

For these reasons, it might be argued that *no* Arizona driver license – regardless of when it was issued – should be acceptable identification to register to vote. This interpretation, however, is contrary to the statutory language that Arizona voters approved in A.R.S. §16-166(F)(1). *Samaritan Health Sys. v. Superior Court*, 194 Ariz. 284, 289, 981 P.2d 584, 589 (App. 1998) (a legislature is presumed to express itself in “as clear a manner as possible.”). Such an interpretation renders meaningless the statutory directive that an Arizona license issued after October 1, 1996 “shall be” acceptable evidence of citizenship to register to vote and ignores the guidance voters received in the Publicity Pamphlet. It also renders superfluous the statutory distinctions between licenses in Arizona issued before or after October 1, 1996 and between licenses issued by the Arizona Department of Transportation and other jurisdictions. This contradicts the principle that courts must “give effect to each word of the statute.” *Bilke v. State*, 206 Ariz. 462, 464, 80 P.3d 269, 271 (2003). Furthermore, the authors of a statute are presumed to know the existing law. *State v. Box*, 205 Ariz. 492, 496, 73 P.3d 623, 627 (App. 2003); *McLaughlin v. State Bd. of Educ.*, 89 Cal. Rptr.2d 295, 305 (App. 1999).

Although relying on Arizona licenses issued after October 1, 1996 as identification does not, by itself, screen all non-citizens from registering to vote, it certainly prevents undocumented immigrants from doing so. In this way, the statutory

language in A.R.S. § 16-166(F)(1) furthers a purpose of Proposition 200, which focused on issues relating to illegal immigration and undocumented immigrants from receiving benefits for which they are not eligible. *See* Proposition 200, § 2 (findings and declarations).⁴ In addition, the requirement that a person registering to vote attest that he or she is a citizen and the associated criminal penalties for violating this requirement provide additional protections against non-citizens registering to vote in Arizona. *See* A.R.S. § 16-152(A)(18); 18 U.S.C. § 1015(f). In sum, Arizona law protects against a non-citizen registering to vote by requiring that a person attest that he or she is a citizen of the United States and provide an Arizona driver license number issued after October 1, 1996 or some other identification specified by A.R.S. § 16-166(F)(1).

Conclusion

Under A.R.S. § 16-166(F)(1), the number of a driver or nonoperating identification license issued in Arizona after October 1, 1996, is satisfactory evidence of United States citizenship for the purpose of registering to vote.

Terry Goddard
Attorney General

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⁴The Proposition's Findings and Declarations stated:

This state finds that illegal immigration is causing economic hardship to this state and that illegal immigration is encouraged by public agencies within this state that provide public benefits without verifying immigration status. This state further finds that illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status, and that this conduct contradicts federal immigration policy, undermines the security of our borders and demeans the value of citizenship. Therefore, the people of this state declare that the public interest of this state requires all public agencies within this state to cooperate with federal immigration authorities to discourage illegal immigration.

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

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| ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL February 9, 2005 | No. I05-002 (R04-037) Re: AIMS testing and special education |
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To: The Honorable Tom Horne
Superintendent of Public Instruction

Questions Presented

You have asked the following questions concerning the requirement that public school students pass Arizona's Instrument to Measure Standards ("AIMS") in order to graduate from high school:

1. Whether Arizona Administrative Code ("A.A.C.") R7-2-302(6), which mandates that school districts develop both a course of study and graduation requirements for all students placed in special education programs, conflicts with Arizona Revised Statutes ("A.R.S.") § 15-701.01(A)(3); and
2. Whether A.A.C. R7-2-302(6) allows school districts to reference special education placement on student transcripts.

Summary Answers

1. The State Board of Education's requirement in A.A.C. R7-2-302(6) that school districts develop graduation requirements for students enrolled in special education programs is consistent with A.R.S. § 15-701.01(A)(3) and the laws governing special education. This rule permits school districts, through individual education programs, to implement the AIMS test in a

manner consistent with the Individuals with Disabilities Education Act. This gives the school districts, through individual education programs, the authority to exempt special education students from passing the AIMS test in order to graduate.

2. School districts may reference a student's special education placement on that student's transcript subject to the confidentiality requirements under the Family Education Rights and Privacy Act of 1974 (as amended) and the Individuals with Disabilities Education Act.¹

Analysis

I. A.A.C. R7-2-206 Complies with Statutory Authority.

A. The Statute and Rule Governing High School Graduation Requirements.

Section 15-701.01(A), A.R.S., requires the State Board of Education to establish requirements regarding high school graduation. Specifically, the statute requires that the State Board:

1. Prescribe a minimum course of study, as defined in section 15-101² and incorporating the academic standards adopted by the state board of education, for the graduation of pupils from high school.
2. Prescribe competency requirements for the graduation of pupils from high school incorporating the academic standards in at least the areas of reading, writing, mathematics, science and social studies.
3. Develop and adopt competency tests for the graduation of pupils from high school in at least the areas of reading, writing and mathematics and shall establish passing scores for each such test.

The State Board has adopted a rule, A.A.C. R7-2-302, that sets forth the minimum competency requirements for graduation from public high schools in Arizona. That rule

¹ This Opinion does not address your third question, which asked whether the State Board could adopt a rule to require an endorsement on a student's diploma indicating the student's proficiency level on the AIMS test. This question is not answered here because Attorney General Opinions answer questions concerning existing statutes and agency rules rather than possible statutory or rule changes.

² A "course of study" is "a list of required and optional subjects to be taught in the schools." A.R.S. § 15-101(9).

“prescribes the minimum course of study and competency requirements” for high school graduation and also requires:

receipt of a passing score on the reading, mathematics, and writing portions of the AIMS (Arizona's Instrument to Measure Standards) assessment for the graduation of pupils from high school or issuance of a high school diploma, effective for the graduation class of 2006.

A.A.C. R7-2-302.³

A.A.C. R7-2-302 has a specific provision addressing students placed in special education programs. In A.A.C. R7-2-302(6), the State Board assigned local school district governing boards the responsibility of developing and approving graduation requirements for students in special education programs:

The local governing board of each school district shall be responsible for developing a course of study and graduation requirements for all students placed in special education programs in accordance with A.R.S. Title 15, Chapter 7, Article 4 and A.A.C. R7-2-401 et seq. Students placed in special education classes, 9-12, are eligible to receive a high school diploma upon completion of graduation requirements, but reference to special education placement may be placed on the student's transcript or permanent file.

This rule refers to the State laws and regulations (A.R.S. §§ 15-761 to –774; A.A.C. R.7-2-401 to –408) which require that the State comply with federal laws governing special education.

B. Federal Requirements Concerning Special Education.

The federal Individuals with Disabilities Education Act (“IDEA”) “ensure[s] 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 and

³ In addition to the AIMS test, the State Board has adopted alternate assessments that are to be used to assess students with significant cognitive disabilities. *See* Arizona’s Instrument to Measure Standards—Alternate (AIMS-A), <http://www.ade.state.az.us/ess/aims-a/>.

prepare them for employment and independent living.” 34 C.F.R. § 300.1(a). To meet the “unique needs” of students, the IDEA requires individual education programs (IEPs) for students with disabilities. *See* 34 C.F.R. § 300.346.⁴

The federal regulations for the IDEA specifically address students with special education needs and state and district assessments.⁵ 34 C.F.R. § 300.138(a). Under these regulations, students are required to take “general state and district-wide assessment programs, with appropriate accommodations and modifications in administration, if necessary,” unless the student’s IEP specifically calls for the student to take an alternate assessment. *Id.* Therefore, a student in special education must take the AIMS test unless that student’s IEP specifically indicates that the student will not participate in the exam and explains why the exam’s method of assessment is not appropriate for that particular student.⁶ *See* 34 C.F.R. § 300.347(a)(5)(A). Although federal law generally requires that students with IEPs take State assessments, such as the AIMS exam, it does not require that those students pass the exam before graduating. Part of providing an individualized education includes adopting an appropriate exit strategy for each student. 34 C.F.R. § 300.347 (b)(1)&(2). Whether a student’s exit strategy involves passing the State’s exit exam is a decision for that student’s IEP Team. *Id.* However, nothing in the IDEA mandates different graduation requirements for special education students. *See Special Sch. Dist. of St. Louis County (MO)*, 16 Educ. for the Handicapped L. Rep. 307, 308 (1989).⁷

⁴ An “individualized education program” or “IEP” is a ‘comprehensive statement of the educational needs of the disabled student and the “specially designed instruction and related services to be employed to meet those needs.” *Burlington Sch. Comm. v. Mass. Dep’t of Educ.*, 471 U.S. 359, 368 (1985); *see also* A.R.S. § 15-761(11) (defining IEP).

⁵ Students with disabilities are entitled to receive necessary accommodation during testing to make allowances for the effects of their disability. 34 C.F.R. § 300.138(a).

⁶ Federal law has changed in the past decade to ensure that all students are assessed. *See generally High School Exit Exams Meet IDEA – An examination of the History, Legal Ramifications, and Implications for Local School Administrators and Teachers*, 2004 BYU Educ. & L.J. 75.

⁷ This OCR letter to the Special School District of St. Louis County advised that a school district is not required to award a diploma to a disabled student who does not meet the requirements for such a diploma, “regardless of

C. A.A.C. R7-2-302(6) Does Not Conflict with A.R.S. § 15-701.01(A)(3) and the State and Federal Laws Concerning Special Education.

A.A.C. R7-2-302(6) is consistent with the relevant statutory directives. “[A] rule adopted by an administrative agency must be in accordance with the statutory authority vested in it, must be reasonable, and must be adequately related to the purpose of the act and neither arbitrary nor in contravention of any expressed statutory provision.” *Grove v. Ariz. Criminal Intelligence Sys. Agency (ACISA)*, 143 Ariz. 166, 169, 692 P.2d 1015, 1018 (App. 1984). In addition, an agency may not adopt an administrative rule that conflicts with a statute. *Ariz. Dep’t of Econ. Sec. v. Leonardo*, 200 Ariz. 74, 79-80, 22 P. 3d 513, 518-19 (App. 2001).

The express language of A.R.S. § 15-701.01(A)(3) mandates that the State Board develop and adopt tests to determine competency for graduation from high school. The statute authorizes the State Board to determine which “tests” are appropriate to assess a student’s proficiency and which scores students must achieve in order to graduate from high school.⁸ The State Board complied with this statutory mandate by promulgating A.A.C. R7-2-302.

Any analysis of a rule or statute regarding special education must be evaluated in light of the relevant federal requirements which emphasize individual education plans for special

whether the handicapped student has met the requirements of the IEP.” However, the OCR letter cautioned that the “district must notify parents in advance when successful completion of the IEP will not result in their child’s receipt of a regular diploma so that the parents may exercise their due process rights to challenge the school’s decision.” *Id.* at 308.

⁸ The legislative history of the statutes addressing competency test requirements is consistent with the conclusion that there is no statutory requirement that all students pass any specific test or tests to receive a diploma. In addition to amending A.R.S. § 15-701.01 to add the competency test requirement, in the same legislation, the Legislature amended A.R.S. § 15-341(A)(30) to require school district governing boards to administer the State Board prescribed competency tests. H.B. 2417, 42nd Leg., 2d Reg. Sess. (1996); 1996 Ariz. Sess. Laws, ch. 284, §15. The original version of House Bill 2417 also contained language that would restrict governing boards from awarding diplomas to students who did not receive a passing score on the required competency tests. *Id.* That language was deleted from the version of the bill that was ultimately enacted. Ariz. State Senate, Final Rev. Fact Sheet for H.B. 2417, 42nd Leg., 2d Reg. Sess. at 9 (1996); *Compare* Introduced version, H.B. 2417, 42nd Leg., 2d Reg. Sess., at § 12 (A.R.S. § 15-341(A)(31)) with 1996 Ariz. Sess. Laws, ch. 284, § 15 (A.R.S. § 15-341(A)(31) (indicating removal of requirement that governing board award diplomas only to those pupils receiving passing score on competency tests.)

education students. *See* 34 C.F.R. § 300.1 (describing purpose of the IDEA to provide individualized education for students with special education needs). Recognizing the need for additional flexibility for students in special education programs, the State Board delegated to the local governing board of each school district the task of developing a course of study and graduation requirements for all students placed in special education programs. A.A.C. R7-2-302(6). This approach ensures that the individual needs of students in special education programs are considered, as required by federal law. *See* 34 C.F.R. § 300.1 (purpose of the IDEA is to provide an individualized education for students with special education needs). Under this rule, school districts may exempt special education students from passing the AIMS test in order to graduate, if that is established in the IEP following the parameters established in federal law.

In adopting A.A.C. R7-2-302(6), the State Board placed the decision of graduation competency in the hands of the local educational agencies responsible for providing an individualized education for students with special education needs. The rule establishes graduation requirements as required by A.R.S. § 15-701.01(A) in a manner that is compatible with the purpose and intent of the IDEA in that it enables school districts to further tailor their educational services to meet the unique needs of their special education students. Therefore, A.A.C. R7-2-302(6) is consistent with statutory authority.

II. Designating Special Education Status is Subject to Confidentiality Requirements of FERPA and IDEA.

A.A.C. R7-2-302(6) also allows school districts to reference students' special education status on their individual transcripts. The recording and maintenance of student educational records in Arizona is generally governed by A.R.S. § 15-141, which requires that all Arizona educational records be maintained, released, and disclosed in accordance with the policies and

procedures laid out in the Family Education Rights and Privacy Act of 1974 (“FERPA”). 20 U.S.C. § 1232g(b). FERPA states, in pertinent part:

No funds shall be made available under any applicable [federal] program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency or organization.”

Id. at § 1232g(b)(1).

FERPA defines educational records as “those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution.” 20 U.S.C. § 1232g (a)(4)(A); Student transcripts are education records and subject to FERPA because they contain information such as grades and test scores and are maintained by school districts. Under FERPA, information contained in the students' transcripts must remain confidential unless disclosure is authorized by the students' parents.⁹

The IDEA creates additional procedures to protect the confidentiality of personally identifiable information at collection, storage, disclosure and destruction stages. *See* 20 U.S.C. §§ 1412(a)(8); 1417(c); 34 C.F.R. §§ 300.572 to .577. The IDEA also requires school district personnel to notify the parents of special education students when personally identifiable information is no longer needed to educate the student, and then to destroy such information upon a parent’s request. *Id.*, 34 C.F.R. § 300.573. Information regarding the students name, address, grades, attendance record, classes attended, grade level completed and year completed,

⁹ Parental rights under FERPA transfer to the student once the student reaches the age of 18 or enrolls in a postsecondary institution. 20 U.S.C. § 1232g(d). Parental rights under IDEA may not transfer to the student at the age of 18 if the student is incompetent or lacks the ability to provide informed consent with respect to his or her educational program. *See* 34 C.F.R. § 300.517.

however, may be maintained without limitation. 34 C.F.R. § 300.573(b). These procedural requirements would apply to any information on the student transcripts.

There is no definitive guidance regarding how courses may be designated on a transcript. In 1996, the U.S. Department of Education's Office of Civil Rights ("OCR") issued an advice letter to Montana's State Director of Special Education Office of Public Instruction (the "Letter") discussing certain aspects of the issue. Letter to Runkel, 25 Individual with Disabilities Educ. L. Rep. 387 (Letter dated Sept. 30, 1996). The Letter acknowledged that "there is yet no definite standard[] enunciated in any court or OCR decision to indicate exactly what terms are permissible" on a student transcript. *Id.* at 389. However, the Letter cautioned that "if the course designation suggests that [such designation] only is used in special education programs involving students with disabilities . . . it may be a violation ." *Id.* Instead, labels used on a transcript should have "a more general connotation." *Id.* A.A.C. R7-2-302(6) plainly permits some designation regarding placements on student transcripts, and school district attorneys should consult federal guidance, such as the Letter, to determine how a particular placement may be referenced on a transcript.

Conclusion

A.A.C. R7-2-302(6), which permits school districts to establish graduation requirements for students in special education programs, is consistent with the requirements in A.R.S. § 15-701.01(A) and the requirements governing special education. Under this rule and federal laws governing special education, school districts may, through an IEPs, exempt special education students from passing the AIMS test in order to graduate from high school.

In addition, A.A.C. R7-2-302(6) permits school districts to identify a student's special education placement on that student's transcript; however, the transcripts are subject to confidentiality requirements under FERPA and IDEA.

Terry Goddard
Attorney General

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STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

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| ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL May 23, 2005 | No. I05-003 (R04-011) Re: County Use of Highway User Revenue Funds |
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TO: Debra Davenport, Auditor General

Question Presented

You have asked whether counties may expend Highway User Revenue Fund (“HURF”) monies to pay expenses such as:

- Legislative monitoring services
- Public outreach and community relations
- Regional and environmental planning
- Traffic and safety studies
- Development services including permitting, zoning and inspection
- Geographic Information System programming and analysis
- Administrative Costs
 - Transportation Department management and administrative support
 - Overhead for County central services such as accounting, payroll, human resources and procurement
 - Information technology support
 - County self-insurance premiums
 - Audit costs

Summary Answer

A county may spend HURF monies for the expenses in question only if the expenditure is directly related to a highway or street purpose under Article IX, § 14 of the Arizona Constitution. If an expenditure only partially relates to a highway or street purpose, counties may use HURF monies only for the portion that directly relates to that purpose.

Background

The revenues that the State receives from licenses, taxes, penalties, and fees for vehicle registration, driver's licenses, and fuel taxes are deposited into the HURF. Arizona Revised Statutes ("A.R.S.") § 28-6501. These restricted monies may only be spent for the purposes prescribed in Article IX, § 14 of the Arizona Constitution¹. The use of HURF monies is restricted to "highway and street purposes." Counties may use HURF monies for "highway and street purposes including costs of rights of way acquisitions and expenses related thereto, construction, reconstruction, maintenance, repair, roadside development, of county . . . roads, streets, and bridges and payment of principal and interest on highway and street bonds." Ariz. Const. art. IX, § 14. This list of the permissible uses of HURF in Article IX, § 14 monies is not exhaustive. Ariz. Att'y. Gen. Op. No. I92-004. HURF monies may be used for any activity that has a "highway or street purpose," even if the activity is not specifically enumerated in Article IX, § 14. *Id.*; *John E. Shaffer Enter. v. City of Yuma*, 183 Ariz. 428, 433, 904 P.2d 1252, 1257 (App. 1995).

This Office has previously advised that HURF monies may be used to "construct county highway offices, storage buildings, garages, appurtenances, fencing, and other related facilities to house county highway officials and employees so long as the duties of those officials and

¹ Monies placed in the HURF from the lottery and excess weight violation fines are not subject to the constitutional use restrictions. Ariz. Att'y. Gen. Op. No. I84-087.

employees are directly related to [highway or street purposes].” Ariz. Att’y. Gen. Op. No. I84-087. However, HURF monies may not be used to create an assurance fund for underground gasoline storage tanks because this does not serve a highway or street purpose. Ariz. Att’y Gen. Op. No. I89-085. There are also some significant differences between how state and counties may use HURF monies. The State may use HURF monies for “expenses of *state* enforcement of traffic laws and *state* administration of traffic safety programs.” Ariz. Const. art. IX, § 14 (emphasis added). The counties are not authorized to use HURF monies for these purposes. *Id.*; Ariz. Att’y. Gen. Op. No. I99-003.

The Auditor General or a contracted Certified Public Accounting firm annually audits each county. A.R.S. § 41-1279.21. Counties must provide financial information “that verifies that highway user revenue fund monies received by the county pursuant to title 28, chapter 18, article 2 and any other dedicated state transportation revenues received by the county are being used solely for the authorized transportation purposes.” A.R.S. § 41-1279.21(A)(1).

You have asked for an opinion on whether several categories of expenses are authorized County HURF expenditures.

Analysis

The key to analyzing the specific expenditures in your opinion request is whether they, in fact, relate directly to “street and highway purposes.” Most of the expenditures mentioned in your opinion request could, under some circumstances, be a permissible expenditure of HURF monies pursuant to Article IX, § 14 of the Arizona Constitution.

1. Public Outreach and Community Relations.

A public hearing must be held to benefit the residents and community before any highway is built using federal monies. 23 U.S.C. § 128. Pursuant to this federal requirement and

in other situations as a matter of policy, the Arizona Department of Transportation (“ADOT”) and county, city and town transportation departments hold public hearings regarding road construction projects. These hearings allow the transportation departments to learn about any concerns the community may have about the proposed project and help resolve these issues before construction begins. This type of public outreach and community relations is a permissible HURF expenditure, but only public outreach and community relations activities that relate directly to street and highway purposes are permitted HURF expenses.

2. *Geographic Information System Programming and Analysis.*

Geographic Information System programming and analysis used to plan design, maintain public roadways relates directly to a street and highway purpose and is a permitted HURF expense. Other uses of this technology that do not directly relate to street or highway purposes would not be a permissible use of HURF monies.

3. *Transportation Management and Administrative Support and Information Technology Support.*

Expenses for transportation management and administrative support and information technology support for county transportation departments relates directly to “highway and street” purpose and are therefore, permitted HURF expenses. Counties may use HURF funds for administrative expenses that support the maintenance, repair or construction of highways or streets. *See Shaffer Enterprises*, 183 Ariz. at 432-433, 904 P.2d at 1256-57. Arizona and other states have recognized that “maintenance” in state constitutional provisions regarding highway funds is a broad term that includes “the doing of everything necessarily and appropriately connected with and incidental to the laying out, opening, and the construction of public roads

and the maintenance of an efficient road system.”² Ariz. Att’y Gen. Op I84-087 (citing *State ex rel. King County v. Murrow*, 93 P.2d 304, 307 (Wash. 1939)). Based on this reasoning, various administrative expenses related to county highway and road purposes are legitimate HURF expenditures, but similar services that are unrelated to the county’s work constructing, repairing and maintaining streets and highways are not legitimate HURF expenditures.

4. *Regional and Environmental Planning.*

Expenses of regional and environmental planning that directly relate to a “highway and street purposes” are allowable HURF expenses. This might include for instance, expenses paid to research the region and the environment in which the county plans to build a road, and studies to determine how to best construct the road. As is true of other expenditures, regional and environment planning unrelated to highway and street purposes are not appropriate HURF expenditures.

5. *Legislative Monitoring Services.*

Because “everything necessarily and appropriately connected with and incidental to the laying out, opening, and the construction of public roads and the maintenance of an efficient road system” is an allowable HURF expense, Ariz. Att’y Gen. Op. I84-087, certain “legislative monitoring” expenses may be permissible HURF expenditures.

For instance, in the 2004 legislative session, the Legislature amended A.R.S. § 11-269.03 to allow political subdivisions to enter into agreements with ADOT for accelerated right of way acquisitions, design or construction of eligible projects and to pledge excise taxes to secure borrowing for advance monies to ADOT. 2004 Ariz. Sess. Laws Ch. 167. Monitoring this legislation could directly relate to street and many highway purposes. Only “legislative

² See also *Shaffer Enterprises*, 183 Ariz. at 433, 904 P.2d at 1257; *Rich v. Williams*, 341 P.2d 432, 437 (Idaho 1959); *Crow v. Tinner*, 47 S.W.2d 391, 392-93 (Tex. Civ. App. 1932).

monitoring services” directly related to street and highway purposes is a legitimate HURF expenditure.

6. *Development Services Such as Permits, Zoning and Inspection.*

The phrase “development services” typically applies to services relating to commercial or residential development. The term does not generally encompass services that are directly related to “construction, reconstruction, maintenance, repair, [or] roadside development [] of county . . . roads, streets, and bridges” Ariz. Const. art. IX § 14. Assuming that this understanding of the term “development services” is correct, these services would not be permissible HURF expenditures. To the extent that a county could establish that the development services are, in fact, directly related to highway and street purposes (rather than those activities traditionally associated with this term), they would be allowable HURF expenditures.

7. *Overhead for County Central Services – Payroll, Human Resources, and Procurement.*

Overhead expenses for centralized county services are allowable HURF expenses only to the extent that they are directly related to street and highway purposes. HURF monies may be used to reimburse a department that actually performs operational and overhead support for ‘highway and street purposes’.” *Shaffer, 83 Ariz. at 434, 904 P.2d at 1258.*

8. *County Self-Insurance Trust Fund Premiums.*

Counties may self-insure against “property loss sustained or lawful claim of liability or fortuitous loss made against the . . . county . . . or its elected or appointed officials, employees or officers.” A.R.S. § 11-981(A)(2). The funds to pay for this insurance are set aside in a trust fund. *Id.* at (B). This self-insurance trust fund is also used to pay “[h]ealth, accident, life or disability benefits for the employees or officers of the . . . county . . . and their dependents.” *Id.*,

at (A)(1). Courts in other jurisdictions have held that funds similar to HURF may not be used to pay personal injury judgments *State ex rel. Varnado v. Louisiana Highway Comm'n*, 147 So. 361 (La. 1933). It follows, therefore, that HURF monies may not be used to pay premiums related to this type of liability. To the extent, however, the trust fund covers insurance for employees whose work directly relates to highways and streets, those costs would be legitimate HURF expenditures.

9. *Traffic and Safety Studies*

Traffic and safety studies conducted to determine the effect of specific construction projects or road closures on the flow of traffic or driver safety are incident to construction and a permissible HURF expense. However, counties may not use HURF monies for traffic and safety studies directed toward the creation or implementation of traffic safety programs or the enforcement of traffic laws. Only the State is specifically authorized to use HURF monies for such purposes. Ariz. Att'y Gen. Op. I99-003.

10. *Audits*

Annual audits are performed to ensure HURF monies are used solely for authorized transportation purposes set forth in the Arizona Constitution, Article IX, § 14. A.R.S. § 41-1279.21(A)(1). Although the audit verifies whether the HURF expenditures were consistent with constitutional requirements, the audit itself does not typically further the county's work to construct, maintain or repair its roadways. As is true for other expenses, a county would have to establish that audit expenses were directly related to street and highway purposes to be a legitimate HURF expenditure.

Conclusion

Counties may use HURF monies only for “highway and street purposes including costs of rights of way acquisitions and expenses related thereto, construction, reconstruction, maintenance, repair, [and] roadside development of county, city and town roads, streets and bridges.” In general, a fact-specific analysis of the purpose of specific expenditures is necessary to determine whether HURF monies may be used for all or a portion of certain expenses.

Terry Goddard
Attorney General

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STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

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| ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL July 25, 2005 | No. I05-004 (R05-010) Re: Open Meeting Law Requirements and E-mail to and from Members of a Public Body |
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To: Donald M. Peters, Esq.
Miller, LaSota & Peters
722 East Osborn Road, Suite 100
Phoenix, Arizona 85014

Pursuant to Arizona Revised Statutes (“A.R.S.”) §15-253(B), you submitted for review your opinion to the president of the Washington Elementary School District (“District”) Governing Board (“Board”) regarding electronic mail (“e-mail”) communications to and from members of the Board and Arizona’s Open Meeting Law (“OML”).

This Opinion revises your analysis to set forth some parameters regarding e-mail to and from members of a public body and is intended to provide guidance to public bodies throughout the State that are subject to the OML. *See* Ariz. Att’y Gen. Op. I98-006 at 2, n.2.

Question Presented

What are the circumstances under which the OML permits e-mail to and from members of a public body?

Summary Answer

Board members must ensure that the board's business is conducted at public meetings and may not use e-mail to circumvent the OML requirements. When members of the public body are parties to an exchange of e-mail communications that involve discussions, deliberations or taking legal action by a quorum of the public body concerning a matter that may foreseeably come before the public body for action, the communications constitute a meeting through technological devices under the OML. While some one-way communications from one board member to enough members to constitute a quorum would not violate the OML, an e-mail by a member of a public body to other members of the public body that proposes legal action would constitute a violation of the OML.

Analysis

The OML is intended to open the conduct of government business to public scrutiny and prevent public bodies from making decisions in secret. *See Karol v. Bd. of Educ. Trs.*, 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979). “[A]ny person or entity charged with the interpretation [of the OML] shall construe any provision [of the OML] in favor of open and public meetings.” A.R.S. § 38-431.09. In addition, devices used to circumvent the OML and its purposes violate the OML and will subject the members of

the public body and others to sanctions.¹ See e.g. Ariz. Att’y. Gen. Ops. I99-022, n. 7; I75-7. These principles guide the analysis of the use of e-mails by members of a public body. E-mail communications to or from members of the public body are analyzed like any other form of communication, written or verbal, in person or through technological means.

A. An Exchange of E-mails Can Constitute a Meeting.

1. A Meeting Can Occur Through Serial Communications between a Quorum of the Members of the Public Body.

All meetings of public bodies must comply with the OML.² The OML defines a “meeting” as:

the gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action.

A.R.S. § 38-431(4).

The OML does not specifically address whether all members of the body must participate simultaneously to constitute a “gathering” or meeting. However, the requirement that the OML be construed in favor of open and public meetings leads to the conclusion that simultaneous interaction is not required for a “meeting” or “gathering”

¹ A.R.S. § 38-431-.07 (A) provides for penalties for violating the OML against not only members of the public body, but also against “[a person] who knowingly aids, agrees to aid or attempts to aid another person in violating [the OML].”

² A “public body” subject to the OML includes:
the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivisions. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, such public body.

A.R.S. § 38-431(6).

within the OML. “Public officials may not circumvent public discussion by splintering the quorum and having separate or serial discussions. . . . Splintering the quorum can be done by meeting in person, by telephone, electronically, or through other means to discuss a topic that is or may be presented to the public body for a decision.” *Arizona Agency Handbook* § 7.5.2. (Ariz. Att’y Gen. 2001) Thus, even if communications on a particular subject between members of a public body do not take place at the same time or place, the communications can nonetheless constitute a “meeting.” *See Del Papa v. Board of Regents*, 114 Nev. 388, 393, 956 P. 2d 770, 774 (1998) (rejecting the argument that a meeting did not occur because the board members were not together at the same time and place)³; *Roberts v. City of Palmdale*, 20 Cal. Rptr. 2d 330, 337, 853 P. 2d 496, 503 (1993) (“[A] concerted plan to engage in collective deliberation on public business through a series of letters or telephone calls passing from one member of the governing body to the next would violate the open meeting requirement.”)⁴

2. Discussion, Proposals and Deliberations Among a Quorum of a Public Body Must Occur at a Public Meeting.

A “meeting” includes four types of activities by a quorum of the members of the public body: discussing legal action, proposing legal action, taking legal action, and deliberating “with respect to such action[s].” A.R.S. § 38-431(4). Three of these activities necessarily involve more than a one-way exchange between a quorum of members of a public body.

³ Like the OML, Nevada’s open meeting law defines a “meeting” as a gathering of a quorum of members of the public body. Nev. Rev. Stat. 241.015(2).

⁴ This Office declines to follow *Beck v. Shelton*, 267 Va. 482, 491, 593 S.E.2d 195, 199 (2004) because of differences between Arizona’s law and Virginia’s. In *Beck*, the court concluded that “the term [‘assemble’] inherently entails the quality of simultaneity.” Further, the court observed that “[w]hile such simultaneity may be present when e-mail technology is used in a ‘chat room’ or as ‘instant messaging,’ it is not present

For example, the ordinary meaning of the word “discuss” suggests that a discussion of possible legal action requires more than a one-way communication. *See Webster’s II New College Dictionary* 385 (1994) (defining “discuss” as “to speak together about.”) Likewise, the term “deliberations” requires some collective activity. *See Ariz. Att’y Gen. Op. I97-012, citing Sacramento Newspaper Guild v. Sacramento Bd. of Supervisors*, 69 Cal. Rptr. 480, 485 (App. 1968) (reversed on other grounds). “Deliberations” and “discussions” involve an exchange between members of the public body, which denotes more than unilateral activity. *See Ariz. Att’y Gen. Op. I75-8; Webster’s* at 390 (“exchange” means “to take or give up for another”; “to give up one thing for another”; “to provide in return for something of equal value.”) Finally, “taking legal action” in the context of the OML requires a “collective decision, commitment or promise” by a majority of the members of a public body. A.R.S. § 38-431(3); *Ariz. Att’y Gen. Op. I75-7*.

Unlike discussions and deliberations, the word “propose” does not imply or require collective action. Webster’s defines “propose” as “to put forward for consideration, discussion, or adoption.” *Webster’s II New College Dictionary* at 944. A single board member may “propose” legal action by recommending a course of action for the board to consider. For example, the statement, “Councilperson Smith was admitted to the hospital last night” is not a proposal, but “We should install a crosswalk at First and Main” is a proposal. Thus, an e-mail from a board member to enough other members to constitute a quorum that *proposes* legal action would be a meeting within the OML, even

when e-mail is used as the functional equivalent of letter communication by ordinary mail, courier, or facsimile transmission.” *Id.*, 267 Va. at 490, 593 S.E. 2d at 199.

if there is only a one-way communication, and no other board members reply to the e-mail.⁵

3. An Exchange of Facts, as Well as Opinions, Among a Quorum of Members of a Public Body Constitutes a Meeting within the OML, if it is Reasonably Foreseeable that the Topic May Come Before the Public Body for Action in the Future.

Arizona's OML does not distinguish between communication of facts or opinions. An exchange of facts, as well as opinion, may constitute deliberations under the OML. *See* Ariz. Att'y Gen. Ops. I97-012, I79-4; I75-8.⁶ The term "deliberations" as used in A.R.S. § 38-431 means "any exchange of facts that relate to a matter which foreseeably might require some final action . . ." Ariz. Att'y Gen. Op. I75-78; *see also Sacramento Newspaper Guild*, 69 Cal. Rptr. at 485 (deliberation connotes not only collective discussion, but also the collective acquisition and exchange of facts preliminary to the final decision).

Of course, the OML applies only to an exchange of facts or opinions if it is foreseeable that the topic may come before the public body for action. *See Valencia v. Cata*, 126 Ariz. 555, 556-57, 617 P.2d 63, 64-5 (App. 1980); Ariz. Att'y Gen. Op. 75-8. The scope of what may foreseeably come before the public body for action is determined

⁵ It might be argued that because the definition of meeting refers to a gathering of a quorum at which *they* discuss, propose or take legal action, the definition only applies to proposals made by a quorum or circumstances in which more than one person actually makes a proposal. That interpretation, however, is inconsistent with the ordinary meaning of the word "propose" and with the process for proposing legal action for consideration by public bodies. It is also contrary to the directive that the OML be construed broadly to achieve its purposes.

⁶ Unlike Arizona, some states permit exchanges of information among a quorum of a public body outside of public meetings. *See* Fla. AGO 2001-20, 2001 WL 276605 (Fla. A.G.) ("[C]ommunication of information, when it does not result in the exchange of council members' comments or responses on subjects requiring council action, does not constitute a meeting subject to [Florida's sunshine law]). As in many other states, Florida's open meeting law is known as its "sunshine law."

by the statutes or ordinances that establish the powers and duties of the body. *See* Ariz. Att'y Gen. Op. I00-009.

4. Applying OML Principles to E-mail.

Few reported decisions discuss when the use of e-mail violates a state's open meeting law. In *Wood v. Battle Ground School District*, 107 Wash. App. 550, 564, 27 P. 3d 1208, 1217 (2001), the Washington Court of Appeals held that the exchange of e-mail messages may constitute a meeting within Washington's Open Public Meetings Act. While the court held that "the mere use or passive receipt of e-mail does not automatically constitute a 'meeting'," it concluded that the plaintiff established a *prima facie* case of "meeting" by e-mails because the members of the school board exchanged e-mails about a matter, copying at least a quorum and sometimes all of the other members. The court said, "[T]he active exchange of information and opinions in these e-mails, as opposed to the mere passive receipt of information, suggests a collective intent to deliberate and/or to discuss Board business." 107 Wash. App. at 566, 27 P. 3d at 1218.

Although the Washington Open Public Meetings Act is not identical to the OML, like the OML, it broadly defines "meeting" and "action," and includes the directive that the law be liberally construed in favor of open and public meetings. 107 Wash. App. at 562, 27 P. 3d at 1216. The holding of the court in *Wood* and its attendant analysis are, therefore, persuasive.

The available case law and Arizona's statutory language indicate that a one-way communication by one board member to other members that form a quorum, with no further exchanges between members, is not a *per se* violation of the OML. Additional facts and circumstances must be evaluated to determine if the communication is being

used to circumvent the OML. A communication that proposes legal action to a quorum of the board would, however, violate the OML, even if there is no exchange among the members concerning the proposal. In addition, passive receipt of information from a member of the staff, with nothing more, does not violate the OML. *See Roberts*, 20 Cal. Rptr. 2d at 337, 853 P. 2d at 503 (receipt of a legal opinion by members of a public body does not result in a meeting.); *Frazer v. Dixon Unified Sch. Dist.*, 18 Cal. App. 4th 781, 797, 22 Cal. Rptr. 2d 641, 657 (1993) (passive receipt by board members of information from school district staff is not a violation of the open meeting law).⁷

There are risks whenever board members send e-mails to a quorum of other board members. Even if the first e-mail does not violate the open meeting law, if enough board members to constitute a quorum respond to the e-mail, there may be a violation of the OML. In addition, a quorum of the members might independently e-mail other board members on the same subject, without knowing that fellow board members are also doing so. This exchange of e-mails might result in discussion or deliberations by a quorum that could violate the OML. Because of these potential problems, I strongly recommend that board members communicate with a quorum about board business at open public meetings, not through e-mails.

B. Hypotheticals Illustrating the Use of E-mail.

The analysis of the OML and e-mail is theoretically no different than analyzing other types of communications. To provide additional guidance, this Opinion will address

⁷ This office has also opined that, in the context of a Call to the Public, passive receipt of information does not constitute a meeting. Ariz. Att’y Gen. Op. I99-006.

OML applications to specific factual scenarios.⁸

- a. E-mail discussions between less than a quorum of the members that are forwarded to a quorum by a board member or at the direction of a board member would violate the OML.
- b. If a staff member or a member of the public e-mails a quorum of members of the public body, and there are no further e-mails among board members, there is no OML violation.
- c. Board member A on a five-member board may not e-mail board members B and C on a particular subject within the scope of the board's responsibilities and include what other board members D and E have previously communicated to board member A. This e-mail would be part of a chain of improper serial communications between a quorum on a subject for potential legal action.
- d. A board member may e-mail staff and a quorum of the board proposing that a matter be placed on a future agenda. Proposing that the board have the opportunity to consider a subject at a future public meeting, without more, does not propose legal action, and, therefore, would not violate the OML.
- e. An e-mail from the superintendent of the school district to a quorum of the board members would not violate the OML. However, if board members reply to the superintendent, they must not send copies to enough other members to constitute a quorum. Similarly, the superintendent must not forward replies to the other board members.
- f. One board member on a three-member board may e-mail a unilateral communication to another board member concerning facts or opinions relating to board business, but board members may not respond to the e-mail because an exchange between two members would be a discussion by a quorum.
- g. A board member may copy other board members on an e-mailed response to a constituent inquiry without violating the OML because this unilateral communication would not constitute discussions, deliberations or taking legal action by a quorum of the board members.
- h. An e-mail request by a board member to staff for specific information does not violate the OML, even if the other board members are copied on the e-mail. The superintendent may reply to all without violating the OML as long as that response does not communicate opinions of other board members. However, if board members reply in a communication that includes a quorum, that would constitute a discussion or deliberation and therefore violate the OML.

⁸ These hypotheticals assume that the e-mails are not sent by board members or at a board member's direction with the purpose of circumventing the OML and that any unilateral communications do not propose legal action.

- i. A board member may use e-mail to send an article, report or other factual information to the other board members or to the superintendent or staff member with a request to include this type of document in the board's agenda packet. The agenda packet may be distributed to board members via e-mail. Board members may not discuss the factual information with a quorum of the board through e-mail.

C. Measures to Help Ensure that the Public Body Conducts Its Business in Public.

Although it is not legally required, I recommend that any e-mail include a notice advising board members of potential OML consequences of responding to the e-mail.

Possible language for a notice for e-mails from the superintendent or staff is as follows:

To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other members of the public body. Members of the public body may reply to this message, but they should not send a copy of the reply to other members.

Language for e-mails from board members could be the following:

To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other board members and board members should not reply to this message.

Although the OML does not require the above notice, such notification may serve as a helpful reminder to board members that they should not discuss or deliberate through e-mail.

It is also important to remember that e-mail among board members implicates the public records law, as well as the OML. E-mails that board members or staff generate pertaining to the business of the public body are public records. *See Star Publ'g Co. v. Pima County Attorney's Office*, 181 Ariz. 432, 891 P.2d 899 (App. 1994); *see also Arizona Agency Handbook* § 6.2.1.1 (Ariz. Att'y Gen. 2001). Therefore, the e-mails must be preserved according to a records retention program and generally be made available

for public inspection. A.R.S. §§ 39-121, 41-1436. Although the OML focuses on e-mails involving a quorum of the members of the public body, the public records law applies to any e-mail communication between board members or board members and staff. Public bodies might consider maintaining a file that is available for public inspection and contains any e-mails sent to and from board members. Ready access to this type of information helps ensure compliance with the legislative mandates favoring open government.

I encourage all public bodies to educate board members and staff concerning the parameters of the OML and the public records law to ensure compliance with these laws. E-mail is a useful technological tool, but it must be used in a manner that follows the OML's mandate that all public bodies propose legal action, discuss, deliberate, and make decisions in public.

Conclusion

E-mail communications among a quorum of the board are subject to the same restrictions that apply to all other forms of communications among a quorum of the board. E-mails exchanged among a quorum of a board that involve discussions, deliberations or taking legal action on matters that may reasonably be expected to come before the board constitute a meeting through technological means. While some unilateral e-mail communications from a board member to a quorum would not violate the OML, a board member may not propose legal action in an e-mail. Finally, a quorum of the board cannot use e-mail as a device to circumvent the requirements in the OML.

Terry Goddard
Attorney General

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STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

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| ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL October 24, 2005 | No. I05-005 (R05-011) Re: Augmenting AIMS Scores Based on Grades in Certain Courses |
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To: The Honorable Tom Horne
Superintendent of Public Schools

Question Presented

You have asked whether Arizona Revised Statutes (“A.R.S.”) § 15-701.02, which allows students to augment their scores on the Arizona Instrument to Measure Standards (“AIMS”) to meet graduation requirements, applies only to grades received in courses that satisfy the eleven and one-half credit requirement for areas of study specified by the State Board of Education (“State Board”), or also includes grades received in other elective subjects that count toward the twenty-one credits required for graduation.

Summary Answer

Students may add points to their AIMS scores to fulfill graduation requirements based on grades received in the courses that satisfy the eleven and one-half credits the State Board specifies in Arizona Administrative Code (“A.A.C.”) R7-2-302(1)(a-f).

Background

The Legislature has assigned the State Board several responsibilities regarding high school graduation requirements. The State Board is responsible for prescribing a “minimum course of study”¹ and competency requirements for high school graduation. A.R.S. § 15-203(A)(13). In addition, the State Board must adopt academic standards and integrate them into the course of study required for graduation from high school. A.R.S. § 15-701.01(A)(1). These academic standards, “in at least the areas of reading, writing, mathematics, science and social studies,” must be incorporated in the competency requirements for graduation. A.R.S. § 15-701.01(A)(2). Finally, pursuant to A.R.S. § 15-701.01(A)(3), the State Board must “[d]evelop and adopt competency tests pursuant to section 15-741 for the graduation of pupils from high school in at least the areas of reading, writing and mathematics and shall establish passing scores for each such test.”

In 1990, the Legislature mandated that the State Board “[a]dopt and implement essential skills tests that measure pupil achievement of the state board adopted essential skills in reading, writing and mathematics in grades three, eight and twelve.” 1990 Ariz. Sess. Laws, ch. 233, Sec. 8 (S.B. 1442) (codified at A.R.S. § 15-741(A)(2)). This statute was amended in 1996 and now requires the State Board to: “Adopt and implement an Arizona instrument to measure standards test to measure pupil achievement of the state board adopted academic standards in reading, writing and mathematics in at least four grades designated by the board.” A.R.S. § 15-741(A)(2); *see also* 1996 Ariz. Sess. Laws ch. 284, § 32. This examination is known as “AIMS.”

¹ A “course of study” is defined in A.R.S. § 15-101(9) as a “list of required and optional subjects to be taught in the schools.”

In 2005, the Legislature also amended A.R.S. § 15-701.01 to enable a student who did not pass AIMS to graduate from high school with a diploma, provided that the student met “alternative graduation requirements established by Section 15-701.02.” 2005 Ariz. Sess. Laws ch. 304, § 1 (S.B. 1038).

Section 15-701.02 presents the State Board with the framework for augmenting the AIMS scores of high school students who fail to attain a passing score and would be otherwise ineligible to receive a diploma. Once a student meets certain criteria,² the student may obtain additional credit to be added “in an amount not to exceed one quarter of the pupil’s achieved score in each area. . . . [A] pupil may use the highest achieved score in each area of any time the [AIMS] test was taken.” A.R.S. § 15-701.02(C).

The State Board is required to “establish the manner that additional credit may be used to augment the score of the pupil.” A.R.S. § 15-701.02(D). A student’s AIMS score may be increased by adding points to the score on each of the mathematics, reading, or writing section of the test as follows:

Additional credits applied to the pupil’s score pursuant to subsections C and D of this section shall be based only on the performance of the pupil in those courses that meet the requirements for graduation established by the state board of education pursuant to Section 15-203, Subsection A, Paragraph 13. Each course that receives additional credit pursuant to this section shall receive equivalent additional credit regardless of subject area, except that greater additional credit shall be granted for courses with more advanced academic content related to the

² Specifically, a student is

eligible for the alternative graduation achievement requirements . . . if all of the following apply:

1. The pupil has taken the competency test each time the test was offered when the pupil was eligible to take the test.
2. The pupil has completed with a passing grade all coursework and credits prescribed for the graduation of pupils from high school by the governing board of the pupil’s school district pursuant to § 15-701.01.
3. The pupil has participated in any academic remediation programs available in the pupil’s school in those subject areas where the pupil failed to achieve a passing score on the competency test.

A.R.S. § 15-701.02(B).

academic standards prescribed by the state board of education pursuant to Section 15-701.01.

A.R.S. § 15-701.02(E).

As A.R.S. § 15-203(A)(13) mandates, the State Board adopted A.A.C. R7-2-302(1), setting forth the subject area requirements for a minimum course of study for high school graduation. Students are required to obtain a minimum of twenty credits in order to graduate. The State Board specifically identifies eleven and one-half credits that the pupil must take to receive a high school diploma.³ A.A.C. R7-2-302(1)(a-f). The State Board also allows a district's local governing board to prescribe additional courses that the student may take to meet the twenty credit minimum. A.A.C. R7-2-302(1)(g).

In A.A.C. R7-2-302, the State Board sets forth the minimum competency requirements for graduation from a public high school, as A.R.S. § 15-701.01(A) requires. Effective with the graduation class of 2006, a student must receive "a passing score on the reading, mathematics, and writing portions of the AIMS (Arizona's Instrument to Measure Standards) assessment" in order to graduate from high school or receive a high school diploma. A.A.C. R7-2-302.

Analysis

The question here is whether A.R.S. § 15-701.02(E) permits students to augment their AIMS scores with additional points based on their performance in courses that are included in the eleven and one-half credit hours that the State Board requires, or if students may augment AIMS scores using grades received in any courses that satisfy the twenty credit requirement for graduation.

A statute's language is the best indicator of its meaning. *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993). The key phrase in A.R.S. § 15-701.02(E) states: "Additional

³ The required subjects are: four credits of English or English as a Second Language; one and one-half credits in instruction on the constitutions of the United States and Arizona, including instruction in the history of Arizona; one credit of world history/geography; two credits of mathematics; two credits of science; and one credit of fine arts or vocational education. A.A.C. R7-2-302(1)(a-f).

credits . . . shall be based only on the performance of the pupil in those courses that meet the requirements for graduation established by the state board of education pursuant to section 15-203, subsection A, paragraph 13.” The legislative history of this statutory language is sparse and provides no assistance in determining whether the students may augment AIMS scores by adding points to grades received in eleven and one-half credits of classes specified by the State Board or twenty credits of classes, which includes those approved by the school district governing board.⁴

The language of A.R.S. § 15-701.02(E) must be read in relation to other provisions of the statute. *See City of Phoenix v. Superior Court*, 144 Ariz. 172, 176, 696 P.2d 724, 728 (App. 1985). One of the eligibility requirements for augmenting AIMS scores identified in A.R.S. § 15-701.02(B) is that the student “has completed with a passing grade all coursework and credits prescribed for the graduation of pupils from high school by the governing board of the pupil’s school district pursuant to Section 15-701.01.” This provision clearly applies to the 20 credits required for graduation. In contrast, the language of A.R.S. § 15-701.02(E) refers specifically to “those courses that meet the requirements for graduation established by the state board of education pursuant to section 15-203, subsection A, paragraph 13.” The language of these two subsections of A.R.S. § 15-701.02 indicates that the Legislature recognized the difference between the credits prescribed by a school district governing board and those required by the State Board.

This distinction suggests that the graduation requirements “established by the state board of education” referred to in A.R.S. § 15-701.02(E) are the eleven and one-half credits that the State Board requires all students to take in order to graduate. A.R.S. § 15-701.02(E). Those courses include English, social studies, math, science and fine arts or vocational education.

⁴ The House Summary to S.B. 1038, as transmitted to the Governor, simply mirrored the legislation by stating that “additional credits must be based only on the performance of the pupil in those courses that meet the requirements for graduation established by the [State Board].” Ariz. H.R., House Summary for S.B. 1038, 47th Leg., 1st Reg. Sess. at 2 (2005). The Fact Sheet for S.B.1038 contains much the same language. Ariz. S., Final Amended Fact Sheet for S.B. 1038, 47th Leg., 1st Reg. Sess. at 3 (2005).

A.A.C. R7-2-301(1)(a-f). This statutory language would not include the additional coursework prescribed by a governing board that, together with the courses required by the State Board, equal 20 credits. Any other reading of the statute ignores the statutory distinction between those credits prescribed by the local governing board and those prescribed by the State Board.

Conclusion

Students may augment their scores on AIMS to meet graduation requirements by adding points based on grades received in courses that satisfy the eleven and one-half credit requirement in State Board Rule A.A.C. R7-2-302(1)(a-f).

Terry Goddard
Attorney General

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STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

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| ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL November 14, 2005 | No. I05-006 (R05-020) Re: Campaign Finance Reports Filed By Candidates Pursuant to A.R.S. §§ 16- 941(B)(2) and -958 |
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To: The Honorable Janice K. Brewer
Arizona Secretary of State

Questions Presented

1. Under Arizona Revised Statutes (“A.R.S.”) §§ 16-941(B)(2) and -958, must a nonparticipating candidate file a complete campaign finance report in accordance with A.R.S. §§ 16-913 and -915 or is the candidate only required to file a report that indicates that the triggering thresholds listed in A.R.S. § 16-941(B)(2)(A) and (B) have occurred?

2. If the report filed under A.R.S. §§ 16-941(B)(2) and -958 is not required to contain the content otherwise required in a campaign finance report under A.R.S. §§ 16-913 and -915, what content must this report contain?

Summary Answer

Under the Citizens Clean Elections Act (the “Act”), nonparticipating candidates must file campaign finance reports with the Secretary of State when their campaigns reach certain

statutory thresholds in collections or spending. The Act requires the Citizens Clean Elections Commission (the “Commission”) to prescribe the form for these and other reports that the Act requires. A.R.S. § 16-956(A)(3). The Commission has adopted rule R2-20-109, which requires that reports filed pursuant to A.R.S. §§ 16-941 and -958 contain the same information regarding receipts and disbursements as A.R.S. § 16-915 requires.

Background

Arizonans passed the Citizens Clean Elections Act, A.R.S. §§ 16-940 through -961, as a voter initiative in the general election of 1998. The Act’s purposes are recited in its text: “To create a clean elections system that will improve the integrity of Arizona State Government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions.” A.R.S. § 16-940(A).

The Act achieves these goals by creating an optional system of public funding for candidates in legislative and statewide campaigns. Candidates that choose the public funding option (“participating candidates”) accept strict spending limits. A.R.S. §§ 16-941; -945. These limits vary by office and depend upon whether the candidate is competing in a primary or a general election.¹ See A.R.S. §§ 16-941; -961(G), (H). Participating candidates must forego all private contributions, other than \$5 “qualifying” contributions and a small amount of “seed” money at the campaign’s outset. A.R.S. §§ 16-941(A)(1); -947(B)(3).

Candidates who wish to run privately financed campaigns (“nonparticipating candidates”) may continue to do so. They face no limits on the total amount of money that they

¹ For instance, the primary election spending limit for the 2004 election was \$11,320 for candidates for the Legislature and \$430,149 for candidates for governor. The general election spending limit was \$16,980 for candidates for the Legislature and \$645,224 for candidates for governor. These limits are collectively referred to herein as the “initial spending limits.”

can raise or spend. The Act reduced the limits on individual contributions to nonparticipating candidates, by twenty percent, A.R.S. § 16-941(B)(1), and authorized the Secretary of State to adjust these limits biennially for inflation, A.R.S. § 16-905(J).

A participating candidate may receive limited matching funds from the Commission. Matching funds are paid when a nonparticipating opponent receives contributions or makes expenditures that exceed the participating candidate's initial spending limit. A.R.S. § 16-952(A), (B). Matching funds also are paid when independent expenditures are made against a participating candidate or in favor of a nonparticipating opponent. A.R.S. § 16-952(C). Matching funds are capped, however, when the participating candidate receives total monies equal to three times the initial spending limit. A.R.S. § 16-952(E).

Campaign finance reports facilitate the accurate and timely disbursement of matching funds. Arizona law requires all candidates to file six campaign finance reports during an election year under provisions that predate the Act. A.R.S. § 16-913. The required contents of the six reports filed pursuant to A.R.S. § 16-913 are set forth under A.R.S. § 16-915. Under that statute, campaign finance reports must provide an itemized list of a candidate's receipts and disbursements, among other information. *See id.*

Nonparticipating candidates may also be required to file additional "trigger" reports under the Act. Pursuant to A.R.S. § 16-941(B)(2), a candidate must file an original trigger report if the campaign's preprimary expenditures have exceeded seventy percent of the original primary election spending limit imposed on a participating opponent or if the contributions to a nonparticipating candidate, less certain expenditures, have exceeded seventy percent of the participating candidate's original general election spending limit.

The number and timing of any supplemental trigger reports that the Act requires also depend upon the nonparticipating candidate's collections or spending.² *See* A.R.S. § 16-958. Candidates are required to file their campaign finance reports electronically using software that the Secretary of State provides to political committees. *See* A.R.S. § 16-958(E). The Secretary of State must inform the Commission "immediately" when trigger reports are filed. A.R.S. § 16-958(D).

Analysis

Your question is whether the trigger reports that are filed pursuant to A.R.S. §§ 16-941 and -958 must contain the same information as the campaign finance reports that are filed pursuant to A.R.S. §§ 16-913 and -915. Section 16-941(B)(2) states that the nonparticipating candidate must comply with A.R.S. § 16-958's reporting requirements, including the requirement of filing reports with the Secretary of State indicating when the candidate's spending or collections has reached the threshold levels that the Act establishes for filing an original trigger report.

Section 16-958 obligates the nonparticipating candidate who engages in a specified amount of additional collections or spending to file supplemental trigger reports with the Secretary of State. That provision states that the supplemental reports that the nonparticipating candidate files shall identify "the dollar amount being reported, the candidate, and the date." A.R.S. § 16-958(A).

The Act leaves the determination of the form of the trigger reports to the Commission. *See* A.R.S. §§ 16-956 -957. The Act grants the Commission broad rulemaking authority "to

² A nonparticipating candidate must file a supplemental trigger report each time new collections or spending exceed (i) ten percent of the original primary election spending limit or twenty-five thousand dollars, whichever is lower, before the general election period, or (ii) ten percent of the original general election spending limit or twenty-five thousand dollars, whichever is lower, during the general election period. A.R.S. § 16-958(A).

carry out the purposes” of the Clean Elections program. A.R.S. § 16-956(C). The Act further provides that the Commission “shall . . . [p]rescribe forms for reports, statements, notices and other documents required by [the Act].” A.R.S. § 16-956(A)(3).³

The Commission’s Rules expressly provide that “[o]riginal and supplemental campaign finance reports filed pursuant to A.R.S. §§ 16-941 shall include the same information regarding receipts and disbursements as required by A.R.S. § 16-915.” A.A.C. R2-20-109(A)(2).

Accordingly, under Commission rules, a nonparticipating candidate must file trigger reports whose contents reflect the requirements found in A.R.S. § 16-915.

Conclusion

Under the rules of the Citizens Clean Elections Commission, the original and supplemental campaign finance reports filed pursuant to A.R.S. §§ 16-941 and -958 must include the same information regarding receipts and disbursements as required under A.R.S. § 16-915.

Terry Goddard
Attorney General

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³ The Act also instructs the Commission to adopt rules to implement the reporting requirements of A.R.S. § 16-958(D) and (E). *See* A.R.S. § 16-956(A)(6). Those provisions require the Secretary of State to immediately notify the Commission of any trigger reports filed under A.R.S. § 16-958 and to distribute computer software to political committees to accommodate such filing. *See* A.R.S. § 16-958(D), (E).

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

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| <p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>December 20, 2005</p> | <p>No. I05-007 (R05-006)</p> <p>Re: Reporting Responsibilities of Teachers and School Volunteers under A.R.S. § 13-3620</p> |
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To: The Honorable Ted Downing
Arizona House of Representatives

Questions Presented

Section 13-3620, Arizona Revised Statutes (“A.R.S.”), imposes a duty on specified categories of individuals to report suspected child abuse. School personnel are among those required to report to a peace officer or to child protective services if there is reason to believe that a child is the victim of abuse, neglect, physical injuries, or specified sexual offenses. You have asked the following questions relating to school teachers’ and school volunteers’ duties under this statute.

1. Does a teacher satisfy the duty to report under Arizona Revised Statutes (“A.R.S.”) § 13-3620(A) if the teacher reports or causes a report to be made to the teacher’s

supervisor without independently ensuring that the suspected abuse is reported to a peace officer or child protective services?

2. Are school volunteers included in the class of persons required to report under A.R.S. § 13-3620(A)?

3. If a school volunteer is subject to the duty to report under A.R.S. § 13-3620(A), does it make a difference if the person is volunteering to work directly with students to assist them with their lessons or to accompany students on field trips as opposed to volunteering to perform administrative tasks, such as clerical tasks or copying?

4. If a volunteer is subject to the duty to report under A.R.S. § 13-3620(A), does the volunteer satisfy the duty to report under A.R.S. § 13-3620(A) if the volunteer reports or causes a report to be made to the responsible teacher or the responsible teacher's supervisor or must the volunteer also report or cause a report to be made independently to a peace officer or child protective services?

Summary Answer

1. Teachers must immediately and independently ensure that the information regarding suspected abuse is reported to a peace officer or child protective services. Section 13-3620(A), A.R.S., (the Reporting Statute) requires all school personnel who reasonably believe that a minor is or has been a victim of child abuse or neglect to "immediately report or cause reports to be made of [the] information to a peace officer or to child protective services." Although informing a principal or other supervisor is advisable, this does not necessarily satisfy the teacher's duty to ensure that the information regarding the suspected abuse is conveyed to a peace officer or child protective services.

2. A school volunteer is required to report suspected abuse under the Reporting Statute if the volunteer is responsible for the care or treatment of a child.

3. Whether a particular volunteer has a duty to report child abuse depends on the facts and circumstances. School volunteers who perform administrative tasks or assist teachers are generally not responsible for the care or treatment of children; however, there may be volunteers who, for example, accompany children on field trips or perform other functions in which, based on the facts and circumstances, they are responsible for the care of children.

4. A volunteer who has a duty to report does not necessarily satisfy this responsibility by reporting the matter to a teacher or other school employee. The volunteer must ensure the information is conveyed to a peace officer or child protective services.

Background

Mandatory child abuse reporting statutes began appearing in the United States in the 1950s. In 1974, Congress passed the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101 to 5107, requiring states to pass specific legislation targeted at child abuse. States were not eligible for federal funds to combat child abuse if they did not have a reporting statute in place. Currently, all fifty states have child abuse reporting legislation modeled after federal guidelines. The state statutes typically require mandatory child abuse reporting, grant immunity to people who report suspected child abuse in good faith, and provide either civil or criminal penalties for failure to file a mandatory report with the specified agency. *See, e.g.*, Wyo. Stat. § 14-3-205; Ky. Rev. Stat. Ann. § 620.030.

Arizona passed its first reporting statute in 1964.¹ The current Reporting Statute mandates that people subject to the statute who “reasonably believe[]” that abuse has occurred report the suspected abuse to a peace officer or to child protective services:

Any person who reasonably believes that a minor is or has been the victim of physical injury, abuse, child abuse, a reportable offense or neglect that appears to have been inflicted on the minor by other than accidental means or that is not explained by the available medical history as being accidental in nature or who reasonably believes there has been a denial or deprivation of necessary medical treatment or surgical care or nourishment with the intent to cause or allow the death of an infant who is protected under §36-2281 shall immediately report or cause reports to be made of this information to a peace officer or to child protective services in the department of economic security

A.R.S. § 13-3620(A) (Emphasis added.)

The people required to report include:

1. Any physician, physician’s assistant, optometrist, dentist, osteopath, chiropractor, podiatrist, behavior health professional, nurse, psychologist, counselor or social worker who develops the reasonable belief in the course of treating a patient.
2. Any peace officer, member of the clergy, priest or Christian Science practitioner.
3. The parent, stepparent or guardian of the minor.
4. School personnel or domestic violence victim advocate who develop the reasonable belief in the course of their employment.
5. Any other person who has responsibility for the care or treatment of the minor.

A.R.S. § 13-3620(A)(1)-(5).

¹ The original Reporting Statute was codified as A.R.S. § 13-843.01. It is currently found at A.R.S. § 13-3620.

If the report concerns a person who does not have care, custody or control of the child, the report is made to a peace officer only, not to child protective services. A.R.S. § 13-3620(A). The reports are to be “made immediately by telephone or in person and . . . be followed by a written report within 72 hours.” A.R.S. § 13-3620(D). A violation of the Reporting Statute is a class 1 misdemeanor or a class 6 felony, depending on the nature of the offense. A.R.S. § 13-3620(O).

Analysis

A. Under A.R.S. § 13-3620(A), Teachers Are Required to Report Suspected Abuse to a Peace Officer or Child Protective Services.

The best indication of the intent of a statute is its language. *State v. Givens*, 206 Ariz. 186, 188, 76 P.3d 457, 459 (2003). The Reporting Statute’s language explicitly mandates that a person subject to the statute who “reasonably believes” that abuse has occurred “*immediately report or cause reports to be made* of this information to a peace officer or to child protective services in the department of economic security.” A.R.S. § 13-3620(A) (emphasis added).

Based on this statutory language, a person satisfies his or her obligation by directly reporting the suspected abuse, or ensuring that a report is made to a peace officer or child protective services. Although reporting the suspected abuse to a principal or other supervisor may be advisable, this does not necessarily satisfy the statute. To comply with the statute, school personnel must ensure that the information is conveyed to the proper authorities (a peace officer or child protective services).

School personnel can ensure that the information is conveyed to the proper state investigating authority by either directly reporting the suspected abuse, or confirming that a report made to a supervisor, or principal or other person is immediately conveyed to a peace

officer or child protective services. Moreover, a school employee who receives a report of child abuse is also statutorily responsible for reporting the information to a peace officer or child protective services. This may result in multiple reports concerning the same incident, but that is neither prohibited nor discouraged by the statutory language. *See Commonwealth v. Allen*, 980 S.W.2d 278, 280 (Ky. 1998) (“it is not illogical or inefficient for the legislature to require every individual entrusted with the care and supervision of children to be required to report crimes against those children.”)²

B. School Volunteers Are Required to Report Suspected Abuse Under A.R.S. § 13-3620(A) if They Are Responsible for the Care or Treatment of Children.

The Reporting Statute does not specifically require school volunteers to report suspected abuse. The issue, therefore, is whether volunteers fall within the other categories of people required to report.

Arizona’s Reporting Statute requires “school personnel . . . who develop the reasonable belief in the course of their employment” that a child has been abused to report the suspected abuse. A.R.S. § 13-3620(4). This provision does not extend to volunteers. Although Title 15, A.R.S., uses the phrase “school personnel” to describe various groups of education personnel, *see* A.R.S. §§ 15-511, -730, -788, -1331, the term is never defined. Generally, these statutes do not contemplate volunteers as school employees or personnel. *Cf.* A.R.S. § 15-502 (“Employment of school district personnel; payment of wages of discharged employee”).

² In *Allen*, a teacher and school counselor were charged with misdemeanor offenses for failing to report suspected child abuse to the proper state authorities. Students had reported separately to the teacher and the school’s counselor that another teacher in the school had engaged in sexual activities with students. *Id.* at 279. Following the school district’s reporting procedures, both the teacher and the counselor repeated the allegations to the school’s principal, but failed to report the allegations to local law enforcement. The Kentucky Supreme Court rejected the arguments of the teacher and counselor that they had satisfied the reporting requirement by telling their supervisor of the suspected abuse. *Id.* at 279-80.

At least one Arizona statute, however, considers volunteers, in a specific circumstance, to be “personnel” for educational purposes. Section 15-512, A.R.S., requires certain “personnel who are not paid employees of the school district” to be fingerprinted. Although some volunteers are considered “personnel” for purposes of the fingerprinting requirement, there is no indication that the Legislature intended to include volunteers as school personnel for purposes of the Reporting Statute.

The Reporting Statute applies to “school personnel” who obtain information “in the course of their employment.” A.R.S. § 13-3620(A)(4). The terms “school personnel” and “in the course of their employment” indicate that this subsection of the Reporting Statute does not apply to volunteers.

The Reporting Statute also requires individuals “who [have] responsibility for the care or treatment of the minor” to report suspected abuse. A.R.S. § 13-3620(A)(5). The statute, however, does not define this phrase. In the context of A.R.S. § 13-3623,³ the child abuse statute, courts have noted that whether a person has assumed responsibility for a child’s care is a question of fact. *State v. Smith*, 188 Ariz. 263, 265, 935 P.2d 841, 843 (App. 1996). The word “care” in A.R.S. § 13-3623 “require[s] that the defendant accept responsibility for the child in some manner.” *State v. Jones*, 188 Ariz. 388, 394, 937 P.2d 310, 316 (1997). It also requires more than the general duty of care that is required to impose tort liability. *Id.* at 393, 937 P.2d at 315.

For example, in the context of A.R.S. § 13-3623, evidence that the defendant allowed two children to ride in his car was not sufficient to establish that he had assumed responsibility for the “care” of those children while they were in his car. *State v. Swanson*, 184 Ariz. 194, 196,

³ Section 13-3623 refers to a person who “having . . . care or custody of a child or vulnerable adult” engages in certain conduct.

908 P.2d 8, 10 (App. 1995). In contrast, where a child has been living in a defendant's residence for three months, and the defendant acted as the child's caregiver, the defendant had "care or custody" of the child for the purposes of A.R.S. § 13-3623. *State v. Jones*, 188 Ariz. at 394, 937 P.2d at 316.

School personnel, not volunteers, are generally responsible for the children's care at school. Nevertheless, whether a particular school volunteer has "responsibility for the care or treatment" of a minor is a fact-specific question and requires an analysis of the role of the particular volunteer. Therefore, some volunteers may be subject to the reporting obligation while others would not, depending on their roles at the school.

Your opinion request specifically mentioned volunteers who perform administrative tasks as opposed to helping students with their lessons or accompanying students on field trips. The volunteer who helps with administrative or clerical work is not subject to the Reporting Statute because that person is not responsible for the care or treatment of children. Similarly, although it is a closer question, the volunteer who helps in a classroom under a teacher's supervision is generally not responsible for the care or treatment of the children. In that situation, the teacher, rather than a volunteer who may assist the teacher, is responsible for the children's care. In contrast, on field trips volunteers may well be responsible for the care of children. In supervising children on a field trip, the volunteer may necessarily "accept responsibility for the child in some manner." *Id.* The role of the volunteer will determine whether he or she is subject to the reporting requirement.

Even if a particular school volunteer is not statutorily required to report, any person who reasonably believes that a child has been abused may, of course, report the suspected abuse. A.R.S. § 13-3620(F); *see also* A.R.S. § 13-3620(J) (immunity for reporting suspected abuse).

If a volunteer is subject to the Reporting Statute, the volunteer must “immediately report or cause reports to be made” to a peace officer or child protective services. For the same reasons that a teacher’s reporting responsibility is not necessarily satisfied by reporting the suspected abuse to the principal, a volunteer’s reporting responsibility is not necessarily satisfied by reporting the information to a teacher or other school employee. The volunteer must ensure that the report is made to the appropriate authorities.

Conclusion

To satisfy the Reporting Statute, teachers must immediately report suspected abuse to a peace officer or child protective services. Although informing a principal or other supervisor may be advisable, it does not necessarily satisfy the teacher’s duty to ensure that information regarding suspected abuse is reported to a peace officer or child protective services. School volunteers who are “responsible for the care or treatment” of children are also required to report suspected abuse.

Terry Goddard
Attorney General

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

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| <p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>December 28, 2005</p> | <p>No. I05-008 (R05-013)</p> <p>Re: Affiliated practice relationships between dental hygienists and dentists</p> |
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To: Julie Chapko, Executive Director
Arizona State Board of Dental Examiners

You requested an Attorney General Opinion regarding affiliated practice relationships between dental hygienists and dentists, both of whom are licensed and regulated by the Arizona State Board of Dental Examiners (“Board”).

Questions Presented

1. Do the supervision requirements in Arizona Revised Statutes § 32-1281 apply to affiliated practice relationships authorized by A.R.S. § 32-1289?
2. Do the supervision limitations in Arizona Administrative Code R4-11-603 apply to affiliated practice relationships?
3. Does A.R.S. § 32-1289(G) authorize the Board to adopt a rule limiting the number of affiliated practice relationships in which dentists and/or dental hygienists may participate?

Summary Answers

1. The general and direct supervision requirements in Arizona Revised Statutes (“A.R.S.”) §32-1281 do not apply to affiliated practice relationships. Instead, A.R.S. § 32-1289(H) requires a dentist in an affiliated practice relationship to “be available to provide an appropriate level of contact, communication, and consultation with the affiliated dental hygienist.”

2. The supervision limitation in Arizona Administrative Code (“A.A.C.”) R4-11-603 does not apply to affiliated practice relationships which are governed by A.R.S. § 32-1289.

3. Section 32-1289(G)(2) authorizes the Board to adopt a rule limiting the number of affiliated practice relationships in which dentists and hygienists may participate.

Background

A. Regulation of Dental Hygienists

Dental hygienists are licensed oral health care providers who provide preventive and therapeutic oral health care. Dental hygienists are licensed and regulated by the Arizona State Board of Dental Examiners (“Board”). The qualifications and requirements for licensure and practice governing dental hygienists, including supervision requirements, are set forth in statute (A.R.S. § 32-1281 to -1292.01) and regulation (A.A.C. R4-11-601 to -608). Prior to 2004, dental hygienists could practice only under the general or direct supervision of a licensed dentist. *See* A.R.S. § 32-1281(E) (2003).¹ The level of supervision required depended upon the nature of the dental procedure performed. A.R.S. § 32-1281(B), (E), and (F) (2003). Pursuant to regulation, a dentist is limited to supervising no more than three hygienists at one time. A.A.C. R4-11-603.

¹ “Direct supervision” is defined as “the dentist is present in the office while the dental hygienist is treating a patient and is available for consultation regarding procedures that the dentist authorizes and for which he is responsible.” A.R.S. § 32-1281(I)(1). “General supervision” is defined as “the dentist is available for consultation, whether or not

B. Affiliated Practice Relationships

In 2004, the Legislature authorized dental hygienists to enter into affiliated practice relationships with dentists. 2004 Ariz. Sess. Laws, Ch. 6, §§ 1, 3. Pursuant to this legislation, a qualified dental hygienist may “provide dental hygiene services under an affiliated practice relationship with a dentist as prescribed in section A.R.S. § 32-1289.” A.R.S. § 32-1281 (H). Section 32-1289, A.R.S., allows a public health agency or institution or a public or private school authority to employ dental hygienists to perform dental hygiene procedures under either general or direct supervision, or to enter into a contract for dental hygiene services with licensees who have entered into an affiliated practice relationship with a licensed dentist. A.R.S. § 32-1289(A) and (C). A dental hygienist in an affiliated practice relationship may perform dental hygiene procedures within the scope of a dental hygiene license, with three exceptions. A.R.S. § 32-1289(J).² The procedures must be performed in specified practice setting(s) pursuant to a written agreement, written procedures and standing orders established by the affiliated dentist. A.R.S. § 32-1289(F).

Analysis

A. The General and Direct Supervision Requirements in A.R.S. § 32-1281 Do Not Apply to Affiliated Practice Relationships.

The primary goal in interpreting a statute is to ascertain and give effect to the Legislature’s intent. *State v. Thompson*, 204 Ariz. 471, 474, 65 P.3d 420, 423 (2003). To determine legislative intent, courts look first to the language of a statute. *Matter of Maricopa County Juv. Action* No. JA 33794, 171 Ariz. 90, 93, 828 P.2d 1231, 1234 (App. 1992). In construing a

the dentist is in his office, over procedures which the dentist has authorized and for which the dentist remains responsible.” A.R.S. § 32-1281(I)(2).

² Hygienists in affiliated practice relationships are prohibited from performing root planing, administering local anesthetics and nitrous oxide, and placing periodontal sutures.

statute, the individual provision at issue must be considered *in pari materia* -- in the context of the entire statute of which it is a part. *State v. Wood*, 198 Ariz. 275, 277, 8 P.3d 1189, 1191 (App. 2000). Thus, in construing the meaning of A.R.S. § 32-1289, we also must consider the entire statutory scheme relating to the licensing and regulation of dental hygienists, A.R.S. §§ 32-1281 through 32-1292.01, but particularly the 2004 amendments to A.R.S. § 32-1281 and -1289. The language of these amendments establish that the supervision requirements of A.R.S. § 32-1281(E) and (F) do not apply to dental hygienists in affiliated relationships.

Section § 32-1281(E) provides that all dental hygienists shall practice under the general supervision of a licensed dentist, “[e]xcept as provided in subsections F and H of this section.”³ Subsection H provides that “[a] dental hygienist may provide dental hygiene services under an affiliated practice relationship with a dentist as prescribed in § 32-1289.” Section § 32-1289(C), which authorizes public health agencies and institutions, school authorities and government sponsored programs to contract with dental hygienists who have entered into an affiliated practice relationship, does not require the hygienist to work under general or direct supervision. A.R.S. §32-1289(C). Instead, the affiliated dentist must be “available to provide an appropriate level of contact, communication and consultation with the affiliated dental hygienist.” A.R.S. § 32-1289(H). Similarly, a dental hygienist in an affiliated practice relationship is required to “maintain an appropriate level of contact, communication and consultation with the affiliated dentist.” A.R.S. § 32-1289(I)(2). The absence of the terms, or any reference to the terms, “general” and “direct” supervision in § 32-1289 (C), (H) and (I) indicates that the Legislature did

³ Subsection F requires dental hygienists who perform certain enumerated procedures to practice under the direct supervision of a licensed dentist. Hygienists in affiliated relationships are prohibited from performing the procedures enumerated in subsection F. *See* A.R.S. § 32-1289(J) and -1281(B).

not intend them to apply to affiliated practice relationships.⁴

Moreover, an affiliated practice hygienist is “responsible and liable for all services rendered by the dental hygienist under the affiliated practice relationship.” A.R.S. § 32-1289(I)(3). Conversely, A.R.S. § 32-1281(I), which defines “direct” and “general” supervision, makes the supervising dentist responsible for authorized procedures a hygienist performs under supervision. The differences in the two provisions also indicate that the Legislature intended a different level of oversight and responsibility to apply to a dental hygienist in an affiliated practice relationship.

B. A.A.C. R4-11-603 Does Not Apply to Affiliated Practice Relationships.

Arizona Administrative Code R4-11-603 states: “A dentist shall not supervise more than three dental hygienists at one time.” The Board adopted this rule pursuant to its mandate to adopt rules regulating the practice of dentists and supervised personnel. A.R.S. § 32-1207(A)(1). This rule applies to the supervision requirements of A.R.S. §32-1281. Because affiliated practice relationships are not subject to the general and direct supervision requirements, it follows that the supervisory limitations in R4-11-603 also do not apply to affiliated practice relationships.

C. The Board May Adopt a Rule Limiting the Number of Affiliated Practice Relationships.

The Board is mandated to adopt rules regarding participation in affiliated practice relationships by dentists and dental hygienists. A.R.S. § 32-1289(G). The rules must specify additional standards and conditions that may apply to affiliated practice relationships. A.R.S. § 32-1289(G) (2). The Legislature, however, did not define the terms “standards” or “conditions.”

⁴ This conclusion is reinforced by the legislative history, which indicates that the affiliated practice relationship legislation was intended to create a new degree of supervision and was intended to allow dental hygienists to perform dental hygiene procedures without general supervision on children 18 years and younger in public health settings. *Arizona State Senate Staff, Fact Sheet* for H.B. 2194; *Dental Hygienists: Meeting on H.B. 2194 Before the H. Comm. On Health*, 46th leg., 2nd Reg. Sess. 7 (2004). 46th Leg., Second Reg. Sess. at 1 (2004), Committee on Health, March 4, 2004.

Undefined words in a statute may be interpreted according to their ordinary meaning. *Circle K Stores, Inc. v. Apache County*, 199 Ariz. 402, 406, 18 P.3d 713, 717 (App. 2001). A “condition” is defined as something that “restricts.” *Webster’s II New Riverside University Dictionary* 295 (1994). “Restrict” means to “hold within limits.” *Id.* at 1002. Accordingly, A.R.S. § 32-1289(G) (2) allows the Board to restrict by rule the number of affiliated practice relationships in which dentists and hygienists may participate. The nature of any restriction would be a policy decision of the Board, subject to the statutory rulemaking process.

Conclusion

Dental hygienists may practice without general or direct supervision in public health settings, if they have written affiliated practice agreements with affiliated dentists that identify the procedures and standing orders the hygienist must follow. Dentists and hygienists in affiliated practice relationships are not subject to the supervision limitation in A.A.C. R4-11-603. The Board, however, has rulemaking authority to limit the number of affiliated practice relationships in which dentists or hygienists may participate.

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STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

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| ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL December 29, 2005 | No. I05-009 (R04-040) Re: Public Benefits under Federal Law and A.R.S. § 46-140.01 |
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To: David Berns
Director, Department of Economic Security

Questions Presented

1. Are programs identified as federal public benefits in the August 4, 1998 United States Department of Health and Human Services (DHHS) Notice subject to the requirements of Arizona Revised Statutes (“A.R.S.”) § 46-140.01?
2. Do the requirements in A.R.S. § 46-140.01 apply to programs identified in 8 U.S.C. § 1611(b) or § 1621(b) as exceptions to the alienage restrictions that generally apply to federal or state or local public benefits?
3. Are programs identified in the January 16, 2001 United States Department of Justice Notice of Final Order as services necessary for the protection of life or safety subject to the requirements of A.R.S. § 46-140.01?

Summary Answers

1. Programs identified as federal public benefits in the DHHS Notice dated August 4, 1998 are not subject to the requirements of A.R.S. § 46-140.01 because A.R.S. § 46-140.01 expressly applies only to “state and local public benefits.” The programs identified in the DHHS notice are, however, subject to the eligibility restrictions, and verification and reporting requirements that apply to federal public benefits as set forth in 8 U.S.C. § 1611 and other federal laws.

2. Programs identified in 8 U.S.C. § 1611(b) or 8 U.S.C. § 1621(b) as exceptions to the alienage eligibility restrictions that otherwise apply to federal public benefits and state and local public benefits are not subject to the requirements of A.R.S. § 46-140.01.

3. Programs listed in the U.S. Department of Justice Notice of Final Order dated January 16, 2001, as necessary for the protection of life or safety, are not subject to the requirements of A.R.S. § 46-140.01 if the programs are community based, provide in-kind (non-cash) services, and do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient’s income, as required by 8 U.S.C. § 1621(b)(4).

Background

At the 2004 general election Arizona voters approved A.R.S. § 46-140.01 as part of Proposition 200. This statute requires that State and local government employees verify the identity and eligibility of applicants for State and local public benefits not mandated by federal law. This Office previously advised that “state and local public benefits” subject to A.R.S. § 46-140.01 included those programs in Title 46 of Arizona Revised Statutes that are "state and local public benefits" under 8 U.S.C. § 1621(c). Section 1621 generally establishes that non-citizens

who are not qualified aliens are not eligible for State and local public benefits. A different federal law, 8 U.S.C. § 1611, establishes similar restrictions for “federal public benefits.” Both of these statutes were part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“Federal Welfare Reform Act”), which included many eligibility restrictions based on immigration status.¹ Pub. L. 104-193, 110 Stat. 2105 [codified in scattered sections of titles 8 and 42 of U.S.C.].

You seek additional guidance regarding the application of the federal law to assist in the implementing of A.R.S. § 46-140.01 and to ensure compliance with federal law.

Analysis

A. Programs Listed in the United States Department of Health and Human Services August 1998 Notice as Federal Public Benefits Are Not "State and Local Public Benefits" Under A.R.S. § 46-140.01.

Section 46-140.01, as added by Proposition 200, expressly applies only to “state and local public benefits.” As explained in Arizona Attorney General Opinion I04-010, A.R.S. § 46-140.01 governs certain programs that are “state and local public benefits” subject to 8 U.S.C. § 1621. Section 1621 specifically provides that the term "state and local public benefits" does not include "any [f]ederal public benefit under 1611(c) of this title." 8 U.S.C. § 1621(c)(3). Likewise, by its terms, A.R.S. § 46-140.01 does not apply to “federal public benefits.” Therefore, a “federal public benefit” subject to 8 U.S.C. § 1611 is not subject to A.R.S. § 46-140.01.

A “federal public benefit” is, with some exceptions:

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

¹ This law also created the Temporary Assistance for Needy Families (“TANF”) block grant program and made significant changes to the national child support program.

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

8 U.S.C. § 1611(c)(1).

In August of 1998, the U.S. Department of Health and Human Services (DHHS) published a notice in the Federal Register identifying DHHS programs that provide federal public benefits under the Federal Welfare Reform Act. DHHS Notice, PRWORA; Interpretation of ‘Federal Public Benefit, 63 FR 41658-01, 1998 WL 435846 (Aug. 4, 1998) (“DHHS Notice”). The DHHS Notice also provided general guidance regarding its interpretation of the term “federal public benefits.” DHHS advised that part A of the definition (“any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States”) “generally include[s] agreements or arrangements between Federally funded programs and individuals, such as research grants, student loans, or patent licenses.” *Id.*, 63 FR at 41659. Similarly, the term “grants” refers to grants to individuals, not block grants provided to states or localities. *Id.*

Regarding Part B of the definition, DHHS advised that a benefit must satisfy two conditions. First, it must be one of the enumerated benefits (“retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, [or] unemployment benefit”) or be a “similar benefit.” *Id.* at 41658 (quoting 8 U.S.C. § 1611(c)(1)(b)). Second, it must be provided to an “individual, household or family eligibility unit by an agency of the United States or by appropriated funds of the United

States.” *Id.* DHHS interpreted “individual, household, or family eligibility unit” to refer to benefits that are:

- (1) provided to an individual, household, or family, and
- (2) the individual, household, or family must, as a condition of receipt, meet specified criteria (e.g., a specified income level or residency) in order to be conferred the benefit.

The benefits do not include “benefits that are generally targeted to communities or specified sectors of the population (e.g., people with particular physical conditions, such as a disability or disease; gender; general age groups, such as youth or elderly).” *Id.* at 41658. For example, DHHS advised that a benefit provided under the Maternal and Child Health program, which provides health services to women and children, is not a “federal public benefit.” *Id.* at 41659.

Based on these principles and a review of DHHS programs, the DHHS Notice identified 29 specific programs or sources of funding as “federal public benefits that are subject to the eligibility restrictions in 8 U.S.C. § 1611.”² These federal benefits are generally not available to immigrants who are not lawfully present in the United States. *See* 8 U.S.C. § 1611(a). Even though some of the programs identified in the 1998 DHHS notice are administered by State and

² The programs included: Adoption Assistance; Administration on Development Disabilities (ADD) — State Developmental Disabilities Councils, ADD special projects, and ADD university affiliated programs; Adult Programs/Payments to Territories; Agency for Health Care Policy and Research Dissertation Grants; Child Care and Development Fund; Clinical Training Grant for Faculty Development in Alcohol & Drug Abuse; Foster Care; Health Profession Education and Training Assistance; Independent Living Program; Job Opportunities for Low Income Individuals; Low Income Home Energy Assistance Program; Medicare; Medicaid (except assistance for an emergency medical condition) Mental Health Clinical Training Grants; Native Hawaiian Loan Program; Refugee Cash Assistance; Refugee Medical Assistance; Refugee Preventive Health Services Program; Refugee Social Services Formula Program; Refugee Social Services Discretionary Program; Refugee Targeted Assistance Formula Program; Refugee Targeted Assistance Discretionary Program; Refugee Unaccompanied Minors Program; Refugee Voluntary Agency Matching Grant Program; Repatriation Program; Residential Energy Assistance Challenge Option; Social Services Block Grant; State Child Health Insurance Program; Temporary Assistance To Needy Families. *Id.* at 41660. Although these programs are “federal public benefits,” some of the specific benefits or services that these programs provide may not be provided to an “individual, household, or family eligibility unit.” If a service is not provided to an “individual, household, or family eligible unit,” it would not be a “federal public benefit” subject to 8 U.S.C. § 1611. *Id.* at 41658.

local governments, they are federal public benefits, not State and local public benefits. The DHHS Notice acknowledges this distinction between state and local public benefits and federal public benefits:

Services or benefits that are wholly funded by state or local governments may be “state or local public benefit(s)” as defined in section 411(c) of [the Federal Welfare Reform Act]. However, services or benefits that are wholly or partially funded with DHHS resources must comply with the interpretation provided in this Notice.

DHHS Notice, 63 FR at 41660.

Any program identified in the DHHS notice as a federal public benefit is not a State and local public benefit subject to A.R.S. § 46-140.01. Under the Federal Welfare Reform Act, States and other entities that provide federal public benefits are required to verify that applicants for federal public benefits are U.S. citizens or qualified aliens. 8 U.S.C. § 1611. States that opt to participate in federal programs are required to follow federal standards and meet federal requirements.

B. Programs Identified in 8 U.S.C. § 1611(b) and 8 U.S.C. § 1621(b) Are Provided to All Eligible Persons Regardless of Immigration Status.

Although 8 U.S.C. § 1611 broadly restricts the eligibility of persons not lawfully in the United States for “federal public benefits,” it also includes several exemptions from those eligibility restrictions. 8 U.S.C. § 1611(b)(1) identifies several federal public benefits that are exempt from the eligibility restrictions in 1611(a). Under federal law these federal public benefits are available to people regardless of whether they are lawfully present in the United States:

1. Emergency medical care (other than organ transplants) for Medicaid eligible persons (8 U.S.C. § 1611 (b)(1)(A));

2. Short-term, non-cash, in-kind emergency disaster relief (8 U.S.C. § 1611 (b)(1)(B));
3. Non-Medicaid public health assistance for immunizations with respect to immunizable diseases, as well as for testing and treatment of symptoms caused by communicable diseases (8 U.S.C. § 1611 (b)(1)(C));
4. Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the U.S. Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate federal agencies and departments, which (i) deliver in-kind services at the community level, including through public or private nonprofit agencies; (ii) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (iii) are necessary for the protection of life or safety (8 U.S.C. § 1611 (b)(1)(D));
5. Programs for housing or community development assistance or financial assistance administered by the U.S. Secretary of Housing and Urban Development, any program under Title V of the Housing Act of 1949, and any assistance under 7 U.S.C. § 1926C to the extent the alien was receiving such a benefit on August 22, 1996 (8 U.S.C. § 1611(b)(1)(E));
6. Title II Social Security Act payments to an alien lawfully present in the U.S. as determined by the U.S. Attorney General if nonpayment would contravene an international agreement, be contrary to 42 U.S.C. § 402(t), or the alien was

entitled to the benefit based on an application filed on or before August 1996 (8 U.S.C. § 1611(b)(2));

7. Medicare payments to an alien lawfully present in the U.S. as determined by the U.S. Attorney General, and with respect to benefits payable under Part A of Medicare, if the alien was authorized to be employed and with respect to any wages attributable to employment which are counted for purposes of eligibility for such benefits (8 U.S.C. § 1611(b)(3));
8. Railroad Retirement Act of 1974 or Railroad Unemployment Insurance Act benefits to an alien who is lawfully present in the United States as determined by the U.S. Attorney General or to an alien residing outside the U.S. (8 U.S.C. § 1611(b)(4)); and
9. SSI benefits (or those programs related to eligibility under SSI) for an alien who was receiving them on August 22, 1996 (8 U.S.C. § 1611 (b)(5)).

A state agency administering these federal programs should not verify the immigration status of applicants for the exempt programs because, under federal law, these programs are available without regard to the applicant's immigration status. *See* DOJ Notice of Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of PRWORA, AG Order No. 2129-97, 62 FR 61344, 61347 (November 17, 1997) (“no verification of an applicant's status as a U.S. citizen, U.S. non-citizen national or qualified alien should be undertaken where benefits are not contingent on such status”).

Similarly, 8 U.S.C. § 1621, which governs “state and local public benefits,” exempts certain programs from its eligibility restrictions. Although A.R.S. § 46-140.01 applies to State and local public benefits in Title 46 of Arizona Revised Statutes that are subject to 8 U.S.C. §

1621, those programs exempt from 8 U.S.C. § 1621 are not subject to the eligibility verification requirements in A.R.S. § 46-140.01. Section 46-140.01 applies to State and local public benefits not mandated by federal law. Although federal law does not mandate “state and local public benefits,” it does mandate that some state and local public benefits be provided without regard to a person’s immigration status. Those programs that are available without regard to immigration status are specified in 8 U.S.C. § 1621(b). They include primarily emergency services:

- (1) assistance for health care items and services that are necessary for the treatment of an emergency medical condition and are not related to an organ transplant;
- (2) short-term, non-cash, in-kind emergency disaster relief;
- (3) public health assistance for immunizations which respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease;
- (4) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the United States Attorney General, in the Attorney General’s sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (A) deliver in-kind services at the community level, including through public or private nonprofit agencies; (B) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient’s income or resources; and (C) are necessary for the protection of life or safety.

Those programs that are exempt from the eligibility restrictions in 8 U.S.C. § 1611 or § 1621 are not subject to the provisions of A.R.S. § 46-140.01.

C. Programs Necessary for Life and Safety are Exempt from the Requirements of A.R.S. § 46-140.01.

The Federal Welfare Reform Act required the Attorney General of the United States, in the Attorney General's "sole and unreviewable discretion," to identify certain federal, state and local public benefits that are exempt from the general prohibition against undocumented immigrants receiving those public benefits. 8 U.S.C. §§ 1611(b)(1)(D); 1621(b)(4). The Attorney General was required to identify programs, services, and assistance that meet three criteria: (1) deliver in-kind services at the community level, including through public or private non-profit agencies; (2) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (3) are necessary for the protection of life or safety. 8 U.S.C. § 1611 (b)(1)(D). Congress specified that soup kitchens, crisis counseling and intervention, and short-term shelter were examples of such assistance. *Id.*

To satisfy this statutory requirement, in 2001, Attorney General Reno identified programs necessary for the protection of life or safety. DOJ Notice of Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, A.G. Order No. 2353-2001, 66 FR 3613, 3616 (Jan. 16, 2001) ("2001 Order") The services listed in the order included:

- (1) Crisis counseling and intervention programs; services and assistance relating to child protection, adult protective services, violence and abuse prevention, victims of domestic violence or other criminal activity; or treatment of mental illness or substance abuse;
- (2) Short-term shelter or housing assistance for the homeless, for victims of domestic violence, or for runaway, abused or abandoned children;

- (3) Programs, services, or assistance to help individuals during periods of heat, cold, or other adverse weather conditions;
- (4) Soup kitchens, community food banks, senior nutrition programs such as Meals on Wheels, and other such community nutritional services for persons requiring special assistance;
- (5) Medical and public health services (including treatment and prevention of diseases and injuries) and mental health, disability, or substance abuse assistance necessary to protect life or safety;
- (6) Activities designed to protect the life or safety of workers, children and youths, or community residents; and
- (7) Any other programs, services, or assistance necessary for the protection of life or safety.

These programs are not subject to the alienage restrictions in the Welfare Reform Act, if they are in-kind, community-based services and the provision of the assistance, amount of assistance or the cost of the assistance are not conditioned on the recipient's income or resources. 8 U.S.C. 1621(b)(4). According to the Order, "[n]either states nor other service providers may use the [Welfare Reform Act] as a basis for prohibiting access of aliens to any programs, services, or assistance covered by this Order." Unless the person is otherwise ineligible for the services, "benefit providers may not restrict the access of any alien to the services covered by this Order." 2001 Order.³ These emergency programs that meet the statutory requirements in 8

³ The Order also specifically found that the alienage restrictions in the Welfare Reform Act did not apply to police, fire, ambulance, transportation, sanitation or other "widely available services." 2001 Order, 64 FR at 3616. The U.S. Attorney General directed that "[s]ervice providers and other interested parties should refer to benefit-granting agencies' interpretations of the term 'federal public benefit' as used in the Act in order to determine whether their program is a federal public benefit and therefore subject to the alienage restrictions of the Act. *Id.* at 3614.

U.S.C. § 1621(b)(4) are not subject to A.R.S. § 46-140.01 because federal law mandates that they be provided without regard to immigration status.

Conclusion

Federally funded public benefits and programs within 8 U.S.C. § 1611 are not subject to A.R.S. § 46-140.01, which expressly applies only to state and local public benefits. This includes those programs identified in the 1998 DHHS notice as “federal public benefits.” In addition, certain emergency programs exempt from the eligibility restrictions in 8 U.S.C. § 1611 and § 1621, including those identified in the U.S. Attorney General Order, are not subject to the eligibility verification requirements in A.R.S. § 46-140.01.

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