

## 2007 AG Opinions

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December 24, 2007	<b>No. I07-013 (R07-028)</b> Re: Open Meeting Law and Comments to the Media Concerning Issues that May Come Before a Public Body
December 20, 2007	<b>No. I07-012 (R06-032)</b> Re: Probation Officers and Surveillance Officers' Status as Qualified Law Enforcement Officers Under Federal Law
December 5, 2007	<b>No. I07-011 (R06-030)</b> Re: Authority of Independent Redistricting Commission; Commissioners' Terms of Office; Effect of Commissioner Change of Party Affiliation
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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 24, 2007	No. I07-013 (R07-028)  Re: Open Meeting Law and Comments to the Media Concerning Issues that May Come Before a Public Body
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TO: The Honorable Steve M. Gallardo  
The Honorable David Lujan  
Arizona House of Representatives

**Question Presented**

You have asked whether Arizona's Open Meeting Law ("OML") prohibits a member of a public body from speaking to the media concerning matters that may come before the public body.

**Summary Answer**

The OML does not prohibit a member of a public body from speaking to the media concerning matters that may come before the public body.

## Analysis

All meetings of public bodies<sup>1</sup> must comply with the OML. Ariz. Att’y Gen. Op. I05-004. Under the OML, a “meeting” is:

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).

Your inquiry concerning comments to the media stems from the theory that the OML may be violated if one member of a public body comments to the media concerning a matter that may come before the public body, and a quorum of the public body reads or hears those comments. When addressing e-mails among a quorum of the members of a public body, this Office advised that a member cannot propose legal action to a quorum of the public body outside of a meeting that complies with the OML. Ariz. Att’y Gen. Op. I05-004. Other conduct within the OML requires more than a single communication because it involves discussion, taking legal action and deliberations. *Id.*

Although a single e-mail to a quorum of a public body proposing legal action violates the OML, a comment reported through the media does not. The distinction is that an e-mail to a quorum of the board involves a “gathering” of a quorum, and a member’s comment to the media does not. A gathering of a quorum under the OML does not require simultaneous interaction.

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<sup>1</sup> 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 subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body.

A.R.S. § 38-431(6).

Ariz. Att’y Gen. Op. I05-004. “[E]ven 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.’” *Id.* The OML also includes a gathering through technological devices. For example, members of a public body may gather by telephone, video conference and e-mail. *Id.* (discussing e-mail meetings); Ariz. Att’y Gen. Op. I91-033 (conducting business at open meetings by use of telephone or video conference); *Arizona Agency Handbook* § 7.10.2 (Ariz. Att’y Gen. 2001) (addressing participation in meetings by telephone and video conference).<sup>2</sup> In addition, board members may “gather” illegally through polling and other devices intended to circumvent the law. Ariz. Att’y Gen. Op. 75-8. Yet, the term “gathering” indicates that the OML does not apply to every situation in which a quorum of a board may become aware of what another member has said.<sup>3</sup>

A statute is interpreted in light of its “context, subject matter, historical background, effects and consequences, and spirit and purpose.” *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). “The OML is intended to open the conduct of government business to public scrutiny and prevent public bodies from making decisions in secret.” Ariz. Att’y Gen. Op. I05-004 at 1 (citing *Karol v. Bd. of Educ. Trs.*, 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979)). Media reports about the work of public bodies supports the interest of open government, which is the same purpose that the OML serves.

Unlike e-mails to a quorum of members, a message communicated to the media reaches other members of a public body indirectly, if at all. In addition, when the media disseminates the

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<sup>2</sup> The reference to “technological devices” in the definition of “meeting” was added to the OML in 2000 “to prohibit a quorum of a public body from secretly communicating through technological devices, including facsimile machines, telephones, and electronic mail.” Ariz. Agency Handbook, § 7.5 (Ariz. Att’y Gen. 2001).

<sup>3</sup> “Gathering” is not defined in the OML statutes. In addition, the dictionary provides little guidance, defining gathering as a meeting or assembly, with assembly defined as a group of persons gathered together. *Webster’s II New College Dictionary* 69, 472 (2005).

information, it is open to and intended for the public. These characteristics distinguish a communication with the media from the types of communications that this Office has previously advised are “meetings” subject to the OML. Therefore, a communication with the media that may reach a quorum of the board’s members is not a “gathering” of the public body, and, for that reason, it is not a meeting. A contrary conclusion would virtually eliminate the concept of a “gathering” from the definition of a meeting. It also undermines the purpose of the OML. If members of public bodies refrain from speaking to the media, then government becomes less open to the public, not more. *Cf. Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (recognizing role of press in “free discussion of governmental affairs”). For these reasons, the language and purpose of the OML indicate that it does not limit the ability of members of public bodies to communicate with the media.<sup>4</sup>

### **Conclusion**

The OML does not prohibit a member of a public body from speaking to the media regarding matters that may come before the public body. A meeting subject to the OML requires a gathering of a quorum of members of the public body, and a gathering does not occur when members merely hear or read a comment, including a proposal for legal action, made by another member in the media.

Terry Goddard  
Attorney General

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<sup>4</sup> Of course, there are some limits on the information members of public bodies may share with the general public, including the media. For example, members may not disclose minutes of or discussions made at an executive session except to certain authorized individuals. A.R.S. § 38-431.03(B); *see also* Ariz. Att’y Gen. Op. I96-012 (recognizing executive sessions are exception to openness requirement).

**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

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ATTORNEY GENERAL OPINION	No. I07-012 (R06-032)
By	Re: Probation Officers and Surveillance Officers' Status as Qualified Law Enforcement Officers Under Federal Law
TERRY GODDARD ATTORNEY GENERAL	
December 20, 2007	

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To: The Honorable Karen S. Johnson  
Arizona State Senate

**Question Presented**

You have asked whether probation officers and surveillance officers are “qualified law enforcement officers” under Arizona law for the purpose of carrying concealed firearms as permitted by the federal Law Enforcement Officers Safety Act of 2004, 18 U.S.C. § 926B (the “Act”).

**Summary Answer**

Probation officers and surveillance officers are not “qualified law enforcement officers” under the Act. Therefore, the Act does not affect their authority to carry concealed firearms.

## Background

The Law Enforcement Officers Safety Act of 2004 permits “qualified law enforcement officers” to carry concealed firearms nationwide. 18 U.S.C. § 926B. With respect to currently employed law enforcement officers, the Act provides:

Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required by subsection (d)<sup>1</sup> may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).

18 U.S.C. § 926B(a). Therefore, any “qualified law enforcement officer” as defined in the Act may carry a concealed firearm anywhere in the United States if he or she meets the statutory criteria, notwithstanding any state concealed-weapons law to the contrary. The only limitation to this federal authorization to carry concealed firearms is that it does not

supersede or limit the laws of any State that—

- (1) permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or
- (2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park.

18 U.S.C. § 926B(b).

The Act defines “qualified law enforcement officer” as an employee of a governmental agency who:

- (1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest;
- (2) is authorized by the agency to carry a firearm;
- (3) is not the subject of any disciplinary action by the agency;
- (4) meets the standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;

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<sup>1</sup> Subsection (d) states: “The identification required by this subsection is the photographic identification issued by the governmental agency for which the individual is employed as a law enforcement officer.”

- (5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and
- (6) is not prohibited by Federal law from receiving a firearm.

18 U.S.C. § 926B(c).

### Analysis

The Act regulates qualified law enforcement officers' carrying of concealed firearms nationwide. Before the Act's passage, each state determined whether an individual could carry a concealed firearm within its borders without respect to whether the individual was a qualified law enforcement officer authorized to carry a concealed weapon in his or her home state. The Act permits a person who meets the definition of a "qualified law enforcement officer" and whose employing agency authorizes him or her to carry a firearm to carry a concealed firearm within his or her home state and into another state without first applying for and receiving permission to carry it under that state's own concealed-weapons process.

The Act sets out six criteria for determining whether an employee of a governmental agency is a "qualified law enforcement officer." 18 U.S.C. § 926B(c). One criterion is whether the employee is authorized by the employing agency to carry a firearm. 18 U.S.C. § 926B(c)(2). As you note in your opinion request, the Arizona Code of Judicial Administration (ACJA) authorizes some probation officers and surveillance officers to carry firearms under certain circumstances. ACJA § 6-113 (setting forth firearms standards for adult and juvenile probation and surveillance officers). Thus, probation officers and surveillance officers may satisfy the requirement in 18 U.S.C. § 926B(c)(2) that they are authorized to carry a firearm.

To be a “qualified law enforcement officer” under the Act, a surveillance officer or probation officer must also be “authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest.” 18 U.S.C. § 926B(c)(1). Determining how this applies requires an analysis of the powers and duties of probation officers and surveillance officers. Although the federal law refers to the “statutory” power of arrest, Arizona law requires an analysis of statutes and the ACJA to determine the authority of probation officers and surveillance officers.

Arizona statutes and the ACJA do not give juvenile surveillance officers the authority to arrest people. *See* A.R.S. § 8-205; ACJA § 6-105(F). Therefore, juvenile surveillance officers do not satisfy subsection (c)(1) and are not “qualified law enforcement officers” under the Act.

In contrast, adult and juvenile probation officers and adult surveillance officers have statutory powers of arrest under Arizona law. Arizona law authorizes adult probation officers to, among other things, “serve warrants, make arrests and bring persons before the court who are under suspended sentences.” A.R.S. § 12-253(3); ACJA § 6-105(E)(2)(c). Arizona law also authorizes adult surveillance officers to “[s]erve warrants, make arrests and bring before the court persons who are under suspended sentences.” A.R.S. § 12-259.01(2)(d). Although Arizona statutes do not explicitly grant arrest powers to juvenile probation officers, the ACJA provides that juvenile probation officers’ duties include serving warrants, making arrests, and bringing non-compliant probationers before the court. ACJA § 6-105(E)(3)(b)(1)-(3). Therefore,

adult and juvenile probation officers and adult surveillance officers have powers of arrest under Arizona law.

In addition to having statutory powers of arrest, the governmental employee must be “authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law.” 18 U.S.C. § 926B(c)(1). The duties of an adult probation officer include creating and maintaining records on all persons placed on probation, exercising supervision and observation over probationers, creating presentence reports for the court, keeping complete identification of probationers and their terms and conditions of probation, obtaining information concerning the conduct of probationers and reporting the information to the court, and bringing defaulting probationers into court when the probationer’s conduct justifies revocation of probation. A.R.S. § 12-253. Adult surveillance officers maintain contact with probationers and their employers and family members, monitor the conduct of the probationer, assemble information on the probationer, and report to the court if the probationer engages in conduct constituting an offense. A.R.S. § 12-259.01.

Juvenile probation officers “receive and examine all referrals or Arizona uniform traffic ticket and complaint forms involving an alleged delinquent juvenile or incorrigible child,” A.R.S. § 8-205(1), “[r]eceive petitions alleging a child or children as dependent and transmit the petitions to the juvenile court,” A.R.S. § 8-205(4), maintain case records, ACJA § 6-105(E)(3)(d), conduct personal interviews, ACJA § 6-105(E)(3)(e), exercise general supervision and observation, enforcing all court orders, ACJA § 6-105(E)(3)(f), ensure probationers pay restitution, ACJA § 6-105(E)(3)(g), conduct risk assessments, ACJA § 6-105(E)(3)(h), monitor school attendance and performance, ACJA § 6-

105(E)(3)(i), assist juveniles in finding employment and monitor employment, ACJA § 6-105(E)(3)(j), involve parent or guardian in the rehabilitation and treatment, ACJA § 6-105(E)(3)(k), provide for supervision of juveniles performing community service, ACJA § 6-105(E)(3)(l), and “prepare a disposition summary report for every juvenile who has been adjudicated of a delinquent act or of a technical violation of probation,” A.R.S. § 8-352(A).

In short, the duties of adult and juvenile probation officers and adult surveillance officers generally consist of supervising persons on probation and addressing probation violations. Taken as a whole, the language “prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law,” 18 U.S.C. § 926B(c)(1), applies to actions taken before or during prosecution, prior to conviction, or during incarceration. *See Ruiz v. Hull*, 191 Ariz. 441, 450, 957 P.2d 984, 993 (1998) (in construing statute, court reads statute as a whole and gives meaningful operation to each of its provisions). The statute does not mention supervision and monitoring for which probation and surveillance officers are responsible. Probation and surveillance officers are not involved in the criminal investigations that precede a person’s prosecution and conviction. And, although probation and surveillance officers might be involved in probation violation hearings, those hearings concern whether a person has violated the terms and conditions of probation and are not criminal prosecutions for violations of law. *See State v. Alfaro*, 127 Ariz. 578, 579, 623 P.2d 8, 9 (1980) (“Essentially, the function of a probation violation hearing is not to decide guilt or innocence but to determine, by a preponderance of all reliable evidence, whether a probationer has violated the terms and conditions of his probation.”). Moreover, probation is not incarceration. *Cf. State v.*

*Graves*, 188 Ariz. 24, 27, 932 P.2d 289, 292 (App. 1996) (holding that because incarceration means “confinement,” it does not include parole, which is a release from confinement). Adult and juvenile probation officers and adult surveillance officers do not engage in the “prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law” as described in 18 U.S.C. § 926B(c)(1), and, therefore, they are not “qualified law enforcement officers” under the Act.<sup>2</sup>

Your opinion request states that “Arizona law also specifically grants peace officer status to probation officers.” While it is true that certain statutes grant probation and surveillance officers the authority of a peace officer under state law, they specifically do so only in regard to the performance of the officer’s duties. *See* A.R.S. § 8-205(3) (stating that juvenile court officers “[h]ave the authority of a peace officer *in the performance of the court officer’s duties.*” [emphasis added]); A.R.S. § 12-253(3) (stating that adult probation officers have “the authority of a peace officer *in the performance of the officer’s duties.*” [emphasis added]); A.R.S. § 13-916(E) (stating that adult probation and surveillance officers “both have the authority of a peace officer *in the performance of their duties.*” [emphasis added]). Thus, probation officers’ authority as peace officers extends only to the duties Arizona law otherwise gives them and does not confer any additional powers or duties upon them. The statutory classification as “peace officers” under certain circumstances does not eliminate the need to fall within the specific definition of qualified law enforcement officer in 18 U.S.C. § 926B.

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<sup>2</sup> In addition, the legislative record repeatedly refers to police officers. *See* H.R. Rep. No. 108-560, at 3 (2004) (stating that purpose of law is to “mandate that . . . police officers could carry a concealed weapon anywhere within the United States”).

## Conclusion

A “qualified law enforcement officer” under the Act must be “authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and ha[ve] statutory powers of arrest.” 18 U.S.C. § 926B(c)(1). Because Arizona law does not bestow statutory powers of arrest on juvenile surveillance officers, they do not qualify under subsection (c)(1), and are therefore not qualified law enforcement officers under the Act. Although adult and juvenile probation officers and adult surveillance officers have statutory powers of arrest, their duties do not include the “prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law.” Therefore, adult and juvenile probation officers and adult surveillance officers are likewise not “qualified law enforcement officers” under the Act.

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

ATTORNEY GENERAL OPINION  by  TERRY GODDARD ATTORNEY GENERAL  December 5, 2007	No. I07-011 (R06-030)  Re: Authority of Independent Redistricting Commission; Commissioners' Terms of Office; Effect of Commissioner Change of Party Affiliation
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To: Steven W. Lynn, Chairman  
Independent Redistricting Commission

**Questions Presented**

The Arizona Constitution establishes the Independent Redistricting Commission ("Commission") to redraw legislative and congressional district boundaries following each decennial census. Ariz. Const. art. IV, pt. 2, § 1. You have asked the following questions concerning the Commission:

1. The Commission "shall not meet or incur expenses after the redistricting plan is completed, except if litigation or any government approval of the plan is pending." Ariz. Const. art. IV, pt. 2, § 1(23). Is litigation pending as long as a party may possibly file a notice of appeal, a motion for reconsideration or a petition for review? If a petition for review is denied, is litigation pending until the mandate issues?

2. If a new legal challenge to legislative or congressional district boundaries is filed after the Commission returns surplus monies to the general fund, how will the Commission control the defense of the challenged redistricting plan?
3. May the Commission properly use any of its existing appropriation to enter into an interagency service agreement with another state agency to collect and prepare election data for elections through 2010 in order to prepare for the next redistricting or to continue working with the United States Census Redistricting Data Office?
4. During a Commissioner's term and "for three years thereafter," a Commissioner is "ineligible for Arizona public office or for registration as a paid lobbyist." Ariz. Const. art. IV, pt. 2, § 1(13). Does an "Arizona public office" include all local, state, or federal offices or just those offices that the Commission redistricted? Is the ban on holding public office during a Commissioner's term of office and for three years thereafter shortened if a Commissioner resigns?
5. No more than two members of the Commission may be members of the same political party, and each member must have been continuously registered with the same political party or registered as not affiliated with a political party for three or more years "immediately preceding appointment." Ariz. Const. art. IV, pt. 2, § 1(3). What happens if a Republican or Democrat member of the Commission re-registers as an independent during his or her term of office or if the independent re-registers with one of the two major parties?

#### **Summary Answers**

1. The Commission may continue incurring expenses and meeting while litigation is pending. The litigation will not end until the time frame for all appeals has expired and the mandate has issued.
2. Any funding for future litigation concerning redistricting should be provided through legislative appropriation.

3. The Commission may not transfer its funds to another agency to enable that agency to continue work to prepare for next decade's redistricting. If this continuing work needs to be accomplished, it is a policy issue for the Legislature to address.

4. Commissioners are not eligible for any state or local office in this state for three years after their term on the Commission. If a person resigns from the Commission before the new Commission is appointed, the three-year prohibition begins to run from the date on which the person's term would have ended if he or she had not resigned, which would be the date upon which the first member of the new Commission is appointed.

5. If a Commissioner changes party affiliation and, as a result, the Commission no longer satisfies the constitutional requirement that no more than two Commissioners are members of the same political party, the Commissioner whose change of parties caused the disparity should resign or be removed from office.

### **Background**

In 2000, Arizona voters passed an initiative, Proposition 106, amending the Arizona Constitution to establish an Independent Redistricting Commission to redraw congressional and state legislative district boundaries following each decennial census. Ariz. Const. art. IV, pt. 2, § 1. Before this constitutional amendment was approved, the Legislature was responsible for legislative and congressional redistricting in Arizona.

Under the constitutional amendment, a new Commission is established every ten years beginning in 2001. *Id.* § 1(3). The five-member Commission must have no more than two Commissioners who are members of the same political party. *Id.* A Commissioner's duties expire upon the appointment of the first member of the next redistricting Commission. *Id.* § 1(23).

The constitutional amendment mandated that the Treasurer transfer six million dollars to the Commission following the 2000 census. *Id.* § 1(18). Any unused funds were to be returned to the general fund. *Id.* For the redistricting work in subsequent decades, the Department of Administration is to submit a recommended appropriation to the Legislature and the Legislature is to “make the necessary appropriations by a majority vote.” *Id.* Once the redistricting plan is finished, the Commission may not meet or incur expenses unless litigation or government approval is pending. *Id.* § 1(23).

The Commission has spent the six million dollars appropriated in the constitutional amendment. Because the Commission was still involved with litigation concerning the legislative districts, the Legislature appropriated an additional \$4,203,000 in fiscal year 2004. 2003 Ariz. Sess. Laws, 2d Spec. Sess., ch. 3 (appropriating \$1,703,000 to the Commission); 2004 Ariz. Sess. Laws, ch. 118 (appropriating \$2,500,000 to the Commission); *see also* Joint Legislative Budget Committee, Fiscal Year 2007 Appropriations Report 218 (July 2006). Litigation concerning the legislative districts is still pending as of this date. In 2004, a trial court determined that the legislative districts did not comply with state constitutional requirements. In 2005, the court of appeals reversed this decision and remanded the matter to the trial court. *Ariz. Minority Coal. for Fair Redistricting v. Indep. Redistricting Comm’n*, 211 Ariz. 337, 121 P.3d 843 (2005). On remand, the trial court again ruled that the plan did not comply with the requirements of the Arizona Constitution, and that decision is presently on appeal.

### Analysis

#### **I. An Action Is “Pending” Until the Court’s Decision Becomes Final and No Other Appeal or Motion for Reconsideration Is Permitted.**

The State Constitution prohibits the Commission from meeting or incurring expenses after the redistricting is completed “except if litigation or any government approval of the plan is pending, or to revise districts if required by court decisions or if the number of congressional or legislative districts is changed.” Ariz. Const. art. IV, pt. 2, § 1(23). Your question asks when litigation is “pending” for the purposes of this constitutional provision. Specifically, you ask

whether litigation is considered “pending” during the thirty-day period of time for the filing of a notice of appeal, or, if a petition for review is filed from a court of appeals decision, whether the litigation is “pending” until the mandate issues after a denial of review.

In *Pima County Assessor v. Arizona State Board of Equalization*, the court held that “an action or suit is ‘pending’ from its inception until the rendition of final judgment.” 195 Ariz. 329, 334, ¶ 18, 987 P.2d 815, 820 (App. 1999). The court quoted the definition of “pending” in *Black’s Law Dictionary* as “[b]egun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Awaiting an occurrence or conclusion of action, period of continuance or indeterminacy.” *Id.* The court of appeals has also noted that “the word ‘action’ refers to the entire judicial process of dispute resolution, from invocation of the courts’ jurisdiction to entry of a final judgment that is not subject to further appeal.” *Sw. Airlines Co. v. Ariz. Dep’t of Revenue*, 197 Ariz. 475, 477, ¶ 7, 4 P.3d 1018, 1020 (App. 2000). Applying the plain meaning of the language in the constitutional amendment and the guidance in the case law, an action is no longer “pending” when the court’s decision becomes final and no other appeal or motion for reconsideration is permitted. The action is “pending” as long as the time for an appeal or a motion to reconsider is running, and with appeals, the action is pending until the mandate issues.

If no motion for reconsideration or petition for review is filed after the court of appeals issues a decision, then the clerk of the court issues a mandate “at the expiration of the time for the filing of such motion or petition.” Ariz. R. Civ. App. P. 24(1). If a motion for reconsideration has been filed, the mandate does not issue until after the motion has been decided and the time for filing a petition for review has expired. *Id.* at subsection (2). If a petition for review is denied, the court of appeals clerk issues a mandate fifteen days after the denial of review; if the supreme court issues a decision that requires the issuance of a mandate, then the supreme court clerk issues the mandate fifteen days after the decision is filed. *Id.* at subsections (3) & (4). The delay is to allow a party to file a motion for reconsideration, which a party must do within fifteen days after the appellate court files its decision. Ariz. R. Civ. App. P. 22(b). If a

case is not remanded, the case is pending until the mandate issues. If the case is remanded, the litigation is pending until the trial court issues a final judgment and the time to file a notice of appeal has expired.

Your letter expresses concern that litigation may end abruptly if, for example, the Commission prevails in the trial court and the opposing party unexpectedly fails to file a notice of appeal. Nevertheless, because the litigation is over when the time for filing an appeal expires, the Commission may not meet or incur expenses after the deadline to appeal passes, even if this results in an abrupt end to the Commission's operations.

## **II. After Commission Expenses Are Paid, Unused Monies Are Transferred to the General Fund.**

Your letter asks how the Commission can fulfill its responsibilities if a lawsuit is filed after the Commission's unspent monies have reverted to the general fund. The Arizona Constitution prescribes the Commission's authority; the Commission has no implied powers. *See Ariz. Corp. Comm'n v. State*, 171 Ariz. 286, 293, 830 P.2d 807, 814 (1992). If the language of a constitutional provision is clear, no further "judicial construction is required or proper." *State v. Roscoe*, 185 Ariz. 68, 71, 912 P.2d 1297, 1300 (1996) (quoting *Pinetop-Lakeside Sanitary Dist. v. Ferguson*, 129 Ariz. 300, 302, 630 P.2d 1032, 1034 (1981)); *see also Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 405, ¶ 10, 111 P.3d 1003, 1005 (2005) (stating that if a constitutional provision is unambiguous, a court gives it its plain meaning and effect). The constitution sets forth the Commission's responsibilities. Ariz. Const. art. IV, pt. 2, § 1(14)-(17).

The Arizona Constitution provided the Commission with six million dollars for the redistricting work necessary following the 2000 census. Ariz. Const. art. IV, pt. 2, § 1(18) ("The treasurer of the state shall make \$6,000,000 available for the work of the independent redistricting commission pursuant to the year 2000 census."). The following sentence of the constitution provides that "[u]nused monies shall be returned to the state's general fund." *Id.* In context, this reference to "unused monies" appears to encompass any portion of the six million

dollars that is not used. The remainder of the paragraph describes legislative appropriations and office space for future redistricting work, but that portion of the paragraph does not include the requirement that monies be returned to the general fund.<sup>1</sup> *Id.* To the extent that the Commission is expending legislative appropriations, the obligation to return those monies to the general fund would be governed by the appropriation's specific language, or, if the appropriation does not address the issue, the monies would be subject to the lapsing provision in A.R.S. § 35-190. The lapsing requirement provides that monies revert to the general fund at the end of a fiscal year.

The Commission's present funding is provided through two legislative appropriations approved in fiscal year 2004. 2003 Ariz. Sess. Laws, 2d Spec. Sess., ch. 3; 2004 Ariz. Sess. Laws, ch. 118. Both appropriations provided that they were "exempt from the provisions of section 35-190, Arizona Revised Statutes, relating to lapsing, except that all monies remaining unexpended and unencumbered after payment of fees, costs and expenses of the commission revert to the state general fund."

If a lawsuit were to be filed after the Commission's unspent monies were returned to the general fund, an additional legislative appropriation would be necessary to provide funds to defend the plan. The Commission has standing in legal actions regarding the plan and has "sole authority to determine whether the Arizona attorney general or counsel hired or selected by the independent redistricting commission shall represent the people of Arizona in the legal defense of a redistricting plan." Ariz. Const. art. IV, pt. 2, § 20. Although the Commission has discretion regarding its choice of legal counsel, its work still requires a legislative appropriation.

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<sup>1</sup> The paragraph regarding funding and office space for the Commission reads as follows:

Upon approval of this amendment, the department of administration or its successor shall make adequate office space available for the independent redistricting commission. The treasurer of the state shall make \$6,000,000 available for the work of the independent redistricting commission pursuant to the year 2000 census. Unused monies shall be returned to the state's general fund. In years ending in eight or nine after the year 2001, the department of administration or its successor shall submit to the legislature a recommendation for an appropriation for adequate redistricting expenses and shall make available adequate office space for the operation of the independent redistricting commission. The legislature shall make the necessary appropriations by a majority vote.

### **III. The Commission May Not Enter into an Interagency Service Agreement for the Purpose of Collecting and Preparing Election Data for the Next Succeeding Commission.**

You also asked whether the Commission may enter into a contract with another state agency to enable that agency to collect and prepare election data to aid the next Commission in its redistricting duties or whether it may enter into a contract with another state agency to enable that agency to continue working with the United States Census Redistricting Data Office. Your opinion request noted that the present Commission has faced many challenges in acquiring reliable data from past elections to help it to draw new districts and that allowing this Commission to enter into an agreement with another state agency to continue to collect election data after this Commission's redistricting duties are completed would greatly assist the next Commission.

As noted in the previous section, the Arizona Constitution prescribes the Commission's authority, and the Commission has no implied powers. *See Ariz. Corp. Comm'n*, 171 Ariz. at 293, 830 P.2d at 814. The constitution sets forth the Commission's responsibilities. Ariz. Const. art. IV, pt. 2, § 1(14)-(17). Legitimate, practical reasons exist for continuing the data collection process for the next Commission's benefit or for continuing to work with the United States Census Redistricting Data Office, but the constitution does not give the Commission the authority to do so. If this continuing work needs to be accomplished, it is a policy issue for the Legislature to address.

### **IV. A Commissioner Is Ineligible for Any State or Local Public Office in Arizona.**

Commissioners are ineligible for an "Arizona public office" "during their term[s] of office and for three years thereafter." Ariz. Const. art. IV, pt. 2, § 1(13). The constitution does not define "Arizona public office." You ask whether the term "Arizona public office" includes all local, state, or federal offices or just those offices that the Commission redistricted.

Another paragraph of this section of the Arizona Constitution uses the term "public office" when describing Commissioners' qualifications. It provides as follows:

Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

*Id.* § 1(3). This language differs in that it refers to a “public office,” rather than to an “Arizona public office.” The language about prohibited conduct after appointment as a Commissioner also does not contain the language that specifically includes precinct committeemen and women and excludes school board members or officers. Using the plain meaning of the words and examining them in the context of the entire constitutional amendment, the term “Arizona public office” includes all public offices—state or local—in Arizona.

The phrase does not, however, include federal offices because the State cannot add to the qualifications for federal office. *See U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (holding that “[a]llowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States”).

**V. If A Commissioner Resigns, the Prohibition on Holding Public Office During a Commissioner's Term and for Three Years Thereafter Expires Three Years After the First Member of the New Commission Is Appointed.**

A Commissioner's duties “expire upon the appointment of the first member of the next redistricting commission.” Ariz. Const. art. IV, pt. 2, § 1(23). A new Commission is appointed in “each year that ends in one.” *Id.* § 1(3). Therefore, the next Commission will be appointed in 2011. There is an argument that the Commissioner is ineligible until three years after the new Commission is appointed, even if the Commissioner resigned from the Commission several years earlier.

Constitutions are to be construed to give effect to the intent and purpose of the framers and the people who adopted them. *See State ex rel. Jones v. Lockhart*, 76 Ariz. 390, 398, 265 P.2d 447, 452 (1953). A Commissioner cannot hold an “Arizona public office” “during the

commissioner's term of office and for three years thereafter." Ariz. Const. art. IV, pt. 2, § 1(13). If a Commissioner "does not complete the term of office for any reason," a new Commissioner is appointed to "serve out the remainder of the original term." *Id.* § 1(11). It is not clear whether the constitutional period during which a Commissioner may not hold a public office is calculated from the date that the person ceases to be a Commissioner or from the date that would have marked the end of the person's term as Commissioner if the person had not resigned.

The prohibition on holding other public offices after serving on the Commission prevents attempts to use, or appearances of having used, the Commission to gain another public office.<sup>2</sup> The language should be interpreted with this purpose in mind. *See Calik v. Kongable*, 195 Ariz. 496, 498, ¶ 10, 990 P.2d 1055, 1057 (1999) (holding that in construing meaning of initiative purpose is to effectuate intent of electorate who adopted it).

In light of the foregoing purpose, the three-year prohibition can reasonably be interpreted to run from the date that would have marked the end of the person's term as Commissioner if the person had not resigned. If it were otherwise, a Commission could finish its redistricting work in two years, and a Commissioner could resign at that point and still have five years to run for office in the district he or she created. This would not be in keeping with the purpose of the provision prohibiting holding other public offices after serving on the Commission—namely, to prevent attempts to use, or appearances of having used, the Commission to gain another public office. However, if the three-year gap runs from the end of the ten-year period, there is no chance that a Commissioner could run for Arizona public office in a district that he or she had created.

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<sup>2</sup> Although Proposition 106, like most initiatives, did not contain a formal statement of intent, the statements in support of the initiative in the "Arguments 'For' Proposition 106" section of the Publicity Pamphlet repeatedly advocate for passage of the initiative on the basis that, by taking redistricting out of the hands of political incumbents, it constitutes a more politically neutral and fairer method of redistricting. *See* Ariz. Sec'y of State, *Ballot Propositions and Judicial Performance Review for the November 7, 2000, General Election* ("Publicity Pamphlet"), at 56-58; *see also Calik v. Kongable*, 195 Ariz. at 500, ¶ 16, 990 P.2d at 1059 (noting that courts may rely on publicity pamphlets or voter guides to determine intent). Moreover, the fact that commissioners may not have held public office within the three years preceding their appointments as commissioners further bolsters the conclusion that the purpose of the prohibition on holding public office for three years after serving as a commissioner is to negate any appearance of having used the commissionership for personal political gain.

**VI. A Republican or a Democrat Commissioner’s Re-registration or an Independent’s Re-registration As a Member of One of the Two Major Parties During His or Her Term of Office May Affect the Commissioner’s Ability to Continue to Serve on the Commission.**

The Commission’s structure and appointment process is designed to ensure that no political party dominates the Commission. No more than two Commissioners may be members of the same political party. Ariz. Const. art. IV, pt. 2, § 1(3). Each member must be “a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions in an honest, independent and impartial fashion . . . .” *Id.* The House and Senate majority and minority party leadership make the first four appointments. *Id.* § 1(6). The first four Commissioners select a fifth member who serves as chair and cannot be registered with any party already represented on the Commission. *Id.* § 1(8).

The constitution does not address what happens if a Commissioner changes party registration while serving on the Commission. It provides that the Governor may remove a member, with the concurrence of two-thirds of the senate, “for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.” *Id.* § 1(10). It also establishes a process for filling vacancies if “a commissioner or chair does not complete the term of office for any reason.” *Id.* § 1(11). Any nominees to fill vacancies “shall be of the same political party or status as was the member who vacated the office at the time of his or her appointment.” *Id.* The language in the provision regarding vacancies suggests that the drafters recognized that a member may not have the same political affiliation at the time that a vacancy occurs as he or she had at the time of appointment.

Assuming that the Commission has two Democrats, two Republicans, and one independent, as the current Commission does, if a Democrat or Republican becomes an independent, the Commission would still comply with the requirement that it have no more than two members from the same political party. *Id.* § 1(3); Ariz. Att’y Gen. Op. 77-139. If,

however, the independent on the Commission registers as a Republican or Democrat, the Commission would no longer comply with the requirement that no more than two members be from the same party. If the independent registers as a member of a major party, the Commission would have a three-member majority party, a two-member minority party, and no third party or independent representation. Similarly, if a Republican on the Commission re-registers as a Democrat, or if a Democrat re-registers as a Republican, the requisite political balance would be lost.

Therefore, if the independent Commissioner becomes a Republican or Democrat, he or she should either resign or be removed from the Commission, in accordance with constitutional procedures, so that the Commission's political balance can be restored. Likewise, if a Republican Commissioner becomes a Democrat, or a Democrat Commissioner becomes a Republican, he or she should resign or be removed.

### **Conclusion**

The Commission may continue incurring expenses and meeting while litigation is pending. Litigation is pending until the court's decision becomes final and no other appeal or motion for reconsideration is permitted. Any funding for litigation involving future redistricting should be provided through legislative appropriation. In addition, the Commission cannot transfer funds to another agency to do work to help prepare for the next decade's redistricting. If this continuing work needs to be accomplished, it is a policy issue for the Legislature to address.

Commissioners are not eligible for any state or local office in this state for three years after their term on the Commission. If a person resigns from the Commission before the new Commission is appointed, the three-year prohibition begins to run from the date on which the person's term would have ended if he or she had not resigned, which would be the date on which the first member of the new Commission is appointed.

Finally, if a Commissioner changes party affiliation and, as a result, the Commission no longer satisfies the requirement that no more than two Commissioners are members of the same political party, the Commissioner whose change of parties caused the disparity should resign or be removed from office.

Terry Goddard  
Attorney General

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**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

ATTORNEY GENERAL OPINION	No. I07-010 (R07-019)
By	
TERRY GODDARD ATTORNEY GENERAL	Re: Validity of Nomination Petitions with Incorrect Primary Election Date after the Enactment of SB 1430
September 19, 2007	

To: The Honorable Janice K. Brewer  
Arizona Secretary of State

**Question Presented**

You have asked whether nomination petitions circulated by candidates with a primary election date of September 9, 2008, listed on the top of their petitions will be considered valid given the recent enactment of SB 1430 (2007 Ariz. Sess. Laws, Ch. 168), which moves the primary election date from eight to nine weeks before the general election (that is, to September 2, 2008) for the primary election next year.

**Summary Answer**

Nomination petitions that list September 9 as the date for the 2008 primary election are valid, even though SB 1430 has changed the date of the primary election to September 2. Because SB 1430 has moved the date of the primary election only one week earlier, petitions with the September 9, 2008, date will not mislead voters as to which primary election is at issue; therefore, those petitions substantially comply with Arizona Revised Statute ("A.R.S.") § 16-314(C).

## **Background**

On May 1, 2007, the Governor signed into law SB 1430, amending A.R.S. § 16-201 to provide as follows: “On the *ninth* Tuesday prior to a general or special election at which candidates for public office are to be elected, a primary election shall be held.” (Emphasis added.) Before the Legislature enacted SB 1430, A.R.S. § 16-201 scheduled primary elections for the *eighth* Tuesday prior to a general or special election. *See* 2007 Ariz. Sess. Laws, Ch. 168, § 1. Since the general election for the year 2008 falls on November 4, SB 1430 changes the date of the 2008 primary from September 9 to September 2.

The Department of Justice precleared SB 1430 on June 28, 2007, and the law becomes effective on September 19, 2007.<sup>1</sup> Before the law was enacted and precleared, however, several candidates for the 2008 elections had already circulated nominating petitions listing the primary election date as September 9, 2008.

## **Analysis**

Section 16-314(A), A.R.S., requires that “[a]ny person desiring to become a candidate at any election and to have the person’s name printed on the official ballot shall . . . file a nomination petition.” Subsection C of that statute specifies the form of a nomination petition. Nomination petitions must include the following information: the elector’s county and party registration; the candidate’s name, address, and county; the office in question; and when the primary election is to be held.<sup>2</sup>

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<sup>1</sup> Arizona is subject to the preclearance requirements in Section 5 of the federal Voting Rights Act. *See* 42 U.S.C. § 1973b(b).

<sup>2</sup> With regard to the date of the election, A.R.S. § 16-314(C) directs that the petition shall include language “substantially” stating the following: “[T]he primary election to be held \_\_\_\_\_.”

The Arizona Supreme Court has described nomination petitions as a mechanism “designed to ‘in some measure [weed] out the cranks, the publicity seekers, [and] the frivolous candidates who have no intention of going through with the campaign.’” *Clifton v. Decillis*, 187 Ariz. 112, 115, 927 P.2d 772, 775 (1996) (quoting *Adams v. Bolin*, 77 Ariz. 316, 320, 271 P.2d 472, 475 (1954) (second insertion added)). Its purpose is “to make the requirements [for candidacy] stringent enough to discourage those who do not for an instant merit the voter’s consideration, yet not to keep out those who are serious in their efforts and have a reasonable number of supporters.” *Clifton*, 187 Ariz. at 115, 927 P.2d at 775. In striking this balance, “the paramount right to propose a nominee is of such gravity as to outweigh purely technical departures from nominating form.” *Adams*, 77 Ariz. at 322, 271 P.2d at 475. Therefore, to be valid, a nomination petition need only “substantially comply” with the form that A.R.S. § 16-314(C) specifies. *See, e.g., Clifton*, 187 Ariz. at 116, 927 P.2d at 776; *Marsh v. Haws*, 111 Ariz. 139, 140, 526 P.2d 161, 162 (1974).

In *Moreno v. Jones*, the Arizona Supreme Court addressed the standard for determining whether a nomination petition substantially complies with A.R.S. § 16-314(C), stating that the focus of the analysis is on “whether the omission of information could confuse or mislead electors signing the petition.” 213 Ariz. 94, 102, 139 P.3d 612, 620 (2006). The Court held that a state senate candidate’s nomination petition substantially complied with A.R.S. § 16-314(C) even though it omitted the particular day and month of the 2006 primary. *Id.* The Court reasoned that “electors would ‘automatically know’ for which primary election they were signing because the petition specified the year and there [was] only one primary that year for state legislative office.”

*Id.*; see also *Hill v. Cuyahoga County Bd. of Elections*, 428 N.E.2d 402, 403 (Ohio 1981) (holding that a misstatement of the date of a primary election in a nominating petition as October 4, 1981, instead of as September 29, 1981, did not invalidate the petition, because the misstatement of the date did not frustrate the purpose of “inform[ing] the electors who sign the [petition] as to which election is at issue.”).

Because there is only one primary election in September 2008, a petition that specifies the date as September 9, 2008, instead of as September 2, 2008, would not mislead the electors signing the petition as to which primary election was at issue. Therefore, petitions that state the date as September 9, 2008, rather than as September 2, 2008, substantially comply with A.R.S. § 16-314(C).

### **Conclusion**

Nomination petitions listing September 9, 2008, as the primary election date substantially comply with the requirements of A.R.S. § 16-314(C) and are therefore valid for the September 2, 2008, primary election.

Terry Goddard  
Attorney General

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**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

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<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>May 10, 2007</p>	<p>No. I07-009 (R06-017)</p> <p>Re: Guest Speakers at School-Sponsored Assemblies and the Limitations of A.R.S. § 15-511</p>
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To: The Honorable Phil Lopes  
Arizona House of Representatives

**Questions Presented**

You have asked a number of questions concerning legal issues that may arise when a school district or charter school invites a person to speak to a class or at a school-sponsored assembly. Specifically, you have asked:

1. whether a public school may invite a person to speak to a group of students, either in a classroom setting or at an assembly other than a nonpartisan public forum, if that person has announced his or her candidacy for elected office in an upcoming election;
2. whether a public school may invite a well-known public figure who can give students a historical perspective on past and current events if the person is not a candidate for public office even if those issues relate to a pending ballot measure;

3. what corrective action a school must take if an invited speaker encourages the students to take some form of political action; and
4. whether, in analyzing these issues, it makes a difference if student participation in the assembly was voluntary.

### **Summary Answers**

1. A public school may invite an elected official or candidate for public office to address students, but candidates may not advocate their election or the defeat of their opponents in violation of Arizona Revised Statutes (“A.R.S.”) § 15-511.
2. A public school may invite a well-known public figure who can give students a historical perspective on past and current events even if those issues relate to a pending ballot measure, but the address must not advocate the election or defeat of the ballot measure.
3. School districts should consider advising speakers at school-sponsored assemblies of the prohibitions in A.R.S. § 15-511 against using school resources to influence elections. If a speaker unambiguously advocates voting in a particular manner, school officials are responsible for determining if corrective action is appropriate to make clear that the school is not endorsing the speaker’s political view.
4. The analysis of A.R.S. § 15-511 does not change if participation at the student assembly is voluntary.

### **Background**

A.R.S. § 15-511 prohibits the use of school-district or charter-school resources to influence the outcome of elections. Specifically, the statute provides, in part:

- A. A person acting on behalf of a school district or a person who aids another person acting on behalf of a school district shall not use school district or charter school personnel, equipment, materials, buildings or other resources for the purpose of influencing the outcomes of elections. . . .
- B. An employee of a school district or charter school who is acting as an agent of or working in an official capacity for the school district or charter school may not give pupils written materials to influence the outcome of an election or to advocate support for or opposition to pending or proposed legislation.
- C. Employees of a school district or charter school may not use the authority of their positions to influence the vote or political activities of any subordinate employee.

A person who knowingly violates these requirements or knowingly aids another who violates these requirements is subject to a \$500 civil penalty in addition to the amount of misused funds. A.R.S. § 15-511(G).

The Legislature required the Attorney General to prepare guidelines regarding the use of school district or charter school resources. *See* A.R.S. § 15-511(E) (“[T]he attorney general shall publish and distribute to school districts and charter schools a detailed guideline regarding activities prohibited under this section.”) These guidelines are available on the Attorney General’s Office website. *See* <http://www.azag.gov/SchoolGuidelines/> (“Guidelines”).

### Analysis

#### **A. Candidates May Speak to Students in a Classroom Setting or at an Assembly Other than a Nonpartisan Public Forum.**

As noted above, A.R.S. § 15-511(A) prohibits “[a] person acting on behalf of a school district or a person who aids another person acting on behalf of a school district” from using public resources for the purpose of influencing the outcomes of elections.<sup>1</sup> The test for determining whether a communication is designed to influence the outcome of an election is set

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<sup>1</sup> The terms “person acting on behalf of” or “aids a person acting on behalf of” mean that the person is acting with the express or implied consent or assent of the school district or the charter school or is aiding such a person. *See Barlage v. Valentine*, 210 Ariz. 270, 275, ¶ 16, 110 P.3d 371, 376 (App. 2005); *Restatement (Third) of Agency* § 1.01 (2006).

forth in *Kromko v. City of Tucson*, 202 Ariz. 499, 47 P.3d 1137 (App. 2002). In that case, the plaintiff filed suit seeking a declaration that the city of Tucson was violating A.R.S. § 9-500.14(A) by disseminating information through various media regarding two propositions that were on a special referendum ballot. *Id.* at 500-01, ¶ 2, 47 P.3d at 1138-39. Much like A.R.S. § 15-511, A.R.S. § 9-500.14(A) prohibits cities and towns from using public resources “for the purpose of influencing the outcomes of elections.”<sup>2</sup> The plaintiff contended that the city’s communications presented the propositions only in a positive light and ignored their negative aspects, and, thus, effectively advocated for their passage. *Id.* at 501-02, ¶ 7, 47 P.3d at 1139-40. In holding that the communications did not violate A.R.S. § 9-500.14(A), the court set forth a test for determining whether a communication is designed to influence the outcome of an election:

[E]xpress advocacy may be based on communication that “taken as a whole[,] unambiguously urge[s]” a person to vote in a particular manner. . . . The communication “must clearly and unmistakably present a plea for action, and identify the advocated action; it is not express advocacy if reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.”

*Kromko*, 202 Ariz. at 503, ¶ 10, 47 P.3d at 1141 (citations omitted).<sup>3</sup> Because reasonable minds could differ as to whether the city’s communications regarding the propositions advocated voting for their passage, the court held that the city had not violated A.R.S. § 9-500.14(A).

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<sup>2</sup> A.R.S. § 9-500.14(A) states:

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

<sup>3</sup> Before the *Kromko* decision, this Office issued an Opinion regarding the statutes prohibiting the use of public resources to influence elections. *See* Ariz. Att’y Gen. Op. I00-020. To the extent that the analysis in *Kromko* differs from the earlier Attorney General Opinion, *Kromko* controls. *See also* Angela C. Poliquin, *Kromko v. City of Tucson: Use of Public Funds to Influence the Outcomes of Elections*, 46 Ariz. L. Rev. 423 (2004).

Merely inviting a candidate for public office to speak to a group of students, either in a classroom setting or at an assembly, does not violate A.R.S. § 15-511. The fact that a person speaking to students is a candidate for public office does not unambiguously urge a person to vote in a particular matter. However, although nothing prohibits a person who is a candidate for public office from speaking to students in a classroom setting or at an assembly, a candidate cannot use that forum to attempt to influence the outcome of an election. As the Guidelines advise:

Persons acting on behalf of a school district shall not permit candidates (including but not limited to candidates for the school district governing board) and their representatives to announce their candidacy or advocate their election or the defeat of their opponents in school buildings or on school property, except for times when they are participating in public forums.<sup>4</sup>

Guidelines at 13, ¶ 10.

#### **B. Educational Programs May Relate to a Current Ballot Measure.**

Public education “serves vital national interests in preparing the Nation’s youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting) (citing *Brown v. Bd. of Educ.* 347 U.S. 483, 493 (1954)). “It also inculcates in tomorrow’s leaders the ‘fundamental values necessary to the maintenance of a democratic political system. . . .’” *Id.* (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)). Age-appropriate education about issues that may be the subject of political debate is a legitimate topic in public schools. However, the

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<sup>4</sup> Regarding public forums, the Guidelines advise: “A school district or charter school may host a nonpartisan forum for the purpose of educating voters about issues or candidates at which speakers and/or members of the public discuss the pros and cons of a ballot measure or candidates appear, so long as there is an equal opportunity to present all viewpoints or all candidates in a particular race are given an equal opportunity to make presentations.” Guidelines at 11, ¶ 9.

issues must be presented in a manner that does not run afoul of A.R.S. § 15-511 by using school resources to influence the outcome of an election.

The specific example you cite is inviting a former Supreme Court Justice to address the role of the judiciary when there is a pending ballot measure that may impact judicial independence. Schools may invite officials to address issues of public importance, even if they relate to matters that may be the subject of an upcoming election. The presentation, however, must not attempt to influence the outcome of an election, as that phrase is explained in *Kromko*. See 202 Ariz. at 503, ¶ 10, 47 P.3d at 1141. Obviously, understanding the roles of the various branches of government is an important part of our children’s education and speeches about the roles of the judiciary, as well as the other branches, are appropriate in a school setting.

**C. School Officials Are Responsible for Determining What Corrective Action Is Appropriate If an Invited Speaker Encourages the Students to Take Some Form of Political Action.**

Your next question concerns a school district’s responsibilities when a speaker “encourages the students to take some form of political action.” Such a statement may be an effort by the speaker to influence the outcome of an election.<sup>5</sup> Cf. *Kromko* 202 Ariz. at 503, ¶ 10, 47 P.2d at 1141. Courts have long recognized that schools may exercise supervisory authority over school-sponsored speech. See *Hazelwood Sch. Dist.*, 484 U.S. at 271. *Hazelwood* addressed school district authority over a high school student newspaper.<sup>6</sup> The Court noted that

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<sup>5</sup> Of course, if a speaker merely urges students to become involved in the political process, such a statement would not be considered express advocacy and, thus, would not violate A.R.S. § 15-511.

<sup>6</sup> Although the facts in *Hazelwood* related to student expression, the holding and rationale of *Hazelwood* was not limited to student speech. See *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817, 827 (9<sup>th</sup> Cir. 1991); *Seidman v. Paradise Valley Unified Sch. Dist.*, 327 F. Supp. 2d 1098, 1106 (D. Ariz. 2004). As the Ninth Circuit recognized, the Supreme Court in *Hazelwood* “remarked on a school’s ability to regulate reasonably the speech not only of students, but also ‘teachers, and other members of the school community.’” *Planned Parenthood*, 941 F.2d at 827 (quoting *Hazelwood*, 484 U.S. at 269). Whatever the source of the speech—whether from inside or outside the school, paid or free—the audience is still the students, and “the school has the same pedagogical concerns, such as respecting audience maturity, disassociating itself from speech inconsistent with its educational mission and avoiding the appearance of endorsing views, no matter who the speaker is.” *Id.* (emphasis added).

school-sponsored publications, theatrical productions, and other expressive activities “may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.” *Id.* The Court concluded that the First Amendment did not prevent educators from “exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273. The Court also recognized that a school retains “the authority to refuse . . . to associate the school with any position other than neutrality on matters of political controversy.” *Id.*

You specifically ask whether school officials must stop a speaker and expressly disassociate the school from a speaker’s inappropriate political comments, even if the speaker has already moved on to a different topic. Fact-specific judgments regarding how best to respond if a speaker makes inappropriate comments at a school assembly are best left to the local education officials. In general, schools must take appropriate steps to ensure compliance with the prohibitions against using school resources to influence elections, which may include advising speakers at school-sponsored events of these restrictions. State law does not, however, require school officials to take remedial action if a speaker makes comments that attempt to influence the outcome of an election. School officials may communicate to the listeners information to reinforce that the school is neutral on election issues and to disassociate the school from comments that suggest otherwise. Such action could ameliorate the perception that the comments “bear the imprimatur of the school.” *Cf. Hazelwood*, 484 U.S. at 281 (Brennan, J., dissenting).

**D. Whether Student Participation at an Assembly Is Voluntary Does Not Affect the Analysis.**

The analysis of the use of school resources to influence elections under A.R.S. § 15-511 does not turn on whether attendance at a school-sponsored event is voluntary. Under section 15-511 “a person acting on behalf of a school district or a person who aids another person acting on behalf of a school shall not use school district or charter school personnel, equipment, materials, buildings or other resources for the purpose of influencing the outcomes of elections.” Although under some circumstances schools may be used for non-partisan public forums, Guidelines at 11, ¶ 9, a school assembly, whether student attendance is voluntary or mandatory, must be conducted in compliance with A.R.S. § 15-511.

**Conclusion**

School districts should take steps to ensure that speakers at school-sponsored events comply with the requirements of A.R.S. § 15-511, which prohibit the use of school resources to influence the outcome of elections. This statute does not, however, prohibit schools from inviting elected officials to address students or from addressing issues relevant to the curriculum that may be related to matters that are on the ballot. If a speaker at a school-sponsored event makes statements that attempt to influence an election, school officials are responsible for determining whether corrective action is appropriate to make clear that the school is not endorsing the speaker’s political view.

Terry Goddard  
Attorney General

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

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ATTORNEY GENERAL OPINION  by  TERRY GODDARD ATTORNEY GENERAL  May 10, 2007	No. I07-008 (R06-007)  Re: Use of Official Titles by Elected Officials in Connection with Political Advocacy
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To: The Honorable Barbara LaWall  
Pima County Attorney

**Question Presented**

You have asked whether county elected officials may use their official titles on letters, publicity pamphlet statements, or political advertisements that advocate the success or defeat of ballot measures.

**Summary Answer**

County elected officials may use their official titles on materials that advocate the success or defeat of ballot measures, but they may not use county public resources to fund such communications.

**Analysis**

The Legislature has prohibited the use of city, town, county, and school district resources or employees to influence the outcome of elections. *See* A.R.S. §§ 9-500.14 (cities and towns), 11-410 (counties), 15-511 (school districts and charter schools); *see*

*also Kronko v. City of Tucson*, 202 Ariz. 499, 502-03, ¶ 10, 47 P.3d 1137, 1140-41 (App. 2002) (analyzing whether materials disseminated in city election violated prohibition in A.R.S. § 9-500.14); Ariz. Att’y Gen. Op. I00-020 (analyzing statutes prohibiting use of public resources to influence elections). The statute governing counties provides that they “shall not use [their] personnel, equipment, materials, buildings or other resources for the purpose of influencing the outcomes of elections,” and that county employees “shall not use the authority of their positions to influence the vote or political activities of any subordinate employee.” A.R.S. § 11-410(A) & (B). The statute, however, does not prohibit counties from reporting on the official actions of the county board of supervisors, A.R.S. § 11-410(A), and directs that “[n]othing contained in this section shall be construed as denying the civil and political liberties of any employee as guaranteed by the United States and Arizona Constitutions,” A.R.S. § 11-410(C).

In 2000, this Office issued a formal opinion regarding a city or county’s permissible use of funds to educate citizens on the impact of ballot measures. Ariz. Att’y Gen. Op. I00-020. The Opinion stated that “A.R.S. §§ 9-500.14 and 11-410 do *not* prohibit elected officials from speaking out individually regarding measures on the ballot.” *Id.* It further recognized that “the effective discharge of an elected official’s duty would necessarily include the communication of one’s considered judgment of . . . [a] proposal to the community which he or she serves,” and that “elected officials ‘acting in their official capacity shed no First Amendment rights in their advocacy of policies.’” *Id.* (quoting *Smith v. Dorsey*, 599 So. 2d 529, 541 (Miss. 1992)).

The Supreme Court has recognized that “the manifest function of the First Amendment in a representative government requires that legislators be given the widest

latitude to express their view on issues of policy.” *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966). Citing *Bond*, the First Circuit concluded that the Supreme Court rejected a differing First Amendment standard for publicly-elected officials. *Miller v. Town of Hull, Mass.*, 878 F.2d 523, 532 (1<sup>st</sup> Cir. 1989).

These principles support the conclusion that elected officials may communicate their views on pending ballot measures and may use their official titles when doing so. Indeed, in order to fulfill their official duties, elected officials must be able to share their “considered judgment of the proposal [with] the community which [they] serve[.]” *Smith*, 599 So. 2d at 541 (citation omitted); *see also Anderson v. City of Boston*, 380 N.E.2d 628, 641 (Mass. 1978) (indicating that “persons in relevant policy-making positions in city government are free to act and to speak out in support of” ballot measures). Knowing not only the person’s name, but also that the person holds a particular local office may be helpful to voters, and the elected official’s authority to communicate this information is consistent with First Amendment principles. Therefore, county elected officials may sign letters or have their names and official titles appear on publicity pamphlets and political advertisements that communicate their views on the merits, or lack thereof, of ballot measures before the voters.

Although county officials may sign their names and use their official titles in such communications, they may not use public resources or funds for the purpose of expressing these views. A.R.S. § 11-410(A) unambiguously prohibits the use of county resources “for the purpose of influencing the outcomes of elections.”<sup>1</sup> While merely using an official title does not constitute an improper use of public resources, no county

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<sup>1</sup> *See Kromko*, 202 Ariz. at 502-03, ¶ 10, 47 P.3d at 1140-41 (stating test for determining whether communication is for the purpose of influencing the outcome of an election).

funds, equipment, or personnel may be used in communications intended to influence elections. If county elected officials engage in advocacy related to ballot measures, the communications must be supported with private funds.

**Conclusion**

County elected officials may sign letters or have their names and official titles appear when supporting or opposing ballot measures that will go before the voters. Regardless of whether county elected officials use their official titles, they may not use county public resources to fund, facilitate, or support such communications.

Terry Goddard  
Attorney General

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

ATTORNEY GENERAL OPINION  by  TERRY GODDARD ATTORNEY GENERAL  May 1, 2007	No. I07-007 (R06-005)  Re: Signature Requirements for Nomination Petitions Under A.R.S. § 16-322(A)(12)
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TO: The Honorable Olivia Cajero Bedford  
Arizona House of Representatives

**Question Presented**

Section 16-322(A)(12), Arizona Revised Statutes (“A.R.S.”), requires that a candidate’s nomination petition for a governing body of a special district contain signatures of qualified electors who are qualified to vote for the candidate “equal to at least one-half of one per cent of the vote in the special district, but not more than two hundred fifty and not fewer than five signatures.” You have asked how many petition signatures are required if one-half of one per cent of the number of qualified electors who are qualified to vote for the candidate exceeds 250 voters.

**Summary Answer**

If one-half of one percent of the qualified electors in the special district exceeds 250 voters, a candidate need only collect 250 signatures to satisfy the requirements of A.R.S. § 16-322(A)(12).

## Analysis

Section 16-322, A.R.S., provides for the number of signatures required on nomination petitions for various public offices. This statute requires that nomination petitions for candidates for a governing body of a special district shall be signed:

by a number of qualified electors who are qualified to vote for the candidate whose nomination petition they are signing *equal to at least one-half of one per cent of the vote in the special district but not more than two hundred fifty and not fewer than five signatures.*

A.R.S. § 16-322(A)(12) (emphasis added).

The question here concerns the meaning of the phrase “equal to at least one-half of one per cent of the vote . . . but not more than two hundred fifty.” The language of a statute is “the best and most reliable indicator of its meaning.” *N. Valley Emergency Specialists, L.L.C. v. Santana*, 208 Ariz. 301, 303, ¶9, 93 P.3d 501, 503 (2004) (quoting *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1933)). Plain meaning is applied to statutory language if it is clear and unambiguous. *Parrot v. Daimler Chrysler Corp.*, 212 Ariz. 255, 257, ¶7, 130 P.3d 530, 532 (2006). Section 16-322(A)(12), A.R.S., requires that the number of signatures collected for nomination petitions is “equal to at least one-half of one per cent of the vote in the special district *but* not more than two hundred fifty [signatures] and not fewer than five signatures.” (Emphasis added.)

In the statute, the conjunction “but” is used as a word of limitation or exception. The word “but” connects two clauses of the sentence in such a way that it creates an exception to the clause preceding it. Therefore, A.R.S. § 16-322(A)(12) requires that the number of signatures for candidate nomination petitions is never less than five but never more than 250. The phrase “at least one-half of one per cent of the vote in the special district” determines the number of signatures from five to 250 that a candidate must collect in order to comply with the statute.

In some instances, “one-half of one per cent of the vote in the special district” will be more than 250 or less than five. To have a concrete example of how the statute functions, your

opinion request asked about the signature requirements in a special district with 60,000 qualified electors.

This question assumes that “the vote” in the phrase “at least one-half of one per cent of *the vote* in the special district,” A.R.S. §16-322(A)(12) (emphasis added), refers to the number of qualified electors in the special district. Although this assumption is correct, some additional analysis of the statute is necessary to explain why. As subsection B of 16-322 explains, “[t]he basis of percentage in each instance referred to in subsection A of this section, except in cities, town and school districts, shall be the number of voters registered in the designated party of the candidate as reported on March 1 of the year in which the general election is held.”

A review of the legislative history shows that the phrase “the vote” is a remnant from an earlier version of the statute that based the signature requirement on votes in an earlier election. The Legislature added the relevant language in 1986 Arizona Session Laws, Chapter 320 (H.B. 2362). That legislation provided that the number of signatures of qualified electors who are qualified to vote for the candidate whose nomination petition they are signing must be “equal to at least *one per cent of the vote* in the special district but not more than two hundred fifty and not fewer than five signatures.” *Id.* ¶13 (codified at A.R.S. § 16-322(A)(11) (1986)) (emphasis added). The legislation also amended A.R.S. § 16-322(B) to direct that

[t]he basis of percentage in each instance referred to in subsection A of this section, except in cities, towns, and school districts, shall be the number of voters registered in the designated party of the candidate as reported pursuant to section 16-168, subsection G on March 1 of the year in which the general election is held. . . . *In special districts, other than school districts, the basis of percentage shall be the highest vote cast for a candidate for the governing body at the last election.*

*Id.* (emphasis added).

In 1993, the Legislature reduced the percentage of the vote required from one per cent to one-half of one per cent, and eliminated the specific language for special districts in subsection B. *See* 1993 Ariz. Sess. Laws Ch. 98, § 23. As a result of the 1993 amendments, A.R.S. § 16-322(B) now bases all signature requirements, except for those in cities, towns, and school

districts, on the number of voters registered in the designated party of the candidate as reported pursuant to A.R.S. § 16-168(G) on March 1 of the year in which the general election is held.<sup>1</sup>

To return to your example of a district with 60,000 qualified electors, “[a]t least one-half of one per cent” of the 60,000 qualified electors is 300; however, since the statute caps the signature requirement at 250, the candidate need only obtain 250 signatures to qualify for the ballot.

### **Conclusion**

Section 16-322(A)(12), A.R.S., requires candidates for a governing body of a special district to obtain a minimum of five signatures and a maximum of 250 signatures. Within this range, the signatures must be from qualified electors (who are qualified to vote for the candidate whose nomination petition they are signing) and must number at least one-half of one per cent of the number of voters registered in the designated party of the candidate as reported on March 1 of the year in which the general election is held.

Terry Goddard  
Attorney General

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<sup>1</sup> Because special district elections are nonpartisan, there is no “designated party” for candidates in such elections. *See* A.R.S. § 16-226(B).

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

ATTORNEY GENERAL OPINION  by  TERRY GODDARD ATTORNEY GENERAL  April 9, 2007	No. I07-006 (R06-012)  Re: Reporting Requirements Under the Child Abuse Reporting Statute, A.R.S. § 13-3620
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To: The Honorable Linda Lopez  
Arizona House of Representatives

**Questions Presented**

Arizona Revised Statutes (“A.R.S.”) Section 13-3620 (“the Reporting Statute”) imposes a duty on certain persons to report suspected child abuse, including “physical injury,” to governmental authorities. You have asked the following questions concerning the Reporting Statute:

1. What is the meaning of “physical injury”?
2. Does a caregiver have a duty to report a non-accidental physical injury that is a cut, bruise, or scratch?
3. Must a teacher report a non-accidental physical injury inflicted on a minor by another student, such as an injury from horseplay or a fight at school?
4. Does a parent have a duty to report a non-accidental physical injury caused by one sibling to another?

5. Must a caregiver to children with disabilities report a non-accidental physical injury to a minor caused by another minor who lacks the cognitive ability to control his or her behavior or understand right from wrong?
6. May a caregiver consider the statutory defenses available under A.R.S. § 13-1407 in determining whether to report the offenses defined in A.R.S. §§ 13-1404 (sexual abuse), 13-1405 (sexual conduct with a minor), or 13-1410 (child molestation)?
7. If a school employee forms a reasonable belief that a child has been abused early in the school day, does the employee satisfy the duty to “immediately” report the abuse if he or she makes a report before the end of the school day?
8. Does a caregiver’s duty to report an incident of child abuse end if he or she has a reasonable belief or knows that another caregiver has previously reported the incident?

### **Summary Answer**

“Physical injury” is “the impairment of physical condition and includes any skin bruising, pressure sores, bleeding, failure to thrive, malnutrition, dehydration, burns, fracture of any bone, subdural hematoma, soft tissue swelling, injury to any internal organ or any physical condition that imperils health or welfare.” A.R.S. § 13-3623(F).

An injury need not be serious or life threatening to trigger the reporting obligation. All that is necessary is that the injury meet the statutory definition and that a person covered by the Reporting Statute have a reasonable belief that the infliction of the injury was non-accidental. In addition, the Reporting Statute does not excuse reporting in situations where particular classes of persons inflict non-accidental physical injury on children, be they other minors, students, siblings, or minors who lack the cognitive ability to control their behavior. The obligation to

report may be removed if the covered person reasonably believes that facts exist that would negate the offense.

Finally, covered persons must report suspected abuse “immediately.” This requires that the person make or cause the required report to be made without delay as soon as he or she forms a reasonable belief that the child has been abused. Specific knowledge that the incident has been reported by another caregiver satisfies this obligation.

### **Background**

All fifty states have child abuse reporting legislation modeled after federal guidelines.

*See* Ariz. Att’y Gen. Op. I05-007.<sup>1</sup> Arizona’s Reporting Statute, A.R.S. § 13-3620(A), provides, in part, that:

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 . . . 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, except if the report concerns a person who does not have care, custody or control of the minor, the report shall be made to a peace officer only.

The persons upon whom the Reporting Statute imposes a duty to report (“covered persons”) are

(1) “[a]ny physician, physician’s assistant, optometrist, dentist, osteopath, chiropractor, podiatrist, behavioral health professional, nurse, psychologist, counselor or social worker who develops the reasonable belief in the course of treating a patient”; (2) “[a]ny peace officer, member of the clergy, priest or christian science practitioner”; (3) “[t]he parent, stepparent or guardian of the minor”; (4) “[s]chool personnel or domestic violence victim advocate who

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<sup>1</sup> Arizona passed its first reporting statute in 1964. *See* 1964 Ariz. Sess. Laws, Ch. 76, § 2 (codified at A.R.S. § 13-842.01). In 1976, the Legislature amended the Reporting Statute to abrogate various evidentiary privileges, including the physician-patient privilege, the husband-wife privilege or any privilege except the attorney-client privilege. *See Church of Jesus Christ of Latter-Day Saints v. Superior Court*, 159 Ariz. 24, 764 P.2d 759 (1988). In 2003, the Legislature made a number of additional revisions, including changes to the Reporting Statute’s list of covered persons and triggering offenses. *See* 2003 Ariz. Sess. Laws, Ch. 222, § 2.

develop the reasonable belief in the course of their employment”; and (5) “Any other person who has responsibility for the care or treatment of the minor.” A.R.S. § 13-3620(A)(1)-(5).

A covered person who violates the Reporting Statute is guilty of a class 1 misdemeanor, except if the failure to report involves certain sexually related offenses, the person is guilty of a class 6 felony. *Id.* § 13-3620(O).

## Analysis

### **I. The Definition of “Physical Injury” Under the Reporting Statute.**

The Reporting Statute imposes an obligation to report whenever a covered person reasonably believes that a child has been the victim of “physical injury, abuse, child abuse, a reportable offense or neglect.” A.R.S. § 13-3620(A). Although the Reporting Statute itself does not define “physical injury,” each of its other triggering terms is defined with regard to statutory offenses against children. *See* A.R.S. § 13-3620(P)(1)-(4). “Child abuse” is defined with reference to A.R.S. § 13-3623 (the “Criminal Abuse Statute”), which establishes the criminal offense of child abuse or vulnerable adult abuse. “Abuse” and “neglect” take on the definitions in A.R.S. § 8-201, which trigger the State’s jurisdiction to take custody of a child and terminate the parent-child relationship. *See* A.R.S. §§ 8-533(B)(2), 8-800. “Reportable offense” refers to numerous sexually-related offenses against children, many of which are incorporated into the definition of “abuse.” *See* A.R.S. § 8-201(2)(a).

In defining “abuse” and “child abuse,” the statutes referenced in the Reporting Statute each use the term “physical injury.” The Criminal Abuse Statute applies in part to “any person who causes a child or vulnerable adult to suffer physical injury or abuse.” A.R.S. § 13-3623(B). Section 8-201(2) provides that “‘abuse’ means the infliction or allowing of physical injury, impairment of bodily function or disfigurement or the infliction of or allowing another person to

cause serious emotional damage.” The definition of “physical injury” in the above statutes is set forth in A.R.S. § 13-3623(F)(4), which provides that: “‘Physical injury’ means the impairment of physical condition and includes any skin bruising, pressure sores, bleeding, failure to thrive, malnutrition, dehydration, burns, fracture of any bone, subdural hematoma, soft tissue swelling, injury to any internal organ or any physical condition that imperils health or welfare.”<sup>2</sup>

The Reporting Statute’s reference to A.R.S. §§ 8-201 and 13-3623 to define “abuse” and “child abuse” ensures consistency among statutes prohibiting child abuse and the Reporting Statute, which imposes a duty on covered persons to report the same offenses. The same purpose and logic is served by using the above-referenced definition of “physical injury.” *See State v. Sweet*, 143 Ariz. 266, 270 693 P.2d 921, 925 (1985) (“It is an accepted rule of statutory construction that when ‘determining the intent of the legislature, the court may consider both prior and subsequent statutes in pari materia.’”) (quoting *Automatic Registering Mach. Co. v. Pima County*, 36 Ariz. 367, 373-74, 285 P. 1034, 1036 (1930)); *People’s Choice TV Corp. v. City of Tucson*, 202 Ariz. 401, 403, 46 P.3d 412, 414 (2002) (noting that in ascertaining the meaning of an undefined term, courts “look to statutes on the same subject matter to determine legislative intent and to maintain statutory harmony”). For these reasons, the term “physical injury” in A.R.S. § 13-3620 has the same meaning as the term “physical injury” set forth in A.R.S. § 13-3623(F)(4).

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<sup>2</sup> Similar definitions of “physical injury” may be found in the statutes of various other states directed at child abuse. *See e.g.*, Nev. Rev. Stat. § 432B.090; Utah Code Ann. § 76-5-109; V.I. Code Ann. Tit. 14, § 505; N.M. Stat. Ann. § 32A-4-2; Idaho Code Ann. § 16-1602(1)(a); Colo. Rev. Stat. § 19-1-103(1)(a)(I); Guam Code Ann. Tit. 9, § 31.30; Wy. Stat. §14-3-202(a)(ii). Statutes prohibiting “physical injury” to children have been upheld even when no further definition is provided. *See Turner v. Jackson*, 417 S.E.2d 881, 888 (Virg. App. 1992) (“[T]his language puts the average person on notice that conduct that creates or inflicts physical harm upon the child falls within the statute’s proscription.”).

## II. Covered Persons Must Report Non-Accidental Cuts, Bruises, and Scratches.

In the context of child abuse, an injury need not be serious or life threatening to constitute “physical injury.”<sup>3</sup> A cut or a scratch accompanied by “bleeding” both fall within the definition of “physical injury,” as does “any skin bruising.” *See* A.R.S. § 13-3623(F)(4). However, to trigger a duty to report, the physical injury must also be accompanied by the covered person’s reasonable belief that the injury derived from non-accidental conduct. In other words, even where “physical injury” is present, the duty to report exists only where the covered person “reasonably believes” that the injury has been “inflicted on the minor by other than accidental means or that is not explained by available medical history as being accidental in nature.” A.R.S. § 13-3620(A).<sup>4</sup>

Whether a reasonable belief triggering the reporting obligation exists necessarily depends on the circumstances, such the child’s age, vulnerability, the location and nature of the injury, the seriousness of the injury, whether the injury is isolated or repeated, previous incidents of abuse,

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<sup>3</sup> A.R.S. § 13-3623 distinguishes between causing “physical injury” and “serious physical injury,” both of which are criminal offenses under paragraphs (F)(4) and (5). Serious physical injury is defined as “physical injury that creates a reasonable risk of death or that causes serious or permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.” The only difference between “physical injury” and “serious physical injury” is in the classification of the crime and the resulting penalty.

<sup>4</sup> As explained by the Court in *L.A.R. v. Ludwig*, 170 Ariz. 24, 821 P.2d 291 (1991), the standard for what constitutes “reasonable grounds” is low:

We agree with appellees that “reasonable grounds” as used in [the Reporting Statute] means that if there are any facts from which one could reasonably conclude that a child had been abused, the person knowing those facts is required to report those facts to the appropriate authorities. “Reasonable grounds” is a low standard. While this appeal may present a close case of when reasonable minds may disagree as to whether reasonable grounds to report alleged abuse exists, we believe that the policy of encouraging people to report child abuse mandates a determination that the trial court did not err in reporting that Ludwig had reasonable grounds to suspect abuse and therefore to report it.

The statute does not contemplate that a person must fully investigate the suspected abuse before making a report. All the person must do is make the report.

*Id.* at 27, 821 P.2d at 294.

or knowledge of extenuating circumstances. A bruise on an older child known to play football, for example, may signify nothing, whereas the same injury on an infant or a toddler may sound an alarm.

### **III. Teachers and School Personnel Must Report Non-Accidental Physical Injuries Inflicted on Minors By Other Students.**

The policy reflected by the Reporting Statute is to protect children from abuse no matter who inflicts it. The same policy is reflected in the Criminal Abuse Statute, which applies to “any person who causes a child . . . to suffer physical injury or abuse” where the injury was inflicted intentionally, knowingly, recklessly, or with criminal negligence. *See* A.R.S. § 13-3623(B). Neither statute excludes intentional injury inflicted by minors, whether at school or elsewhere. Minors are capable of inflicting serious physical injury or even death. They are also capable of perpetrating other offenses listed in the Reporting Statute, including incest, sexual assault, and sexual molestation.

Although applying the Reporting Statute to minors in the school environment sometimes may lead to difficult interpretive situations, there is no indication that the Legislature intended to exempt teachers from reporting triggering offenses, including “physical injury,” inflicted by students. In this regard, the age of the perpetrator and the age or vulnerability of victim may be relevant factors in determining whether a reasonable belief triggering the reporting obligation exists. *See* Section II, *supra*. The same may be true of the circumstances in which the injury arises. For example, a cut inflicted by an adult on a young child may be viewed differently than a minor cut inflicted during an isolated school yard tussle among 12-year-old boys. However, labels such as “horseplay” or school yard “fights” are imprecise and cannot be used as a litmus test to dismiss the reporting obligation where the conduct fairly falls within the statute. When in doubt, teachers and school personnel should report the offense.

**IV. The Reporting Statute Does Not Exempt Parents from the Duty to Report Non-Accidental Physical Injury Caused by a Sibling.**

The Reporting Statute does not expressly or impliedly exclude physical injuries inflicted by siblings, or any other family member. Infants and small children can be mistreated (physically, sexually, or both) by older siblings, and if not reported, such injuries may go unabated. There is no indication that the Legislature intended to exclude sibling-inflicted injuries as triggering offenses, or to excuse parents or other covered persons from the duty to report. Indeed, the Reporting Statute specifically imposes a reporting obligation on “the parent, stepparent or guardian of the minor” and “any other person who has responsibility for the care or treatment of the minor.” A.R.S. § 13-3620(A)(3)&(5).

**V. The Reporting Statute Makes No Exception for Situations in Which a Non-Accidental Physical Injury to a Minor Is Caused by a Child Who Lacks the Cognitive Ability to Control His or Her Behavior.**

The statutory language does not exclude the reporting requirement for caregivers to children with disabilities where the perpetrator lacks the cognitive ability to control his or her behavior or understand right from wrong. From the injured child’s point of view, it makes little difference whether a perpetrator has the cognitive ability to control or appreciate his conduct. Indeed, such lack of control or understanding may make the situation more likely to recur. The primary purpose of the Reporting Statute is not to punish the wrongdoer, but is, rather, to protect the child.

**VI. Covered Persons May Take Into Consideration Statutory Defenses In Determining Whether to Report.**

The Reporting Statute imposes a reporting obligation if a covered person reasonably believes that a minor has been the victim of a “reportable offense,” which encompasses several sexually-related offenses, including A.R.S. § 13-1404, sexual conduct with a minor under A.R.S.

§ 13-1405, and molestation of a child under A.R.S. § 13-1410.<sup>5</sup> A.R.S. §§ 13-3620(A), - 3620(P)(4). Failure to report a “reportable offense” is a class 6 felony. *See* A.R.S. § 13-3620.

Section 13-1407, A.R.S., sets forth various statutory defenses to some of the listed criminal offenses which, if found, may negate the existence of an offense. For example, in the case of “sexual abuse” under A.R.S. § 13-1404 (which includes “intentionally or knowingly engaging in sexual contact with [a minor]”) or sexual conduct with a minor under A.R.S. § 13-1405 (“intentionally or knowingly engaging in sexual intercourse or oral sexual contact”), there is a defense if done in furtherance of a lawful medical practice, A.R.S. §13-1407(A), or during the course of recognized and lawful emergency care, A.R.S. §13-1407(C), if the defendant is the spouse of the minor, A.R.S. § 13-1407(D), or if the victim’s lack of consent was based on incapacity to consent because he or she was fifteen, sixteen or seventeen years of age if the defendant did not know and could not have reasonably known the age of the victim, A.R.S. § 13-1407(B). There is also a defense to sexual conduct with a minor, A.R.S. § 13-1405, if the victim is fifteen, sixteen or seventeen, the defendant is under nineteen or attending high school and is no more than twenty-four months older than the victim and the conduct is consensual, A.R.S. § 13-1407(F).

Although the Reporting Statute does not address the effect of such statutory defenses on the duty to report, such defenses may be considered in the determination whether a “reportable offense” has occurred. *See Lowry v. Indus. Comm’n of Ariz.*, 195 Ariz. 398, 400, 989 P.2d 152, 154 (1999) (noting that ambiguous statutes must be interpreted with regard to their intended purposes). The purpose of the Reporting Statute is to protect children against “reportable

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<sup>5</sup> “Reportable offense” in the Reporting Statute is defined to include (1) “any offense listed in chapters 14 [“sexual offenses”] and 35.1 [“sexual exploitation of children”] of this title,” (2) “surreptitious photographing, videotaping, filming or digitally recording of a minor pursuant to § 13-3019,” (3) “child prostitution pursuant to § 13-3212,” and (4) “incest pursuant to § 13-3608.” A.R.S. § 13-3620(P)(4).

offenses.” Thus, where the facts would lead a reasonable person to conclude that no offense has been committed (*i.e.*, where the defense negates the existence of an offense), there is no reporting obligation.<sup>6</sup>

**VII. Absent Extenuating Circumstances, a School Employee Who Reasonably Believes that a Child Has Been Abused Must Report, or Cause a Report to Be Made, Immediately.**

The Reporting Statute provides that “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 . . . shall immediately report or cause reports to be made of this information .” A.R.S. § 13-3620(A). The Reporting Statute further provides that “reports shall be made immediately by telephone or in person and shall be followed by a written report within seventy-two hours.” *Id.* at § 13-3620(D). The term “immediately” is not defined in the Reporting Statute or elsewhere in Title 13.

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<sup>6</sup> Subsection B of the Reporting Statute specifies that “a report is not required under this section for conduct prescribed by §§ 13-1404 and 13-1405 if the conduct involves only minors who are fourteen, fifteen, sixteen, or seventeen years of age and there is nothing to indicate that the conduct is other than consensual” but it does not address the additional scenario presented in § 13-1407(F), where the consensual conduct involves a defendant who is “under nineteen years of age or attending high school and is no more than twenty-four months older than the victim.” This does not, however, establish that the Legislature considered and rejected a similar exclusion there. Although the five provisions contained in § 13-1407(A)-(E) have been in existence since 1985, the statutory defenses did not address knowing consensual sex among minors until 1990, *the same date that the Legislature enacted the consensual sexual conduct exception to the Reporting Statute*. The original (1990) version of § 13-1407(F), which was added by Laws 1990, Ch. 384, § 3, was virtually identical to the Reporting Statute’s consensual sex exception in that it did not allow for any defense where the defendant was over seventeen years of age. (The 1990 version of A.R.S. § 13-1407(F) provided: “It is a defense to prosecution pursuant to §§ 13-1404 and 13-1410 if both the defendant and the victim are of the age of fourteen, fifteen, sixteen or seventeen and the conduct is consensual.”). Subsection F did not take its current form until 1993, when the provision was revised to read: “It is a defense to a prosecution pursuant to § 13-1405 if the victim is of the age of fifteen, sixteen or seventeen, the defendant is less than 19 years of age or attending high school and is no more than twenty-four months older than the victim and the conduct is consensual.” 1993 Ariz. Sess. Laws, Ch. 255, § 28. The lack of a parallel revision to the Reporting Statute does not mean that the Legislature intended to mandate a duty to report “non-offenses.” In fact, the 2003 legislative history for S.B. 1352 reflects that at least two Senators expressed concern that parents not be charged as felons for not reporting sexual relationships. *Hearing on S.B. 1352 Before the S. Comm. on Family Servs.*, 46<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess. (2003) at 4. Legislators were informed by the Maricopa County Attorney’s Office that: “The duty to report is based on the violation of the criminal law and sometimes there is a defense due to the relative ages of the individuals being under 18. If there is a defense there is no crime and therefore no duty to report.” *Id.*, at 3. The Legislature’s failure to amend the Reporting Statute cannot be seen as imposing a duty to report even if a statutory defense exists.

In interpreting statutes, “we give words their usual and commonly understood meaning unless the legislature clearly intended a different meaning.” *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990). “Immediately” is defined in Webster’s New International Dictionary, as “without interval of time” or “in direct connection or relation.” Webster’s New Int’l. Dict. (3d ed. 1976). Moreover, as indicated by the Legislature’s use of the word “immediately,” in the realm of child abuse, time is often of the essence. This sense of urgency is reinforced in subsection D of the Statute, which provides that that “reports shall be made immediately by telephone or in person and shall be followed by a written report within seventy-two hours.”<sup>7</sup>

If a school employee forms a reasonable belief early in the school day that a child has been abused, the statute would require the teacher to make a report, or cause the report to be made, as soon as possible. If injuries are being inflicted by family members or other custodial caregivers, failure to act before the end of the school day may put the child at further risk. By requiring immediate reporting, the statute makes it more likely that child protective services will be able to respond to the report before the end of the school day when the child is scheduled to return home. In short, to comply with the Reporting Statute, a covered person should make the required report immediately and without delay as soon as the person forms a reasonable belief that a child has been abused.

#### **VIII. A Caregiver’s Obligation to Report Is Satisfied Through Specific Knowledge that the Incident Has Been Reported by Another Caregiver.**

As explained in Attorney General Opinion I05-007, 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

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<sup>7</sup> The word “immediately” is also used in subsection H, which requires that upon receipt of the report, a peace officer shall “immediately” notify child protective services, and that when child protective services receives a report, it must “immediately” notify a peace officer in the appropriate jurisdiction.

or to child protective services in the department of economic security.” *Id.* at 4 (quoting A.R.S. § 13-3620(A)). A caregiver satisfies this obligation either by directly reporting the incident or ensuring that the information is conveyed to the proper authorities. *Id.* Specific knowledge that the incident has been reported by another caregiver satisfies this obligation. Mere belief without verification is insufficient.

### **Conclusion**

The Reporting Statute imposes a reporting obligation if a covered person reasonably believes that a minor has been the victim of “physical injury, abuse, child abuse, a reportable offense or neglect.” In this context, “physical injury” is defined as “the impairment of physical condition and includes any skin bruising, pressure sores, bleeding, failure to thrive, malnutrition, dehydration, burns, fracture of any bone, subdural hematoma, soft tissue swelling, injury to any internal organ or any physical condition that imperils health or welfare.” A.R.S. § 13-3623(F).

The Reporting Statute does not require an injury to be serious or life threatening to trigger the reporting obligation. All that is necessary is that the injury meet the statutory definition and that the covered person have a reasonable belief that the injury was inflicted by non-accidental means. Nor does the Reporting Statute excuse reporting in situations where particular classes of persons inflict non-accidental physical injury on children, be they minors, other students, siblings, or minors who lack the cognitive ability to control their behavior. In certain cases, the obligation to report may be lifted if the covered person reasonably believes that facts exist that would constitute a statutory defense and, thus, negate the offense.

Finally, the Reporting Statute is clear that covered persons must report immediately. This requires that the covered individual make the report, or cause the required report to be made, without delay as soon as the person forms a reasonable belief that the child has been

abused. Specific knowledge that the incident has been reported by another caregiver satisfies this obligation.

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Terry Goddard  
Attorney General

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

ATTORNEY GENERAL OPINION  by  TERRY GODDARD ATTORNEY GENERAL  April 6, 2007	No. I07-005 (R07-005)  Re: Implementation of Proposition 300 With Regard to Adult Education Services
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TO: The Honorable Tom Horne  
Superintendent of Public Instruction

**Questions Presented**

You have requested guidance on the following issues to assist the Department of Education in implementing Proposition 300:

1. What is Proposition 300's effective date and when are reports due to the Joint Legislative Budget Committee ("JLBC")?
2. How is legal residency determined under Proposition 300, and what types of procedures and documents are required by Proposition 300 to verify an applicant's residency status?
3. Does federal law invalidate or preempt Proposition 300?

**Summary Answer**

1. Proposition 300 became effective on December 7, 2006. The first report to the JLBC regarding implementation of the Proposition is due June 30, 2007.

2. Under the Proposition, only citizens, legal residents of the United States, and others lawfully present in this country are eligible to receive adult education services through the Department of Education (“Department”). Because the Proposition does not mandate a specific screening process to determine eligibility, the Department is responsible for establishing procedures to determine that people receiving adult education services are eligible to participate in those programs. This process may include, for example, self declarations subject to penalty of perjury or a review of appropriate documents. Any process must be implemented in a nondiscriminatory manner.

3. Federal law does not invalidate or preempt Proposition 300.

### **Background**

#### **A. Proposition 300.**

In the November 2006 general election, Arizona voters passed Proposition 300, which limits certain services and benefits, including adult education services, to citizens, legal residents, or persons otherwise lawfully present in the United States. *See* A.R.S. § 15-232 (as amended by Proposition 300). With regard to adult education services, Proposition 300 provides that

[t]he Department of Education shall provide classes under this section only to adults who are citizens or legal residents of the United States or are otherwise lawfully present in the United States. This subsection shall be enforced without regard to race, religion, gender, ethnicity or national origin.

A.R.S. § 15-232(B). In addition to limiting who is eligible for adult education services, Proposition 300 requires the Department to report to the JLBC the total number of adults who

were denied instruction under this section because they were not citizens, lawful residents, or otherwise lawfully present in the United States. *See* A.R.S. § 15-232(C). The report is due December 31 and June 30 of each year. *Id.*

**B. Adult Education Services**

Pursuant to A.R.S. § 15-232(A), the Department is responsible for overseeing adult education services for the State of Arizona. The Department’s duties include the following: (1) prescribing a course of study for adult education in school districts; (2) supervising the adult education programs that other state institutions and agencies provide; (3) adopting rules for the conduct of classes for immigrant and adult education—including teaching English to foreign-born residents; (4) “stimulating and correlating” the Americanization work of various agencies; and (5) prescribing a course of study to enable adults to pass a general equivalency diploma test.

*Id.* The Department distributes funds to “adult education providers,” which include school districts, community colleges, correctional facilities, community-based organizations, and other local organizations. *See* A.R.S. § 15-234.

The Department receives federal funding for adult education services through Title II of the Workforce Investment Act (“WIA”) of 1998. *See* 20 U.S.C. §§ 9201 to 9253. The WIA requires State matching funds. *See* 20 U.S.C. §§ 9211, 9222. The Department distributes both State and federal funds to the local programs that provide adult education services. *See* A.R.S. § 15-234; 20 U.S.C. § 9222.

## Analysis

### **A. Proposition 300's Effective Date and Reporting Requirements.**

The Arizona Constitution states that initiatives and referenda “shall become law when approved by a majority of the votes cast thereon and upon proclamation of the Governor.” Ariz. Const. art. 4, pt. 1, § 1(5). Proposition 300 became effective on December 7, 2006, when Governor Napolitano signed the Proclamation for it.

Proposition 300 requires that the Department submit a report to the JLBC semiannually on December 31 and June 30. *See* A.R.S. § 15-232(C). This report is to include “the total number of adults who applied for instruction and the total number of adults who were denied instruction under this section because the applicant was not a citizen or legal resident of the United States or was not otherwise lawfully present in the United States.” *Id.* Although the Proposition could be read to have required a report to the JLBC on December 31, 2006, the Department would not have had any of the information necessary for the December 31 report. Statutes cannot be construed to require futile acts. *See Pinal Vista Props., L.L.C. v. Turnbull*, 208 Ariz. 188, 193, ¶ 17, 91 P.3d 1031, 1036 (App. 2004). Therefore, the first report that the Department could reasonably submit to comply with the new law is due June 30, 2007.<sup>1</sup>

Proposition 300 does not identify the time period that each report must encompass. *See* A.R.S. § 15-232(C). Thus, it leaves the beginning and ending date for each reporting period to the Department's discretion. The two reports, however, should cover the entire calendar year.

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<sup>1</sup> This Office has previously noted that the effective date of a statute “is not necessarily identical to the date by which the *implementation* of its substantive provisions must be completed.” Ariz. Att’y Gen. Op. I01-003.

**B. Determining Whether People Are Citizens, Legal Residents, or Otherwise Lawfully Present in This Country.**

In construing a ballot initiative's meaning, the objective is to give effect to the intent of those who framed its provisions and of the electorate that adopted it. *See State v. Givens*, 206 Ariz. 186, 188, ¶ 5, 76 P.3d 457, 459 (App. 2003). The best indication of a statute's intent is its language. *Id.* Although Proposition 300 mandates eligibility requirements for adult education services, it does not establish specific procedures for the Department or local providers to follow to determine a person's eligibility. *See* A.R.S. § 15-232. Therefore, the Department must develop nondiscriminatory procedures to screen applicants to ensure compliance with Proposition 300. Although the Proposition does not establish specific screening requirements, the United States Department of Justice ("DOJ") has previously identified the following methods for determining an applicant's immigration status as to federal public benefits:

- Accepting a written declaration under penalty of perjury whether an applicant is a United States citizen, a legal resident, or is otherwise lawfully present in the United States;
- Accepting a written declaration under penalty of perjury from one or more third parties indicating a reasonable basis for personal knowledge that an applicant is a United State citizen, a legal resident, or is otherwise lawfully present in the United States; or
- Requiring an applicant to provide documentary evidence that he or she is a citizen, a legal resident, or is otherwise lawfully present in the United States.

Interim Guidance on Verification of Citizenship: Qualified Alien Status and Eligibility Under Title IV of PRWORA, 62 Fed. Reg. 61344, 61348 (November 17, 1997). Federal law

establishes whether a person is a citizen, a legal resident, or is otherwise lawfully present in this country. *See DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (noting that the power to regulate who enters the country is undeniably a federal power). The procedures necessary to implement Proposition 300 will merely verify the person’s status to determine whether the person is eligible for adult education programs.

Although there are various methods for verifying immigration status, the DOJ has advised that “[t]he appropriate method of verifying an applicant’s citizenship will depend upon the requirements and needs of the particular program, including, but not limited to, the nature of the benefits to be provided, the need for benefits to be provided on an expedited basis, the length of time during which benefits will be provided, the cost of providing the benefits, the length of time it will take to verify based on a particular method, and the cost of a particular method of verification.” Interim Guidance on Verification of Citizenship, 62 Fed. Reg. at 61347.<sup>2</sup>

### **C. The Federal Workforce Investment Act of 1998.**

You have also asked whether the WIA preempts the eligibility requirements for adult education services that Proposition 300 mandates.<sup>3</sup> Section 188 of the WIA prohibits states that receive federal funding from discriminating based on age, disability, race, color, or national origin in administering such programs. *See* 29 U.S.C. § 2938(a). The WIA does not address whether states receiving money under the WIA may limit adult education services to persons legally residing in the United States.

The power to regulate immigration is indisputably a federal power. *See DeCanas*, 424 U.S. at 354. However, not every state enactment that “in any way deals with aliens is a

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<sup>2</sup> Because different programs may necessitate different methods of determining eligibility, agencies should work closely with their assigned assistant attorneys general in order to fashion appropriate procedures.

regulation of immigration and thus *per se* preempted.” *Id.* at 355. The regulation of immigration is a “determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” *Id.* Proposition 300 does not permit state or local employees to determine who should or should not be admitted to the country or who should remain here. The statute merely requires that the Department limit the provision of adult education services to citizens, legal residents, and others lawfully present in the United States. Thus, A.R.S. § 15-232 is not an invalid immigration regulation.

The statute also passes the second *DeCanas* test, which analyzes whether Congress has fully occupied the field and intended “to oust State authority,” including state authority to promulgate laws that are harmonious with federal law. *DeCanas*, 424 U.S. at 357. Field preemption requires a demonstration that a “complete ouster of state power” was “the clear and manifest purpose of Congress.” *Id.* (quoting *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 146 (1963)). A comprehensive federal law does not evidence congressional intent to preempt all state authority. *Id.*; see also *N.Y. Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 415 (1973) (noting that “a detailed statutory scheme [relating to requiring work for welfare] was both likely and appropriate, completely apart from any questions of pre-emptive intent”). The WIA’s scheme for providing funds to States for adult education services does not prohibit state legislation that is harmonious with and implements the WIA. There is no evidence that Congress intended to preclude harmonious state legislation when it enacted the WIA.

Even absent any evidence of congressional intent to “occupy the field,” the Supremacy Clause invalidates any state law that burdens or conflicts with federal laws or treaties. *DeCanas*,

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<sup>3</sup> Your opinion request indicates that the federal agency responsible for administering the WIA suggested that you seek guidance from this Office concerning whether federal law preempts Arizona’s new state law.

424 U.S. at 358. Preemption exists under this test when “compliance with both state and federal law is impossible, or when the state law ‘stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress.’” *Mich. Cannery & Freezers Ass’n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984) (citations omitted). Accordingly, state laws that place burdens on the entrance or residence of aliens legally residing in the United States have been held invalid because they conflict with the constitutionally derived federal power to regulate immigration. *See DeCanas*, 424 U.S. at 358. Here, however, A.R.S. § 15-232(B) merely establishes eligibility requirements for the State’s adult education services. Moreover, as noted above, the WIA mandates only that states receiving funds under it are prohibited from discriminating based on age, gender, disability, race, color, or national origin; it does not address specific eligibility requirements. *See* 29 U.S.C. § 2938(a). Thus, A.R.S. § 15-232(B) does not conflict with the WIA.

Finally, the Proposition’s requirements apply equally to any expenditure of monies for programs under A.R.S. § 15-232, including both federal money received under the WIA and state matching funds. As noted above, the WIA does not prohibit states from implementing laws that restrict adult education services to persons legally residing in the United States. Under the WIA, the federal government awards grants to “eligible agencies,” 20 U.S.C. § 9211(b)(1), which in turn award grants or contracts to “eligible providers within the State,” 20 U.S.C. § 9241(a). The WIA defines an “eligible agency” as “the sole entity or agency in a State or an outlying area responsible for administering or supervising policy for adult education and literacy in the State or outlying area, respectively, *consistent with the law of the State or outlying area*, respectively.” 20 U.S.C. § 9202(4) (emphasis added). Thus, the federal law contemplates that the Department, an eligible agency, administers its adult education services, funded in part with

federal money, pursuant to State law. Therefore, the Department need not treat differently federal and state monies in the administration and supervision of adult education services.

Because the WIA does not invalidate or preempt A.R.S. § 15-232(B), the Department may lawfully implement the new statute in administering adult education services that are in part funded with money that the federal government provides pursuant to Title II of the Workforce Investment Act of 1998.

### **Conclusion**

Proposition 300 became effective on December 7, 2006, and the next report that it requires is due June 30, 2007. Federal law does not invalidate or preempt Proposition 300. To comply with Proposition 300, the Department must develop procedures so that only citizens, legal residents, and others lawfully present in the United States receive services. The process may include statements subject to penalty of perjury or documentary evidence.

Terry Goddard  
Attorney General

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

ATTORNEY GENERAL OPINION  by  TERRY GODDARD ATTORNEY GENERAL  March 19, 2007	No. I07-004 (R06-029)  Re: Insurance Producer License Applicants and 2005 Amendments to A.R.S. § 20-284(A)
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To: The Honorable Robert L. Burns  
Arizona State Senate

**Question Presented**

As amended by 2005 Ariz.Sess.Laws, Ch. 126, Arizona Revised Statute (“A.R.S.”) § 20-284(A) requires insurance producer license applicants to take their license examinations within the 120-day period before filing their applications. You have asked whether this new requirement applies to applicants who took their examinations before the amendment’s effective date but filed their applications after the law became effective.

**Summary Answer**

Section 20-284, A.R.S., as amended by 2005 Ariz.Sess.Laws, Ch. 126, applies only to examinations administered after the effective date of the Act. Therefore, an applicant who took the examination before the effective date of the Act, August 12, 2005, but filed the application after that date, is not subject to the 120-day requirement of A.R.S. § 20-284(A).

## Background

A resident applying for an insurance producer license must pass an examination that tests his or her knowledge of the duties and responsibilities of an insurance producer, the insurance laws of this state, and the lines of authority for which the application is made. *See* A.R.S. § 20-284(A). Before 2005, the law did not require the applicant to take the insurance producer license examination within any specified time period before filing the application. In 2005, however, the Legislature amended A.R.S. § 20-284(A) to require that applicants pass the examination within 120 days before filing the application. *See* 2005 Ariz.Sess.Laws, Ch. 126, § 1. The amendment also provides an extension of the 120-day period for an individual called into active military service and limits the number of times an individual can take the license examination within a twelve-month period. *See* 2005 Ariz.Sess.Laws, Ch. 126, § 1. Finally, 2005 Ariz.Sess.Laws, Ch. 126, § 3 provides: “Section 20-284, Arizona Revised Statutes, as amended by this act, *applies only for examinations that are administered from and after the effective date of this act.*” (Emphasis added.) The amended law became effective on August 12, 2005.

## Analysis

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the Legislature. *See Mail Boxes, etc., U.S.A. v. Indus. Comm’n of Ariz.*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). If the statutory language is clear and unambiguous, it is conclusive unless the Legislature clearly expresses an intent to the contrary or absurd consequences would result. *See Bustos v. W.M. Grace Dev.*, 192 Ariz. 396, 398, 966 P.2d 1000, 1002 (App. 1997).

The language of Section 3 of 2005 Ariz.Sess.Laws, Ch. 126, is unambiguous. It clearly states that the amendments to A.R.S. § 20-284 in that Act apply only to examinations administered from and after the effective date of the Act. This language plainly exempts all

examinations taken prior to the effective date from the new regulatory requirements. Thus, the law leaves applicants who passed their examinations before August 12, 2005, in the same position they would have been had the statute never been amended.

The language of Section 3 expressly applies to all amendments to A.R.S. §20-284, including the amendments to subsection A. Section 3 and other portions of Chapter 126 include no language that supports applying the 120-day requirement to examinations administered before the effective date of the legislation. Furthermore, if the Legislature had intended the 120-day period in subsection A to apply to examinations taken before August 12, 2005, Section 3 could have stated that A.R.S. § 20-284 applies to *applications* filed after the Act's effective date. As it is, 2005 Ariz.Sess.Laws, Ch. 126, does not evidence an intent to exclude any part of A.R.S. § 20-284 from the provisions of the grandfather clause in Section 3. To the contrary, the Legislature's use of a separate section to limit the amendment's scope underscores its intent to apply the language in Section 3 to all provisions of the Act. The Legislation imposes the new regulatory requirements on *examinations* administered after the effective date of the amended Act.

This analysis is consistent with the statute's legislative history. The fact sheet on the bill prepared by Senate staff for the Senate Finance Committee states that the bill "[a]pplies the provisions of the bill only to those examinations administered after the general effective date." Senate Research Staff, Fact Sheet on H.B. 2189, 47<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess., at 2 (March 8, 2005). The wording of this fact sheet, which does not reference any exceptions to the grandfather clause, confirms that Section 3 governs all sections of the amended statute.

According to testimony concerning the Legislation, the 120-day period is intended to ensure that people who obtain licenses have current knowledge of the relevant issues. *Hearing on H.B. 2189 Before the H. Comm. on Financial Institutions and Insurance*, 47<sup>th</sup> Leg., 1<sup>st</sup> Reg.

Sess. (January 24, 2005). Arguably, exempting those who took the test before the Act's effective date from the 120-day requirement does not further that purpose. But that policy argument cannot override the clear language of Section 3. Applying the plain language of the statute does not lead to an absurd result, but simply leaves applicants who took the examination before the effective date of the Act in the same position they would have been had the law not been passed.

### **Conclusion**

The language of 2005 Ariz.Sess.Laws, Ch. 126, is clear and unambiguous. The provisions of A.R.S § 20-284, as amended, apply only to examinations administered after the effective date of the Act. Examinations taken before that date are exempt from the new regulatory requirements imposed by 2005 Ariz.Sess.Laws, Ch. 126, even if the application is filed after August 12, 2005.

Terry Goddard  
Attorney General

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**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>March 5, 2007</p>	<p>No. I07-003 (R07-002)</p> <p>Re: Interpretation of HB 2874: Salary and Benefit Increases for School District and Charter School Nonadministrative Personnel</p>
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To: The Honorable Tom Horne  
Superintendent of Public Instruction

Debbie Davenport  
Auditor General

Candyce B. Pardee  
Deputy Cochise County Attorney

The Attorney General's Office received a joint request for an opinion from Superintendent of Public Instruction Tom Horne and Auditor General Debbie Davenport regarding the interpretation of House Bill ("HB") 2874, section 27 (the "Legislation"). Deputy Cochise County Attorney Candace Pardee also submitted to the Attorney General's Office for review an opinion that she prepared for the Douglas and Sierra Vista Unified School Districts. The Cochise County Attorney's Office concluded that the districts had properly expended funds that the Legislation had appropriated. Because the subject matter of the request and the opinion is similar, this Opinion addresses them together. This Office concurs with Ms. Pardee's analysis

of the Legislation but declines to review those portions of her opinion that address the specific facts pertaining to the Douglas and Sierra Vista Unified School Districts.

### **Questions Presented**

1. May school districts and charter schools use the funds appropriated in the Legislation to pay for any increase in salaries and benefits for nonadministrative personnel in fiscal year 2006-2007 over fiscal year 2005-2006 levels, or may they use funds appropriated in the Legislation only to pay for increases of salary and benefits levels in contracts for fiscal year 2006-2007 executed after the Legislation was enacted?

2. If school districts and charter schools did not execute contracts for fiscal year 2006-2007 before the Legislation was enacted, how should they determine the base salary and benefit levels from which to calculate the increase that may be paid from the appropriation?

### **Summary Answer**

1. School districts and charter schools may use the funds appropriated in the Legislation for any increases in salaries and benefits for nonadministrative personnel in fiscal year 2006-2007 over fiscal year 2005-2006, including increases that were negotiated before the Legislation was enacted.

2. School districts and charter schools should use fiscal year 2005-2006 salary and benefit levels to determine increases resulting from the Legislation's appropriation.

### **Background**

The Legislature adopted and the Governor signed HB 2874 on June 20 and June 21, 2006, respectively, as part of the fiscal year 2006-2007 budget process. 2006 Ariz. Sess. Laws, ch. 353. House Bill 2874 increased the base level in Arizona's school finance formula from

\$3,001.00 in fiscal year 2005-2006 to \$3,133.53 in fiscal year 2006-2007. 2006 Ariz. Sess.

Laws, ch. 353, § 3 (codified at A.R.S. § 15-901(B)(2)(c)). Section 27 of the Legislation provides as follows:

Sec. 27. Appropriation; basic state aid; base level increase

A. The sum of \$100,000,000 is appropriated from the state general fund in fiscal year 2006-2007 to the department of education to fund the increase in the base level authorized in section 15-901, subsection B, paragraph 2, Arizona Revised Statutes, as amended by this act.

B. The funding appropriated in subsection A of this section shall be used to provide salary and benefit increases for school district and charter school nonadministrative personnel.<sup>1</sup>

2006 Ariz. Sess. Laws ch. 353, § 27.

This Office previously issued an Opinion regarding the Legislation that addressed whether school districts and charter schools could amend contracts with nonadministrative personnel to increase the employees' salary and benefits without violating Article IX, § 7 (the "Gift Clause") or Article IV, part 2, § 17 (the "Extra Compensation Clause") of the Arizona Constitution. Ariz. Att'y Gen. Op. I06-003. This Office concluded that previously executed employment contracts for fiscal year 2006-2007 could be amended to add current fiscal year salary and benefit increases as a result of HB 2874 without violating the Gift Clause or the Extra Compensation Clause. *Id.* at 9-10. This Office also concluded that the Legislation expressly required districts to use the monies received for funding salary and benefit increases for

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<sup>1</sup> The Legislation's use of the term "benefit" is consistent with other statutes under Title 15. *See, e.g.*, A.R.S. § 15-502(A) ("The governing board may . . . fix the salaries and benefits of employees necessary for the succeeding year."). The Uniform System of Financial Records (USFR) defines "employee benefits" as "[a]mounts paid by the district on behalf of employees; these amounts are not included in the gross salary, but are in addition to that amount. Such payments are fringe benefit payments and, while not paid directly to employees, nevertheless are part of the cost of personal services." USFR, Chart of Accounts, Expenditures and Other Financing Uses, Object Codes at III-E-3.1. The USFR also lists a variety of employment benefits. *See id.*

nonadministrative personnel and no other purpose. *Id.* at 7. However, the specific questions raised here were not addressed.

According to the requests submitted, school districts are using the funds appropriated by the Legislation to fund salary and benefit increases in a variety of ways, including funding in whole or in part previously negotiated raises agreed to in contracts executed before the enactment of the Legislation. The first question raised by the Superintendent of Public Instruction and the Auditor General asks whether this is appropriate.

### **Analysis**

The Legislation appropriated \$100 million for use by school districts and charter schools to provide salary and benefit “increases” for nonadministrative personnel. *See* 2006 Ariz. Sess. Laws ch. 353, § 27. The issue here is whether school districts and charter schools may use these monies for any increase in salaries and benefits over fiscal year 2005-2006 levels or only for increases for fiscal year 2006-2007 that exceed any increases that were in contracts executed before the Legislation’s enactment.

The primary rule of statutory construction is to find and give effect to the Legislature’s intent. *See Mail Boxes, Etc., U.S.A. v. Indus. Comm’n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). The best and most reliable indicator of that intent is the statute’s own words. *See Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). “When the statute’s language is not clear, we determine legislative intent by reading the statute as a whole, giving meaningful operation to all of its provisions, and by considering factors such as the statute’s context, subject matter, historical background, effects and consequences, and spirit and purpose.” *Id.* A statute’s individual provisions must be considered in the context of the statute as a whole

to achieve a consistent interpretation. *See State v. Gaynor-Fonte*, 211 Ariz. 516, 518, 123 P.3d 1153, 1155 (App. 2005).

The word “increases” is not defined in the Legislation. *See* 2006 Ariz. Sess. Laws ch. 353, § 27(B). When statutory terms are undefined, courts look to the plain meaning of the terms. *See, e.g., Mail Boxes*, 181 Ariz. at 121, 888 P.2d at 779. Webster’s Dictionary defines “increase” as the “act or instance of increasing” or the “amount or rate by which something is increased.” *Webster’s II New College Dictionary* 562 (1999). The plain meaning of the word “increases” does not clarify whether the Legislature intended the increases to encompass only salary and benefit increases over and above those contained in contracts for fiscal year 2006-2007 executed prior to the Legislation’s enactment or any salary and benefit increases over 2005-2006 levels.

The term “increases,” therefore, must be considered in the context of the Legislation. *See Gaynor-Fonte*, 211 Ariz. at 518, 123 P.3d at 1155. Section 27(A) of the Legislation appropriated \$100 million from the state general fund in fiscal year 2006-2007 to fund the increase in the base level authorized in A.R.S. § 15-901(B)(2) as amended by HB 2874. Section 27(B) of the Legislation requires the appropriation in subsection A to be used to provide salary and benefit increases for school district and charter school nonadministrative personnel. 2006 Ariz. Sess. Laws, ch. 353, § 27. Reading these two subsections together indicates that the Legislation funded an increase in 2006-2007 salaries and benefits over 2005-2006 salaries and benefits. Based on this interpretation, if nonadministrative personnel contracts negotiated for fiscal year 2006-2007 contain salary and benefit increases over fiscal year 2005-2006 levels, then the school districts and charter schools may use the appropriated funds for these increases, regardless of when the contract was negotiated.

The Legislation clearly requires that school districts and charter schools use these monies only for salary and benefit increases for nonadministrative personnel. Nothing in the Legislation, however, prohibits school districts and charter schools from using the appropriated monies for salary and benefit increases in 2006-2007 nonadministrative personnel contracts executed before the Legislation's enactment. State law requires school districts to issue contracts to continuing certificated teachers for the following school year between March 15 and May 15. *See* Ariz. Att'y Gen. Op. I06-003 at 2-3 (citing A.R.S. §§ 15-536 and 15-538.01). Therefore, it is likely that school districts and charter schools executed contracts with nonadministrative, non-certificated personnel and continuing charter school teachers before the Legislature enacted HB 2874 on June 20. *Id.* The Legislature could have required that school districts and charter schools use the monies appropriated in the Legislation only for increases over and above those provided for in contracts previously negotiated for fiscal year 2006-2007, but it did not do so. When construing a statute, one presumes that "what the legislature means, it will say." *Padilla v. Indus. Comm'n*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976).

Moreover, the Legislature has historically expressed its desire to supplement and not supplant existing funds by including such a directive in the legislation. *See, e.g.*, A.R.S. § 15-977(A) (stating that "school districts and charter schools may not supplant existing school site funding with revenues from the fund" and that "teacher compensation increases based on performance or teacher base salary increases distributed pursuant to this subsection shall supplement, and not supplant, teacher compensation monies from any other sources."); 2005 Ariz. Sess. Laws ch. 314, § 1(E) ("Monies in the nursing education demonstration project shall be used . . . [t]o supplement and not supplant monies that are appropriated by the legislature for

fiscal years 2005-2006 through 2009-2010.”). The Legislation did not contain any language prohibiting supplantation.<sup>2</sup>

Nothing in the Legislation indicates that the timing of the execution of 2006-2007 contracts affects the use of the monies appropriated for salary and benefit increases. If the “increases” in the Legislation referred only to increases negotiated after the effective date of the Legislation, then school districts that issued contracts for continuing certificated employees by May 15, as required by statute, would be required to negotiate additional salary and benefit increases to nonadministrative employees even if they provided increases in the previously negotiated contracts. In contrast, school districts that failed to issue contracts in accordance with the statutory deadline could use the funds in the Legislation for a single increase negotiated after the Legislation was enacted. The language of the statute does not suggest that “increases” are based on the date the contract was executed. Rather, the increases are based on comparing fiscal year 2005-2006 funding with fiscal year 2006-2007 funding.

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<sup>2</sup> On June 1, 2006, during HB 2874’s progress through the Legislature, a legislator did express for the record his intent to prevent funds appropriated under the bill from supplanting existing budgeted funds. *Compact Disc Recording (Part 3) of the Senate Third Reading of HB 2874*, 47<sup>th</sup> Leg., 2d Reg. Sess. at 28:17-31:10 (June 1, 2006). This legislator, in addition to two others, also expressed the intent that the appropriated funds were to be used for teacher salary increases and increases in retirement contribution costs. *Id.* The Conference Committee promulgated an amendment to HB 2874 on June 16, 2007, that added Section 27 to the bill. *Free Conference Committee Amendments to HB 2874 (Reference to House Engrossed Bill)*, 47<sup>th</sup> Leg., 2d Reg. Sess., § 27 (June 16, 2007). The amendment limited the use of the appropriated funds to salary and benefit increases, but applied the increases to benefits generally—not just to retirement contributions. It also applied the increases to all nonadministrative personnel—not just teachers. *Id.* The Legislature enacted the bill as amended on June 20, 2006. The Conference Committee amendment did not contain language prohibiting supplantation of funds appropriated under Section 27 of the Legislation. *Id.* Given the fact that language reflecting the statement concerning supplantation was not included in the Conference Committee amendment, it is apparent that the Legislature did not intend to prohibit supplantation of the funds appropriated by Section 27 of the Legislation. *See Hernandez-Gomez v. Leonardo*, 185 Ariz. 509, 513, 917 P.2d 238, 243 (1996) (“We are mindful of the fact that the expressed intent of several congressmen is not necessarily determinative, and that these ‘unenacted approvals, beliefs, and desires are not laws.’”) (quoting *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501, 108 S. Ct. 1350, 1354 (1988)).

Although “increases” as used in the Legislation means increases over fiscal year 2005-2006 levels, nothing in this Opinion prohibits school districts or charter schools from providing increases in addition to those contained in contracts executed prior to the Legislation’s enactment. As Opinion I06-003 indicated, school districts and charter schools may amend their contracts as necessary to fund additional increases. *See* Ariz. Att’y Gen. Op. I06-003 at 7. Finally, school districts and charter schools should consider any language in their own employment contracts that may place additional limitations on the use of such funds.<sup>3</sup>

Because “increases” in the Legislation means increases over fiscal year 2005-2006 levels, school districts and charter schools should use fiscal year 2005-2006 salary and benefit levels to determine increases for their nonadministrative personnel.

### **Conclusion**

School districts and charter schools may use the Legislation to fund any increase in salary and benefits for nonadministrative personnel over fiscal year 2005-2006 levels. The funding, however, may not be used for any other purpose. School districts and charter schools should use fiscal year 2005-2006 salary and benefit levels to determine increases resulting from the Legislation’s appropriation.

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Attorney General

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<sup>3</sup> Some contracts may contain contingency clauses that allow or require governing boards to increase staff salaries or benefits upon additional monies becoming available for such purpose.

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>February 7, 2007</p>	<p>No. I07-002 (R06-039)</p> <p>Re: Proposition 202 (Minimum Wage Law) and the Disabled Worker</p>
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To: The Honorable John McComish  
Arizona House of Representatives

**Questions Presented**

You have requested a formal opinion answering the following questions regarding application of the State's new minimum wage law:

1. Does the new minimum wage law promulgated in Proposition 202 apply to the developmentally disabled worker or is the "special" minimum wage authorized by 29 U.S.C. § 214(c) of the Fair Labor Standards Act still applicable?
2. Are there any other federal exemptions that are still in effect? If so, which ones?
3. The official title of Proposition 202 contained a phrase alluding to the repeal of A.R.S. § 23-362. However, the text of the measure contains no such repeal. Does this mean that the old statute was not repealed?
4. If you determine that the old law was not properly repealed, and since the new law contains no express provision for workers with disabilities, can employers still pay "commensurate" wages in accordance with the reference to federal law found in the old A.R.S. § 23-362?

### **Summary Answer**

The State's new minimum wage enacted in Proposition 202 applies to developmentally disabled workers.<sup>1</sup> The "special certificate" minimum wage authorized by the federal Fair Labor Standards Act (FLSA) at 29 U.S.C § 214(c) for disabled workers, which allows employers to pay a special minimum wage to disabled individuals, was not incorporated in Proposition 202 and is therefore inapplicable.

Although the text of Proposition 202 does not explicitly repeal former A.R.S. § 23-362, the language of the two directly conflict with one another and cannot be read together harmoniously. Therefore, the more recent enactment controls, and Proposition 202 impliedly repeals former A.R.S. § 23-362.

### **Background**

Proposition 202 establishes a State minimum wage of \$6.75 per hour with an annual cost of living increase, provides for enforcement, establishes record-keeping requirements, and empowers the Industrial Commission to promulgate regulations consistent with the Proposition. *See* A.R.S. §§ 23-362 to -364 (as amended by Prop 202).

Until the Proposition's effective date on January 1, 2007, Arizona adult workers were covered solely by federal minimum wage laws contained in the FLSA. *See* 29 U.S.C. §§ 201–219.

The FLSA contains numerous exemptions. One of its exemptions applies to individuals employed under a "special certificate" pursuant to § 214 of the FLSA. Specifically, § 214 permits employers to obtain special certificates for certain qualifying employees and pay those employees a "special minimum wage rate" that is commensurate with the worker's productivity

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<sup>1</sup> This Opinion does not address the relationship, if any, between a disabled worker's minimum wage and services the disabled worker might receive under Title XIX of the Social Security Act. It also does not address whether any particular worker is an employee subject to Arizona's new minimum wage law.

and that may be lower than the minimum wage prescribed by § 6 of the FLSA (codified at 29 U.S.C. § 206).<sup>2</sup> Disabled workers are one of the classes of employees that may be eligible for these special FLSA certificates.

### Analysis

#### **I. Application of Proposition 202 to Developmentally Disabled Workers.**

Arizona is one of six states that enacted legislation in 2006 to raise its minimum wage.<sup>3</sup> Two of the six states—Ohio and Missouri—adopted measures that exempted individuals with disabilities from the minimum wage provisions of their laws. *See* Ohio Const. art. II, § 34a; Ohio Rev. Code Ann. § 4111.14(C) (implementing Ohio Const. art II, § 34a); Mo. Rev. Stat. §§ 290.500(3)(g), 290.502 and 290.515. The remaining four states—Arizona, Nevada, Colorado and Montana—did not include in their laws any language similar to the FLSA that would exempt disabled workers from their new state minimum wage. *See* A.R.S. §§ 23-362 to -364; Nev. Const. art. 15, § 16; Colo. Const. art. XVIII, § 15; Mont. Code Ann. § 39-3-409.

The drafters of Proposition 202 did not, however, ignore all FLSA exemptions. For example, the FLSA exempts from its minimum wage and maximum hour requirements “any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship

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<sup>2</sup> The commensurate wage is calculated by comparing the disabled worker’s productivity to that of an experienced, non-disabled worker and then reducing the prevailing wage for that position to compensate for any reduction in productivity. 29 C.F.R. § 525.9. The commensurate wage is always lower than the prevailing wage and is often lower than the minimum wage.

<sup>3</sup> Ohio voters approved a constitutional amendment that raised the minimum wage to \$6.85 per hour but also adopted FLSA exemptions. Ohio Const. art. II, § 34a; Ohio Rev. Code Ann. § 4111.14(C). Specific language in the amendment allows for the issuance of a license to pay less than the state minimum wage rate for individuals with disabilities. Ohio Const. art II, § 34a. Likewise, Missouri’s Proposition B contains a specific exemption for individuals working in sheltered workshops certified by the Department of Elementary and Secondary Education. Mo. Rev. Stat. § 290.500(3)(g). Arizona, Nevada, Colorado and Montana did not provide any exemptions in the text of their legislation for the exclusion of the disabled worker who previously was covered under Subsection 214(C) of the FLSA. *See* A.R.S. §§ 23-362 to -364; Nev. Const. art. 15, § 16; Colo. Const. art. XVIII, § 15; Mont. Code Ann. § 39-3-409 (2007).

services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulation of the Secretary.” 29 U.S.C. § 213(a)(15).

Like the FLSA, Proposition 202 also exempts individuals “performing babysitting services in the employer’s home on a casual basis.” A.R.S. § 23-362(A). However, the Proposition is silent regarding “companionship services.” Proposition 202’s omission of the FLSA companionship services exemption supports the conclusion that the drafters of the Proposition made a conscious decision regarding the FLSA exemptions the Proposition would adopt and those the Proposition would omit, e.g., the special minimum wage exemption for disabled workers. *See State v. Gonzales*, 206 Ariz. 469, 471, ¶ 11, 80 P.3d 276, 278 (App. 2003) (explaining rule of statutory construction that the expression of one thing is the exclusion of another).

In addition, the FLSA does not usurp state law regarding the establishment of a minimum wage. The FLSA states that “[n]o provision of this Chapter or of any order thereunder shall excuse non-compliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Chapter.” 29 U.S.C. § 218(a); *see also* 29 C.F.R. § 525.20 (“[n]o provision of these regulations, or of any special minimum wage certificate issued thereunder, shall excuse noncompliance with any other Federal or State law or municipal ordinance establishing higher standards”); *Pac. Merch. Shipping Ass’n v. Aubry*, 918 F.2d 1409, 1419 (9<sup>th</sup> Cir. 1990) (where a state legislates in the area of minimum wage, the provisions of the state statute will be enforced where a worker receives additional benefits provided by state law). Thus, the plain language of the FLSA provides that a worker is entitled to a state or local minimum wage that is higher than the federal minimum wage.

Because Proposition 202 did not incorporate the “special certificate” minimum wage provisions of FLSA for disabled workers, employers are required to pay the higher state minimum wage to developmentally disabled workers subject to Proposition 202.<sup>4</sup>

## **II. Implied Repeal of A.R.S. § 23-362.**

In 1997, the Legislature enacted A.R.S. § 23-362, which prohibited any “political subdivision of this state” from establishing a minimum wage higher than the “federal minimum wage prescribed in 29 United States Code § 206.” 1997 Ariz. Sess. Laws ch. 51.<sup>5</sup> This law effectively ensured that Arizona was governed solely by the federal minimum wage law provisions.

The official title of Proposition 202 states: “An Initiative Measure: Repealing Section 23-362, amending by adding new Section 23-362 relating to the Arizona Minimum Wage Act.” The text of the proposed amendment adds new statutes A.R.S. §§ 23-362, 23-363 and 23-364. Nowhere, however, does the text of the proposed amendment explicitly repeal the previous version of A.R.S. § 23-362. When voters pass an initiative, it is the text of the measure that becomes law. A.R.S. § 19-127(B) (“The secretary of state shall cause every measure . . . submitted under the initiative and approved by the people to be printed with the general laws enacted by the next ensuing session of the legislature.”). Thus, Proposition 202 does not explicitly repeal A.R.S. § 23-362 because the text of the proposed amendment does not so provide.

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<sup>4</sup> It should be noted that this conclusion applies only to developmentally disabled workers who are not covered by any other state or federal exemption.

<sup>5</sup> Former A.R.S. § 23-362 reads in full:

- A. The legislature declares that the establishment of a uniform minimum wage is a matter of statewide concern.
- B. No political subdivision of this state may establish, mandate or otherwise require a minimum wage that exceeds the federal minimum wage prescribed in 29 United States Code § 206.

The question then becomes whether Proposition 202 impliedly repealed A.R.S. § 23-362. Although implicit repeal of statutes is not favored, *UNUM Life Insurance Company of America v. Craig*, 200 Ariz. 327, 333, ¶ 28, 26 P.3d 510, 516 (2001), courts will find implied repeal to have occurred when two statutes are so in conflict that they cannot stand together. *State ex rel. Purcell v. Superior Court*, 107 Ariz. 224, 227, 485 P.2d 549, 552 (1971).

Here, prior to the enactment of Proposition 202, A.R.S. § 23-362 established that Arizona workers were governed by the federal minimum wage law, and it specifically prohibited political subdivisions of the State from enacting their own minimum wage laws. In contrast, Proposition 202 established a state minimum wage law, setting forth a minimum wage higher than the federal level, and providing for certain exemptions and mechanisms for enforcement of the minimum wage law. Proposition 202 also specifically empowers state political subdivisions such as counties, cities, or towns to regulate minimum wages and benefits by ordinance. A.R.S. § 23-364(I) (“A county, city, or town may by ordinance regulate minimum wages and benefits within its geographic boundaries but may not provide for a minimum wage lower than that prescribed in this article.”). This is in direct contrast to, and in direct conflict with, the version of A.R.S. § 23-362 that was in effect before Proposition 202. Because the language of Proposition 202 and the previous version of A.R.S. § 23-362 cannot be interpreted harmoniously, Proposition 202 impliedly repeals the previous statute.<sup>6</sup>

### **Conclusion**

Developmentally disabled workers are not exempt from the minimum wage enacted in Proposition 202. Thus, developmentally disabled workers formerly earning a sub-minimum

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<sup>6</sup> Because Proposition 202 impliedly repeals A.R.S. § 23-362 (1997 Ariz. Sess. Laws ch. 51), the last question regarding the application of the former statute is moot.

wage under the FLSA “special certificate” are entitled to earn the new state minimum wage of \$6.75 per hour if they are employees subject to the new law.<sup>7</sup> In addition, Proposition 202 impliedly repealed the previous version of A.R.S. § 23-362.

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<sup>7</sup> The Legislature's ability to now incorporate an exemption for disabled workers is limited by article IV, part 1, section 1 of the Arizona Constitution. Any amendment to a voter-approved initiative must “further the purpose” of the proposition and receive approval of at least three-fourths of the members of the House of Representatives and Senate. Alternatively, the Legislature could refer the issue to the voters.



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>January 29, 2007</p>	<p>No. I07-001 (R06-037)</p> <p>Re: Application of Open Meeting Laws to Board of Trustees created under A.R.S. § 11-952.01.</p>
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To: Kathryn A. Munro, Esq.  
Mangum, Wall, Stoops & Warden, P.L.L.C.

**Question Presented**

Does the Open Meeting Law (Arizona Revised Statutes (“A.R.S.”) §§ 38-431 to -431.09) apply to the Board of Trustees (the “Board”) appointed by the multimember governing bodies of various political subdivisions to administer the Northern Arizona Public Employees Benefit Trust (“NAPEBT”) formed under A.R.S. § 11-952.01(C)?

**Summary Answer**

Yes. The Board of Trustees appointed by the political subdivisions under A.R.S. § 11-952.01 constitutes a public body under A.R.S. § 38-431(6). In administering an employee benefits program on behalf of the political subdivisions that created it, the Board constitutes an instrumentality of those political subdivisions. Moreover, one or more of the participating political subdivisions appoints each trustee on the Board. Therefore, the Board falls within the

definition of “public body” in A.R.S. § 38-431(6) and must comply with the Arizona Open Meeting Law.

### **Background**

Section 11-952.01 of the Arizona Revised Statutes authorizes two or more public agencies to pool funds to insure or indemnify the agencies against risks of claims for loss of life, disability, accidents, or other claims. A.R.S. § 11-952.01(C). The public agencies may undertake such pooling (1) on a cooperative or contract basis, (2) by the formation of a nonprofit corporation, (3) by contracts or intergovernmental agreements with the Arizona Health Care Cost Containment System administration, or (4) by the execution of a trust agreement directly by the agencies or by contracting with a third party. A.R.S. § 11-952.01(C). Section 11-952.01(H) requires that any pool shall be operated by a Board of Trustees, at least three of whom are elected officials or employees of public entities within the state. This Board of Trustees, among other things, must establish the terms and conditions of coverage within the pool, ensure that all claims are paid promptly, and take all necessary precautions to safeguard the assets of the group. A.R.S. § 11-952.01(H).

Five political subdivisions<sup>1</sup> of the State of Arizona, all of whom are governed by multimember governing bodies, entered into an Intergovernmental Agreement and Declaration of Trust (the “Trust Agreement”) under A.R.S. § 11-952.01(C) to create the NAPEBT for the purpose of providing and maintaining health and welfare benefits for employees of the participating subdivisions. Trust Agreement, Art. 3.1. The political subdivisions subscribing to the Trust Agreement are the City of Flagstaff, Coconino County, Coconino County Community College District, Flagstaff Unified School District, and the Northern Arizona Intergovernmental

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<sup>1</sup> A.R.S. § 38-431(5) defines “political subdivision” as “all political subdivisions of this state, including without limitation all counties, cities and towns, school districts and special districts.”

Public Transportation Authority (“NAIPTA”). NAIPTA is a political subdivision formed under A.R.S. § 28-9103 for the purpose of operating a public transportation system and consists of the following political subdivisions: City of Cottonwood; City of Flagstaff; City of Sedona; Coconino County; Yavapai County; and the Arizona Board of Regents, for and on behalf of Northern Arizona University. Although the Trust Agreement authorizes the addition of new participants in the trust, it specifically requires that participants be public employers. Trust Agreement, Art. 1.9. The Trust Agreement requires each participating political subdivision to contribute funds to the trust in an amount anticipated to pay for the benefits provided, and specifies that employees of the participants may also be required to contribute. Trust Agreement, Arts. 7.1, 7.3.

As required by statute, the Trust Agreement created the Board of Trustees to carry out the duties of overseeing the administration of the trust. Trust Agreement, Art. 5.1. Each Trustee is appointed by a participating political subdivision and has one vote in all matters that come before the Board. Trust Agreement, Art. 5.1. To appoint a Trustee, the political subdivision must either be a participating member at the time the latest amendment was executed or have been a participant in the Trust Agreement for at least one full year and must have at least two hundred active (non-retiree) employees covered under the terms and conditions set forth by the Board. Trust Agreement, Art. 5.2. A Trustee may resign or be removed at any time by the participating political subdivision that appointed him or her, and the political subdivision can then designate a successor Trustee. Trust Agreement, Art. 5.1. The Board meets regularly on a semi-annual basis with the requirement that twenty-four hours prior notice and an agenda be given to each Trustee. Trust Agreement, Art. 5.15.4. The Board also must maintain minutes of each meeting as required by statute. A.R.S. § 11-952.01(H); Trust Agreement, Art. 5.6.5. Nothing in the statute

or the Trust Agreement requires that notice be given to the public or that meetings be open for public attendance. The question presented is whether the Board is a public body such that its meetings must be open to the public under the Arizona Open Meeting Law, A.R.S. § 38-431.01.

### Analysis

Under Arizona's Open Meeting Law, "all meetings of any *public body* shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings." A.R.S. § 38-431.01 (emphasis added). A "public body" includes "all multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and *other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision.*" A.R.S. § 38-431(6) (emphasis added). For guidance in interpreting the Open Meeting Law, the Legislature included a declaration of public policy in A.R.S. § 38-431.09 stating:

It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. Toward this end, any person or entity charged with the interpretations of this article shall construe any provision of this article in favor of open and public meetings.

The question then is whether the Board constitutes a multimember governing body of an instrumentality of one or more political subdivisions.

The term "instrumentality" is not defined in the statute, other than to indicate that the term includes corporations or other instrumentalities whose boards of directors are appointed or elected by the political subdivisions. A.R.S. § 38-431(6). In Arizona, the only Court that considered the term employed the dictionary definition of "instrumentality," namely, "something that serves as in intermediary or agent through which one or more functions of a controlling

force are carried out: a part, organ or subsidiary branch esp. of a governing body.” *Prescott Newspapers, Inc. v. Yavapai Cmty. Hosp. Ass’n*, 163 Ariz. 33, 39, 785 P.2d 1221, 1227 (App. 1989). The Court included a later statement from the dictionary that “INSTRUMENTALITY may suggest the fact of serving as an instrument but in today’s English it is likely to suggest a means or agency which is a minor part of a larger entity or under the control of a subsuming organization.” *Id.* Moreover, in evaluating whether an entity constitutes an instrumentality of a political subdivision, the Court looked to whether the function performed by the entity is committed to the political subdivision, i.e., is it something the political subdivision could do itself. *Id.* (noting that statute required the function of the entity to be carried out by a nonprofit corporation and not the Hospital District itself).

The Supreme Court of Oregon adopted a similar, yet more detailed, line of analysis in determining whether an entity constitutes a public body subject to the state’s public records law. *Marks v. McKenzie High School Fact-Finding Team*, 319 Or. 451, 463-64, 878 P.2d 417, 424-25 (1994). In that case, the Court adopted a six-factor analytical framework that focused on the control of the entity by the state or a political subdivision:

1. The entity’s origin (whether it was created by the government or independently of the government);
2. The nature of the function assigned to and performed by the entity (e.g., whether that function is one traditionally associated with government or is one commonly performed by private entities);
3. The scope of authority granted to and exercised by the entity (e.g., does the entity have authority to make binding governmental decisions or is it limited to making nonbinding recommendations?);

4. The nature and level of government financial involvement with the entity;
5. The nature and scope of government control over the entity's operation;  
and
6. The status of the entity's officers and employees (e.g. whether the officers and employees are government officials or government employees).

*Id.* The Court noted that the list of factors was not exhaustive, and no single factor was either indispensable or dispositive. *Id.* at 464 n.9, 878 P.2d at 425 n.9.

Here, the Board falls within the definition of “public body” because it is an instrumentality of the participating political subdivisions and each trustee of the Board is appointed by the political subdivisions.<sup>2</sup> The Trust Agreement specifically provides that each member of the Board is appointed by one of the participating political subdivisions, although not every political subdivision may be entitled to appoint a Trustee. Trust Agreement, Art. 5.1. Additionally, each Trustee may be removed and replaced at any time by the political subdivision that appointed him or her. Trust Agreement, Art. 5.1.

Furthermore, NAPEBT—and the Board that administers it—were created by the various political subdivisions to carry out the duties and powers of the government entities that signed the Trust Agreement, namely, providing health and welfare benefits to their employees, or pooling assets and funds with other public agencies to do so. Applying the analytical framework set forth above, it is apparent that the Board operates under the control of the participating political subdivisions to carry out governmental functions. Although the *Marks* test is not

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<sup>2</sup> “Board of Directors” in the statute should be interpreted to include a board of trustees such as the one in this case. In *Prescott Newspapers*, the Court did not distinguish between “board of directors” and “board of trustees” in considering whether the hospital association’s board of trustees was appointed by a political subdivision. 163 Ariz. at 40, 785 P.2d at 1228. This result also would seem to be mandated by the public policy provision in the Open Meeting Law favoring open and public meetings.


binding, it proves helpful in analyzing whether the Board and the NAPEBT constitute “instrumentalities” under the statute. First, the NAPEBT is created pursuant to state statute by an intergovernmental agreement between various political subdivisions. The participating political subdivisions pooled their funds under A.R.S. § 11-952.01(C) to form a trust that would administer and manage the employee benefit programs on their behalf. These functions are assigned by law to each of the political subdivisions and could be carried out by any of them independently of the trust. A.R.S. § 11-981(A) (authorizing cities, towns, and counties to provide insurance or to self-insure for employee health and welfare benefits); A.R.S. § 15-387 (authorizing school districts to provide insurance or to self-insure for employee health and welfare benefits); A.R.S. § 15-1444(B)(7) (authorizing community college districts to offer employee benefit plans); A.R.S. § 15-1626(F) (authorizing Arizona Board of Regents to offer employee benefit plans). The Board administers the trust and makes final binding decisions about disposition of the assets therein. Trust Agreement, Art. 5.6. Moreover, the participating political subdivisions provide primary funding for the trust, although employee contributions are authorized by the Trust Agreement. Trust Agreement, Arts. 7.1, 7.3. As noted above, the participating political subdivisions maintain the power to appoint and remove Trustees, thereby exercising a great degree of control over the operation of the trust itself. Trust Agreement, Art. 5.1. Finally, the Trust Agreement requires that at least four of the Trustees on the Board be employees of the participating political subdivisions, as required by statute. Trust Agreement, Art. 5.1.

In light of the degree of control exercised by the political subdivisions over NAPEBT and its Board, and the nature of the functions assigned to the Board, the Board is an instrumentality of the various political subdivisions that subscribed to the Trust Agreement. This analysis

complements previous opinions from this Office that boards of trustees administering employee benefit trusts created by school districts under A.R.S. § 15-382 were subject to the Open Meeting Law. *See* Op. Atty. Gen. Nos. I83-018 and I87-038. For these reasons, the Board constitutes a “public body” under A.R.S. § 38-431(6) and is subject to the Open Meeting Law.

**Conclusion**

Under the definition set forth in A.R.S. § 38-431(6), the Board constitutes a multimember governing body of an instrumentality of one or more political subdivisions and must comply with the requirements of the Arizona Open Meeting Law.

  
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