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STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL December 9, 2009	No. I09-011 (R09-020) Re: Applicability of Rationale in *Jenkins v. Hale* to All Circulated Petitions

To: The Honorable Ken Bennett
Arizona Secretary of State

Questions Presented

1. Does the opinion in *Jenkins v. Hale*, 218 Ariz. 561, 190 P.3d 175 (2008), apply to all circulated petitions, including initiative petitions and new party recognition petitions?

2. For petitions to which *Jenkins* applies, how should counties process those signatures?

3. For petitions to which *Jenkins* does not apply, how should counties process those signatures?

Summary Answers

1. In addition to nomination petitions, which were specifically addressed in *Jenkins*, petitions for new party recognition are encompassed by the holding and analysis of *Jenkins*. That case rejected a *per se* rule that signatures containing a post office box address, as opposed

to an actual residence address, are invalid. The holding of *Jenkins*, however, likely does not apply in the context of referendum, initiative and recall petitions.

2. Under *Jenkins*, with regard to nomination petitions, when a signature is challenged pursuant to Arizona Revised Statutes ("A.R.S.") § 16-351(A) on the basis that the signer included only a post office box address, such a signature loses the presumption of validity to which it otherwise may have been entitled. In such case, the burden shifts to the proponent of the signature to persuade the trier of fact that the signature is that of a qualified elector.

With regard to new party recognition petitions, Arizona law requires county election officials to verify and count the signatures of qualified electors. Although, under *Jenkins*, signatures that are accompanied by solely a post office box address lose any presumption of validity, if election officials can verify that such signatures are those of qualified electors, then they should count those signatures.

3. The process for referendum, initiative and recall petitions is set forth in Title 19, A.R.S. §§ 19-121.01, -121.04, -208.01, -208.02, and Ariz. Const. art. 4, pt. 1 § 1(9). Under the applicable provisions, election officials should invalidate signatures on such petitions for which only a post office box address is provided.

Background

Arizona statutes provide for the use of petitions in several aspects of the State's electoral processes. For example, A.R.S. §§ 16-314 and -341 provide for nomination petitions with regard to candidates for public office. In addition, A.R.S. § 16-801 provides for petitions for individuals attempting to gain state or other governmental recognition of a new political party. With regard to individuals attempting directly to legislate through the ballot or to recall an elected official from office, A.R.S. §§ 19-101, -102, and -204 provide for referendum, initiative and recall petitions, respectively.

Although there are similarities in the requirements and purposes of the above-referenced petitions, the requirements pertaining to those petitions are differentiated and addressed distinctly in the statutes. For example, for nomination petitions, the statutes set forth the form and signature requirements of the petitions and the requirements for certification of such petitions. A.R.S. §§ 16-311(H), -314, -315, -321, -322. The specific form requirements for nomination petitions are set forth in A.R.S. § 16-315. That statute requires, among other things, that such petitions be "in substantially the following form: . . . [t]he signature portion of the petition shall be divided into columns headed by the titles: signature; printed name; *actual residence address or description of place of residence, city, town or post office*; and date of signing." A.R.S. § 16-315(A) (emphasis added).

The statutes further set forth a procedure for electors to challenge the nomination of a candidate. Such actions may challenge, among other things, the validity of petitions or the signatures thereon. A.R.S. § 16-351(A). Although nomination petitions may be challenged, they are "presumptively valid" once they have been circulated, signed, and filed. *Jenkins*, 218 Ariz. at 562-63, 190 P.3d at 176-77 (citing *Miller v. Bd. of Supervisors of Pinal County*, 175 Ariz. 296, 301, 855 P.2d 1357, 1362 (1993)). In a challenge to the validity of nomination petition signatures, the challenger bears the burden of proving by clear and convincing evidence that the individual who signed a petition is not a qualified elector. *Id.*

In the case of petitions for new party recognition, the statutes set forth the minimum number of signatures needed and require that the petitions be "in substantially the form prescribed by § 16-315," which is described above. A.R.S. § 16-801. With regard to petitions for new party recognition, the county recorders "shall verify and count all signatures of qualified electors within thirty days after submission." A.R.S. § 16-803(C). Unlike the provisions pertaining to nomination petitions, the new party recognition provisions do not set forth a specific procedure for challenging the validity of new party recognition petitions or signatures thereon.

With regard to referendum, initiative and recall petitions, statutes in Title 19 set forth specific requirements for the form of such petitions, signature requirements, and certification by petition circulators. A.R.S. §§ 19-101, -102, -112, -121. In addition, Title 19 sets forth specific duties of election officials with regard to processing referendum, initiative and recall petitions. A.R.S. §§ 19-121.01, -121.02, -121.04, -208.02. Title 19 also provides for the legal procedures for challenging election officials' certification of such petitions. A.R.S. §§ 19-121.03, -122, & -208.04; *see also Time Infrastructure Moving Arizona's Economy v. Brewer*, 219 Ariz. 207, 211, 196 P.3d 229, 233 (2008) (identifying the Title 19 provisions for review of county and state election officials' actions regarding initiative and referendum petitions).

In *Jenkins*, the Court addressed the question of whether an elector's signature on a nomination petition "is invalid as a matter of law if the elector provides a post office box address in the address portion of the signature line." 218 Ariz. at 562, 190 P.3d at 176. The question stemmed from the statutory requirement described above that nomination petitions be in a form that includes a column for "actual residence address or description of place of residence, city, town or post office." A.R.S. § 16-315(A).

In that case, a legislative candidate filed petitions containing signatures of individuals who provided only a post office box address under the "actual residence address" portion of the petition. *Jenkins*, 218 Ariz. at 562, 190 P.3d at 176. The challenger sued and argued that such signatures were invalid. Without the challenged signatures the candidate lacked the requisite number of signatures to support his candidacy. *Id.* at 562-63, 190 P.3d at 176-77.

In the superior court, the candidate introduced evidence (in the form of review by the county recorder) to show that, although a post office box had been provided in lieu of a residence address, the signatures of the challenged entries were in fact those of qualified electors. *Id.* at 565-66, 190 P.3d at 179-80. Following the evidentiary hearing, the superior court found that the candidate had shown that a sufficient number of the challenged signatures were in fact those of qualified electors, and that the candidate thus had obtained a sufficient number of signatures to support his candidacy. *Id.* at 562, 190 P.3d at 176.

The Court affirmed the trial court's ruling and in so doing set out several legal principles regarding nomination petitions. *Id.* at 564-65, 190 P.3d at 178-79. First, the Court held that based upon its construction of A.R.S. § 16-315(A)(4) and other relevant statutory provisions, the Legislature intended to require on such petitions "the signer's actual residence address or some description of its location, whether by reference to a place, or to the relevant city, town or post office." *Id.* at 564, 190 P.3d at 178 (internal quotation marks and alteration omitted). Second, the Court held that, in a nomination petition challenge proceeding, signatures that do not contain such information lose the presumption of validity to which they otherwise are entitled. *Id.* at 565, 190 P.3d at 179. The Court further held, however, that the proponent of such signatures may come forward with evidence to "demonstrate to the trier of fact that the challenged signatures are those of qualified electors." *Id.* Thus, the Court rejected the notion that such signatures were invalid as a matter of law.

Analysis

I. Nomination Petitions.

The reasoning and holding of *Jenkins* expressly applies to nomination petitions, which include petitions of candidates seeking election through either the primary process or otherwise.[1]

II. New Party Recognition Petitions.

Courts most likely would apply the reasoning of *Jenkins* to petitions for new party recognition. As an initial matter, petitions for new party recognition must be "in substantially the form prescribed" for nomination petitions in A.R.S. § 16-315. A.R.S. § 16-801(3). As noted above, A.R.S. § 16-315 contains the "actual residence address" language requirement for the form of petition that was interpreted in *Jenkins*. Because, as *Jenkins* found, the language of § 16-315(A) reflected a legislative intent to require an actual residence address, as opposed to merely a post office box address, on nomination petitions, the Legislature likely intended that petitions for new party recognition include the signer's residence address or a description of residence location. *Cf. Obregon v. Indus. Comm'n of Ariz.*, 217 Ariz. 612, 616, 177 P.3d 873, 877 (App. 2008) (noting that courts interpret the same words used in different parts of the same act to have the same meaning).

Moreover, the same rationale for the residence address requirement in the case of nomination petitions applies with equal force to such requirement for new party petitions. As the Court in *Jenkins* noted, the purpose of the address requirement "is to determine whether the signer is a qualified elector." *Jenkins,* 218 Ariz. at 564, 190 P.3d at 178. An address requirement for new party recognition petitions, which similarly require that signers be qualified electors, would serve the same purpose of ensuring that only qualified individuals sign petitions

[1] This opinion does not analyze the law with regard to nomination petitions for candidates for the office of delegate to a convention for ratifying amendments to the federal constitution. *See* A.R.S. § 16-703.

for recognition of a new political party. Thus, under the reasoning and holdings of *Jenkins*, to be valid, signatures on petitions for new party recognition should contain the signer's actual residence address or some description of residence location, which may refer to a place, or to the relevant city, town or post office. *Id.* at 564, 190 P.3d at 178.

The obligations of election officials with regard to new party recognition petitions, however, are different from those pertaining to nomination petitions. As noted above, nomination petitions that are circulated, signed and filed with the appropriate filing officer are "presumptively valid" and remain so unless challenged by court action by an elector. *Id.* at 562-63, 190 P.3d at 176-77; *see also* A.R.S. § 16-351(A). Neither the statutory provisions nor the cases, however, suggest that any similar presumption is conferred on petitions for new party recognition, for which there is no specific statutory mechanism for court challenge. To the contrary, the requirement set out in A.R.S. § 16-803(C) that the county recorder "verify and count all signatures" on new party recognition petitions suggests that signatures on such petitions are *not* afforded any presumption of validity upon their filing with the appropriate filing officer.

Under *Jenkins*, the absence of the residence address information on new party recognition petitions arguably "provides a prima facie showing that the signers are not qualified electors." *See Jenkins,* 218 Ariz. at 565, 190 P.3d at 179 (stating that if an elector challenges signatures on nomination petitions based on the absence of a residence address or description of residence location, the presumption of such signatures' validity "disappears"). As noted above, however, the Court in *Jenkins* did not hold that such signatures necessarily *must* be invalidated where the evidence established that the signatures were those of qualified electors.

In the case of new party recognition petitions, county election officials "shall verify and count all signatures of qualified electors." A.R.S. § 16-803(C). Thus, although a signature on a filed new party recognition petition may not be entitled to any presumption of validity because the signature is not accompanied by a residence address, election officials nonetheless must verify such signature in accordance with A.R.S. § 16-803(C). If the election officials can verify such a signature as belonging to a qualified elector, then the signature should be counted. If the election officials are unable to verify such a signature as belonging to a qualified elector, then the signature should be invalidated. The absence of a residence address by itself, however, does not mandate the disqualification of the signature on a new party recognition petition if the county election officials are able to verify such signature.

III. Referendum, Initiative and Recall Petitions.

Title 19 governs petitions for referenda, initiative measures and recall. Unlike the Title 16 provisions that govern the types of petitions discussed above, Title 19 expressly sets forth specific information that must be included by signers of referendum, initiative and recall petitions. *E.g.*, A.R.S. §§ 19-112(A) (setting forth the information that must be included for the signer of a petition for initiative measure or referendum); 19-205(A) (setting forth the information that must be included for the signer of a recall petition); *see also Jenkins*, 218 Ariz. at 177, 190 P.3d at 563 (discussing A.R.S. § 16-315(A) and explaining that the statutory guidance of that provision "differs from the procedure for initiative, referendum, and recall elections, for which specific statutes dictate the information signers must provide on the petition forms").

The Court in *Jenkins* expressly stated that its analysis pertained only to nomination petitions. *Id.* at 178 n.3, 190 P.3d at 564 n.3. In so stating, the Court noted that "[i]nitiative, referendum, or recall petitions are governed by different statutes, *which require the Secretary of State to disqualify signatures* ['i]f the residence address or the description of residence location is missing.'" *Id.* (quoting A.R.S. §§ 19-121.01(A)(3)(b) and -208.01 (2002)) (emphasis added); *see also* A.R.S. § 19-121.02(A)(1) (providing that signatures on initiative, referendum, or recall petitions for which no "residence address or description of residence location is provided" "shall be disqualified" by the county recorder). Accordingly, *Jenkins* does not apply to referendum, initiative or recall petitions.

Signatures on petitions governed by Title 19 should be processed in accordance with that title. Specifically, signatures on such petitions that include only a post office address, as opposed to an actual residence address or description of residence location, must be disqualified. *See* A.R.S. § 19-121.02(A) (providing that the county recorder shall disqualify signatures if "[n]o residence address or description of residence location is provided").

Conclusion

Upon court challenge by an elector, signatures on nomination petitions that include only a post office address, and not a residence address or description of residence location, lose the presumption of validity that may otherwise attach to them. If the proponent of such signatures persuades the trier of fact that the signatures are those of qualified electors, then such signatures should be deemed valid.

Signatures on new party recognition petitions that include only a post office address, and not a residence address or description of residence location, are not afforded any presumption of validity. Election officials must verify and count all signatures of qualified electors, however, notwithstanding that the signature is accompanied by a post office box address and not an actual residence address. If such a signature can be verified, then the county election officials should count that signature.

Signatures on petitions for referendum, initiative or recall that include only a post office address, and not a residence address or description of residence location, must be disqualified.

Terry Goddard
Attorney General

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL December 9, 2009	No. I09-010 (R09-042, R09-043, R09-044) Re: March 2010 School District Override Elections Authorized by H.B. 2011

To: David Pauole
Holm Wright Hyde & Hays P.L.C.

A. Dean Pickett
Mangum Wall Stoops & Warden, P.L.L.C.

Eve A. Parnell
Hufford Horstman Mongini Parnell & Tucker P.C.

You have presented to the Attorney General's Office for review opinions prepared for Glendale Elementary School District, Arlington Elementary School District, Union Elementary School District, Phoenix Union High School District, Flagstaff Unified School District, Nogales Unified School District, and Apache Junction Unified School District analyzing the provisions of 2009 Ariz. Sess. Laws, 3d Spec. Sess., ch. 12, § 72(1) (" H.B. 2011") regarding school district override elections procedures for fiscal year 2009-2010. This Office concurs with your conclusion and issues this Opinion to address matters of statewide importance.

Question Presented

May school districts that conducted failed budget override elections in November 2009 conduct another override election in March 2010 pursuant to H.B. 2011, section 72(1)?

Summary Answer

For fiscal year 2009-2010, school districts that conducted failed budget override elections in November 2009 may conduct another override election in March 2010 pursuant to H.B. 2011, section 72(1).

Background

During its third special session, the Legislature adopted H.B. 2011, which the Governor signed on September 4, 2009.[1] 2009 Ariz. Sess. Laws, 3d Spec. Sess., ch. 12. House Bill 2011, section 72(1) allows school districts to conduct override elections in March 2010 for fiscal year 2009-2010 and states that notwithstanding any other law, for fiscal year 2009-2010:

> A school district may conduct an election on the second Tuesday in March 2010 to submit a proposed budget increase to the qualified electors in an amount of not more than fifteen per cent of the revenue control limit as prescribed in section 15-481, subsection G, Arizona Revised Statutes, as amended by this act. Override elections conducted in subsequent fiscal years shall be as prescribed by statute. An increase of not more than fifteen per cent that is subsequently approved by a majority of the qualified electors of the school district voting in the election shall replace any previously authorized increases approved by the qualified electors voting in the election pursuant to section 15-481, subsection E or F, Arizona Revised Statutes, as amended by this act, and section 15-482, Arizona Revised Statutes, as amended by this act.

[1] The Governor issued a line-item veto for portions of H.B. 2011 that are not at issue in this Opinion.

2009 Ariz. Sess. Laws, 3d Spec. Sess., ch. 12, § 72(1).[2] House Bill 2011 became effective on November 24, 2009. *See* the Arizona State Legislature's web site, 2009, Forty-ninth Legislature, Third Special Session (www.azleg.gov/GeneralEffectiveDates.asp).

Case law analyzing Arizona's school district override election statutes prior to the promulgation of H.B. 2011 stated that school districts had no legislative authority to conduct more than one override election in any given fiscal year but indicated that the Legislature could provide such authority. *Washington Elementary Sch. Dist. No. 6 v. Maricopa County*, 200 Ariz. 588, 593-94, 30 P. 3d. 655, 660-61 (App. 2001); *Wilson Elementary Sch. Dist. No. 7 v. Superior Court*, 158 Ariz. 339, 341, ¶ 28, 762 P.2d 626, 628 (App. 1988). After the adoption of H.B. 2011, several school districts that had held unsuccessful budget override elections on November 3, 2009, sought this opinion to determine whether H.B. 2011 provides the authority for school districts to conduct a second budget override election in March 2010.

Analysis

In *Wilson Elementary School District*, the school district lost an override election in February 1988 and sought to hold an additional election in the same fiscal year. *Wilson Elementary Sch. Dist.*, 158 Ariz. at 339-40, 762 P.2d at 626-27. The court in *Wilson* analyzed various school district override provisions delineated in A.R.S. § 15-481 as they existed at the time. Specifically, the court indicated that A.R.S. § 15-481(A) required the governing board to call for an override election where the proposed budget included an increase over statutory limits

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[2] House Bill 2011, section 72 also allows school districts that passed a proposed budget increase of not more than ten per cent of the revenue control limit during the November 2009 election or common school districts that had previous overrides that were still in effect on the effective date of H.B. 2011 to hold elections in March 2010 to submit to the qualified electors a proposed budget increase in the amount of not more than five per cent or seventeen per cent of the revenue control limit respectively. 2009 Ariz. Sess. Laws, 3d Spec. Sess., ch. 12, § 72(2), (3).

and to prepare an alternate budget that excluded an increase in the budget of more than the amount permitted. It also indicated that A.R.S. § 15-481(R) required the governing board to adopt the alternate budget that excluded the budget increase beyond what was permitted if the voters rejected the proposed budget. *Id.* at 340-41, 762 P.2d at 627-28. The court stated that the "statutory scheme is antithetical to holding more than one override election each budget year" and held that "a district, having lost (or won) an override election, is not entitled to have that school year budget submitted to the voters a second time." *Id.*

The Legislature subsequently amended A.R.S. § 15-481 and removed the specific language upon which the *Wilson* court based its decision. *Washington Elementary Sch. Dist.*, 200 Ariz. at 591, 30 P. 3d. at 658. Accordingly, the Washington Elementary School District attempted to call for a second override election during the 1999-2000 fiscal year. *Id.* at 589, 30 P. 3d. at 656. Despite acknowledging the intervening statutory changes, the court in *Washington* still concluded that the ultimate holding of *Wilson* remained intact. *Id.* at 592, 30 P. 3d. at 659. The court determined that school districts had no discretionary authority to call an override election under A.R.S. § 15-481(A) and that A.R.S. § 15-481(A) instead imposed a mandatory duty to order an election only when the proposed budget exceeded the aggregate budget limit for the year. *Id.* The court concluded that "the statutory scheme authorize[d] only one school district budget override election for any given year, and then only to the extent required by the provisions of [A.R.S.] § 15-481(A)." *Id.* at 593, 30 P.3d. at 660. However, the court also indicated that the Legislature could change this result by amending A.R.S. § 15-481 to authorize a school district to hold more than one override election during a fiscal year. *Id.*

Section 15-481(A) still requires school districts to order override elections to be held in November when their proposed budget exceeds the aggregate budget limit for the year.[3] However, despite this mandate, the Legislature granted school districts the discretionary authority through H.B. 2011, section 72 to conduct an override election for this fiscal year in March 2010 to achieve the increased funding limits that the bill establishes. Specifically, a school district may:

> conduct an election on the second Tuesday in March 2010 to submit a proposed budget increase to the qualified electors in an amount of not more than fifteen per cent of the revenue control limit as prescribed in section 15-481, subsection G, Arizona Revised Statutes, as amended by this act.

2009 Ariz. Sess. Laws, 3d Spec. Sess., ch. 12, § 72(1). Moreover, H.B. 2011 authorizes school districts to exercise this discretionary authority "[n]othwithstanding any other law." *Id.*

The primary rule of statutory construction is to find and give effect to legislative intent. *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 legislative intent is a statute's own words. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). Where the language of the statute is plain and unambiguous, the text must generally be followed as written. *Id.* When the statute's

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[3] A.R.S. § 15-481(A) states the following:

> If a proposed budget of a school district exceeds the aggregate budget limit for the budget year, at least ninety days before the proposed election the governing board shall order an override election to be held on the first Tuesday following the first Monday in November as prescribed by section 16-204, subsection B, paragraph 1, subdivision (d) for the purpose of presenting the proposed budget to the qualified electors of the school district who by a majority of those voting either shall affirm or reject the budget. In addition, the governing board shall prepare an alternate budget which does not include an increase in the budget of more than the amount permitted as provided in section 15-905. If the qualified electors approve the proposed budget, the governing board. . .shall follow the procedures described in section 15-905 for adopting a budget that includes the authorized increase. If the qualified electors disapprove the proposed budget, the governing board shall follow the procedures prescribed in section 15-905 for adopting a budget that does not include the proposed budget increase. . . .

language is not clear, legislative intent is determined 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.*

Here, the plain language of H.B. 2011, section 72(1) allows school districts to hold budget override elections in March 2010 in order to seek proposed budget increases based upon the new limits that the bill establishes. It gives school districts this authority notwithstanding any other law.

"Notwithstanding any other law" is plain and unambiguous. "Notwithstanding" means "despite" or "in spite of." *Black's Law Dictionary* 1091 (7th ed. 1999). Consistent with this definition, "notwithstanding any other law" means that statutory provisions containing this phrase operate in spite of any existing or pre-existing law. *See, e.g., Mapoy v. Carroll*, 185 F.3d 224, 229 (4th Cir. 1999) (interpreting "notwithstanding any other provision of law" to mean that all other jurisdictional statutes shall be of no effect); *U.S. v. Fernandez*, 887 F.2d 465, 468 (4th Cir. 1989) (interpreting "notwithstanding any other provision of law" in the Ethics in Government Act to mean that the "conferral of prosecutorial powers [on an independent counsel] should not be limited by other statutes"). Therefore, despite any other law—including A.R.S. §15-481(A)'s provisions that dictate when school districts must hold override elections—school districts have discretion to hold override elections in March 2010 for this fiscal year to seek the increased budget amounts that H.B. 2011, section 72(1) authorizes.

Section 72(2) specifically addresses school districts that passed override elections in November 2009. This section states that if a school district passed a proposed budget increase of not more than ten per cent of the revenue control limit "in an election conducted on the first Tuesday in November 2009, the school district may subsequently conduct an election on the second Tuesday in March 2010 to submit to the qualified electors a proposed budget increase in an amount of not more than an additional five per cent of the revenue control limit." 2009 Ariz. Sess. Laws, 3d Spec. Sess., ch. 12, § 72(2). Section 72(2) explains how the March 2010 override applies to districts that approved overrides in November 2009. The legislation also does not place any restrictions on districts in which overrides failed to pass in November 2009. Thus, the broad authorization in section 72(1) to conduct override elections in March 2010 applies to all school districts, including those in which voters defeated overrides in November 2009.

Conclusion

For fiscal year 2009-2010, school districts that conducted failed budget override elections in November 2009 may conduct another override election in March 2010 pursuant to HB 2011, section 72(1).

Terry Goddard
Attorney General

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL November 24 , 2009	No. I09-009 (R08-059) Re: Management of the State's Defined Contribution Retirement System

To: Paul Matson, Director
Arizona State Retirement System

Questions Presented

The Arizona State Retirement System ("ASRS") operates a Defined Contribution Retirement System ("System") for certain public employees and retirees who were employed during the period of 1953 through 1976 and who did not subsequently elect to participate in the State's newer Defined Benefit Plan ("Plan"). There are approximately 1800 remaining System participants. You have asked the following questions relating to the accounts and monthly retirement benefits of the System participants:

1. Under the System as enacted by the Legislature in 1953 and as subsequently amended, and under Article 29 of the Arizona Constitution, are there any circumstances in which the ASRS must or may reduce the accounts and payments to System members and beneficiaries?

2. If the accounts and payments may be reduced, is there a minimum amount that must be paid to System members and beneficiaries? For example, is that portion of their benefits derived from contributions plus interest guaranteed, as opposed to the increased benefits resulting from funding surpluses? Are they entitled to at least the amount of the comparable benefit that would be received by a Plan member with the same number of years of service, retirement date and salary history?

3. If benefits cannot be reduced below the comparable Plan amount, would the benefit amount be measured prospectively from the date of reduction of System benefits, or would the ASRS take into account the entire amount that the member had received since the date of retirement before paying the System member the defined benefit plan amount?

4. If there are insufficient funds to pay legally required benefits to members entitled to a System benefit, what would be the lawful source of funds to pay remaining benefits? That is, if a certain level of benefits is required to be paid that is in excess of the System fund balance would the remaining benefits be payable from the Plan trust fund or only from a legislative appropriation?

5. Finally, if reductions in benefits are permissible and ultimately required, what is the lawful method for calculating the amount of each System member's benefit reduction?

Summary Answer

The plain language of Article 29 of the Arizona Constitution prohibits the reduction of benefit payments to System members. Because ASRS may not reduce System members' benefits, we do not reach the second, third, and fifth questions. If there are insufficient funds to pay benefits to System members who retired on or after July 1, 1981, those benefits would be payable from the Plan trust fund. If there are insufficient funds to pay benefits to System members who retired before July 1, 1981, the State is liable for the shortfall, and a legislative appropriation would be necessary to satisfy the obligation.

Background

In 1953, the Legislature created a hybrid defined contribution program for public employees—the Defined Contribution Retirement System. 1953 Ariz. Sess. Laws ch. 128. The System is a "defined contribution" program because each pay period the member and employer pay a specified (or defined) amount into a retirement account. Ultimately, a member's retirement benefit is based on the value of the account at retirement. It is a "hybrid" program because, unlike a typical defined contribution plan in which a retiree draws on his or her accumulated account balance during retirement, on the date of retirement the account value is converted into an annuity calculated using the member's age.

When it created the System, the Legislature provided a method whereby any trust fund "surplus"[1] (the value of the fund minus the total future retirement liabilities of the fund) could be distributed to retirees by increasing annuity payments. 1953 Ariz. Sess. Laws ch. 128, § 18(c). However, that enactment also gave ASRS the power to reduce or eliminate the enhanced annuity payments if "subsequent experience determines that the fund is inadequate to maintain reserves and to pay such benefits." *Id.* In 1960, the Legislature gave ASRS the authority to distribute a prorated portion of any surplus to non-retired members by increasing their retirement accounts. 1960 Ariz. Sess. Laws ch. 90, § 1. The 1960 enactment also preserved the right to reduce or eliminate the increases to annuities and retirement accounts in the event that there were insufficient reserves to pay the benefits deriving from the surplus.

Commencing in 1970, the Legislature embarked on a series of efforts to transition public employees into the State's newly created defined benefit Plan. All State employees who were System members were allowed to elect to participate in the Plan, and all new State employees

[1] The surplus generally derives from either investment returns in excess of anticipated returns, or amounts forfeited by members who withdraw from the System prior to retirement.

were required to participate in the Plan starting July 1, 1971.[2] 1970 Ariz. Sess. Laws ch. 134. In 1975, the Legislature required that all political subdivisions participating in the System begin participating in the Plan and give their existing employees the right to elect to participate in the Plan, and that all of their new employees hired on and after July 1, 1976, be members of the Plan. 1975 Ariz. Sess. Laws ch. 44. In 1980, the Legislature directed that all non-retired members of the System and their accounts were to be transferred to the Plan effective July 1, 1981.[3] 1980 Ariz. Sess. Laws ch. 238. The 1980 enactment included the following proviso in § 1(B):

> In no event may benefits payable under the retirement plan to a non-retired member of the state retirement system who has transferred to membership in the state retirement plan under this section be less than the retirement benefits payable to the member under the retirement system had the member remained a member of the system.

Although the Arizona Legislature has made numerous amendments to the System over the more than 50 years of its existence, the Legislature never eliminated ASRS' express right to reduce members' accounts and annuity payments that were derived from surplus funds. Even in 1995, when the Legislature repealed the System statutes entirely, it preserved both System members' rights to surplus and the State's right to reduce accounts and annuity payments that were based on surplus allotments. 1995 Ariz. Sess. Laws ch. 32, § 24.

In 1998, the Legislature approved Senate Concurrent Resolution 1009, 43d Leg., 2d Reg. Sess. (Ariz. 1998), which referred a constitutional amendment on public retirement systems to

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[2] The Legislature required ASRS to provide information to members to assist them in electing between the two programs. 1970 Ariz. Sess. Laws ch 134, § 6(C). The *Prospectus* prepared by the ASRS in response to this mandate noted several times that certain benefits under the System were not guaranteed. You noted in your letter that those few who chose to stay in the System and take the risk of pension reductions have generally received higher retirement payments than those who opted out and into the Plan.

[3] All references to "System members" in this opinion include employees who retired after July 1, 1981 (whose accounts were transferred to the Plan, but who retained the right to choose a System benefit upon retirement), as well as those employees who retired before July 1, 1981.

Arizona voters as Proposition 100. At the 1998 General Election, the voters approved Proposition 100, which is now Article 29 of the Arizona Constitution. Article 29 provides the following:

> **§ 1. Public retirement systems**
>
> **A.** Public retirement systems shall be funded with contributions and investment earnings using actuarial methods and assumptions that are consistent with generally accepted actuarial standards.
>
> **B.** The assets of public retirement systems, including investment earnings and contributions, are separate and independent trust funds and shall be invested, administered and distributed as determined by law solely in the interests of the members and beneficiaries of the public retirement systems.
>
> **C.** Membership in a public retirement system is a contractual relationship that is subject to article II, § 25, and public retirement system benefits shall not be diminished or impaired.

In your letter requesting this opinion, you indicate that over the years the ASRS Board has on multiple occasions increased retirement accounts and annuity payments of those individuals eligible to receive a System benefit. You further indicate that, due to the unprecedented disruption of world markets and for the first time since the creation of the System in 1953, there is potential that the funds set aside in reserve for System benefits might be insufficient to pay future annuity payments.

Analysis

I. Article 29 Prevents ASRS from Reducing System Annuity Payments.

When the Legislature created the System in 1953, it expressly gave the ASRS Board discretion, as a fiduciary, to reduce accounts and benefits. Under the program, the Legislature authorized ASRS to increase annuity payments when there was a surplus and to decrease those payments if "subsequent experience determines the fund is inadequate to maintain reserves and to pay such benefits." 1953 Ariz. Sess. Laws ch. 128, § 18(c). As explained below, the voters removed this authority from ASRS upon passage of Proposition 100, which became Article 29 of the Constitution, by prohibiting the "diminish[ment] or impair[ment]" of retirement benefits.

Article 29 requires that public retirement systems be "funded with contributions and investment earning using actuarial methods and assumptions that are consistent with generally accepted actuarial standards." Ariz. Const. Art. XXIX, § 1(A). It also requires that "[t]he assets of public retirement systems . . . be invested, administered and distributed as determined by law solely in the interests of the members and beneficiaries of the public retirement systems." *Id.* §1(B). Finally, it establishes that "[m]embership in a public retirement system is a contractual relationship that is subject to article II, § 25, and public retirement system benefits *shall not be diminished or impaired.*" *Id.* §1(C) (emphasis added). The question is whether the language in Paragraph C stating that benefits "shall not be diminished or impaired" precludes ASRS from reducing benefits that were provided for in the legislation governing the System.

Fundamental principles of constitutional construction guide the analysis. *Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994). The principal purpose is to effectuate the intent of the framers of the provision and, in the case of a constitutional amendment, the intent of the electorate. *Id.*; *Hernandez v. Lynch*, 216 Ariz. 469, 472, ¶8, 167 P.3d 1264, 1267 (App. 2007). Intent is first to be determined from the provision's language; if that language is plain and unambiguous leading to only one meaning, then the text of the provision is followed as written, and no extrinsic matter is considered. *Kimu P. v. Arizona Dep't of Economic Sec.*, 218 Ariz. 39, 43, ¶16, 178 P.3d 511, 515 (App. 2008); *see also Jett*, 180 Ariz. at 119, 882 P.2d at 430. However, if the language is ambiguous, other principles of construction are utilized to determine intent. *Bentley v. Building Our Future*, 217 Ariz. 265, 270, ¶13, 172 P.3d 860, 865

(App. 2007). Language is ambiguous if there is more than one rational or reasonable interpretation. *Id.*

Determining whether Article 29 prohibits the reduction of System annuity payments requires analysis of the phrase "public retirement benefits shall not be diminished or impaired." Article 29 does not define "benefit", "diminish", or "impaired". Nor are these terms defined in Article 2 of Title 38 of the Arizona Revised Statutes, the statutory section addressing the state retirement system and the operations of ASRS.

The American Heritage Dictionary defines "benefit" in one denotation as "[s]omething that promotes or enhances well-being; advantage" and in another, more specific denotation as "[p]ayments made or entitlements available in accordance with a wage agreement, insurance contract, or public assistance program." *The American Heritage Dictionary* 171 (2d Coll. ed. 1976); *Simpson v. Owens*, 207 Ariz. 261, 273, ¶35, 85 P.3d 478, 490 (App. 2004) (noting that, in construing statutes, courts may reference well-known and reputable dictionaries). Thus, "benefit" has a common meaning of "financial benefit" or a specific payment of money. *Downs v. Sulphur Springs Valley Elec. Coop.*, 80 Ariz. 286, 293, 297 P.2d 339, 343 (1956) (when construing language contained in constitutional provision adopted by a vote of the people, words "should be given the meaning most common to the ordinary individual"). Likewise, "impair" has a common meaning of "[t]o diminish in strength, value, quantity, or quality." *The American Heritage Dictionary* 644 (2d Coll. ed. 1976). And "diminish" is defined as "mak[ing] smaller or less or caus[ing] to appear smaller or less." *Id.* at 397. As a result, this constitutional language prohibits the reduction of the annuity payments to System members. But, even if the term "benefit" were ambiguous, application of other principles of construction would yield the same result.

Courts construe language in a provision as a whole, giving effect to each word and phrase, so that no part is rendered void, superfluous, contradictory or insignificant. *Pinal Vista Props., L.L.C. v. Turnbull*, 208 Ariz. 188, 190, ¶10, 91 P.3d 1031, 1033 (App. 2004); *see also Mejak v. Granville*, 212 Ariz. 555, 557, ¶9, 136 P.3d 874, 876 (2006) ("We must interpret the statute so that no provision is rendered meaningless, insignificant, or void."). As noted above, subsection C of Article 29 states that, "[m]embership in a public retirement system is a contractual relationship that is subject to Article II, § 25, and public retirement system benefits shall not be diminished or impaired." Article 2, section 25, of the Arizona Constitution states that "[n]o . . . law impairing the obligation of a contract[] shall ever be enacted." Thus, the first clause in Article 29 protects public employees' contractual rights in their public retirement plans. The rule that each phrase in a provision is to be given meaning so that it is not rendered superfluous compels the conclusion that the second clause—"public retirement system benefits shall not be diminished or impaired"—provides additional, substantive protection in the form of a prohibition against reduction of benefit payments.

The common definition of the terms discussed above and the placement of the phrase "benefits shall not be diminished or impaired" in the second clause of subsection C support the conclusion that Article 29 not only preserves the contractual rights that public employees hold in the terms of their retirement plans, but also prohibits ASRS from reducing the actual benefit payments to System members.[4]

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[4] Because we answer in the negative the question of whether Article 29 of the Arizona Constitution permits the ASRS Board to reduce benefit payments to System members, we do not reach the questions in the opinion request relating to the allowable amount of reductions and the manner in which the ASRS Board would determine those reductions.

II. The Plan Trust Fund Is Liable for Shortfalls for Monthly Benefit Payments for Those Who Retired on or after July 1, 1981, and Legislative Appropriations Are Necessary for Shortfalls in Benefits for Those Who Retired Before July 1, 1981.

The 1980 legislation which transferred to the Plan all former System members who were not retired as of July 1, 1981, also directed that their accounts be transferred from the System to the Plan. 1980 Ariz. Sess. Laws ch. 238. As a result of this legislation, these individuals became Plan members and their funds were effectively comingled with the Plan trust fund. It follows that their annuities are payable from the Plan trust fund. Therefore, the Plan trust fund is responsible to make all their annuity payments, even if at retirement they elected a System benefit.

Those individuals who retired prior to July 1, 1981, remained in the System without any promise from the Legislature that they would be members of the Plan. Pursuant to Article 29 of the Constitution, the assets of public retirement systems are trust funds and can be distributed "solely in the interests of the members and beneficiaries." Ariz. Const. art. XXIX, § 1(B). Since they are not members of the Plan, the Plan trust fund cannot be used to make their annuity payments. Any shortfall in the System would be an obligation of the State and would require a legislative appropriation.

Conclusion

The plain language of Article 29 of the Arizona Constitution prohibits ASRS from reducing benefit payments to System members. As regards the lawful source or sources of funds to satisfy a shortfall in the System fund balance, the Plan trust fund would furnish the benefit payments of those individuals who retired on or after July 1, 1981, since those individuals now have benefits and accounts that are funded through the Plan. For those System members who retired before July 1, 1981, if there are insufficient monies remaining in the System trust fund to pay all of their guaranteed benefits, those remaining benefits would require a legislative appropriation.

Terry Goddard
Attorney General

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL September 29, 2009	No. I09-008 (R09-026) Re: Diminution of School District Boundaries Under A.R.S. § 15-460(B)

To: Britt W. Hanson
Chief Civil Deputy County Attorney
Cochise County Attorney's Office

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), you submitted for review an opinion that you prepared for the Cochise County School Superintendent. This Office is revising the conclusion reached and issues this opinion to provide guidance concerning this matter to all school districts within Arizona.

Questions Presented

1. Can the territory that comprises Rucker Elementary School District eliminate its boundaries and thereby become unorganized territory if its citizens follow and complete the procedures set forth in A.R.S. § 15-460(B) for diminishing a school district's boundaries?

2. If so, in what manner should Rucker dispose of its assets?

Summary Answers

1. Under A.R.S. § 15-460(B), the boundaries of Rucker Elementary School District may be diminished, not eliminated.

2. Having concluded that the boundaries of Rucker may be diminished, not eliminated, under A.R.S. § 15-460(B), we do not reach the second question.

Background

The Cochise County School Superintendent is considering suspending and lapsing Rucker Elementary School District pursuant to A.R.S. § 15-469. Under that statute, the county school superintendent of a common school district in which for three months during the school year there has been a student count of less than eight pupils between the ages of six and twenty-one years may suspend the common school district and report the suspension to the board of supervisors at its next meeting. The board of supervisors may declare the common school district lapsed and attach its territory to one or more of the adjoining school districts, dispose of the property of the lapsed district, and apply the proceeds to the credit of the lapsed district. The citizens of Rucker have asked if, alternatively, Rucker may become an unorganized territory.[1] The opinion submitted for review states that Rucker citizens are interested in this alternative because their tax rate as an unorganized territory would be lower than if their property is attached to an adjacent school district. The opinion also notes that currently no residents of Rucker have school-aged children.

Analysis

The Arizona Legislature in A.R.S. § 15-441(A) expressed its intent that existing school districts shall continue in existence. "The bases of the educational organization of the county and

[1] "Organized territory" refers to land already situated within the boundaries of an organized school district. "Unorganized territory" refers to lands that are not within the boundaries of any organized school district.

state are the school districts as defined in § 15-101. Existing districts shall be continued, and new districts may be formed as provided in this title." A.R.S. § 15-441(A).

Title 15, Article 3 (A.R.S. §§ 15-441 through -469) provides a number of methods by which school district boundaries may be changed (e.g., consolidation, unification, dissolution, lapsing, diminishing). While there are statutes addressing the manner in which an unorganized territory may become an organized school district or may join an existing organized school district, there are no statutes that directly allow a school district, in its entirety, to become an unorganized territory. Section 15-443 provides that an unorganized territory may form new common school districts. Under A.R.S. §§ 15-445 and 15-825.02, residents of an unorganized territory must join an existing adjacent school district if the annual number of certificates of educational convenience[2] or students attending through open enrollment in any adjacent school district exceeds one hundred fifty. Under A.R.S. § 15-460(A), a school district may change its boundaries to include adjacent unorganized territory.

The boundaries of a school district may be diminished under A.R.S. § 15-460(B). The territory excluded or removed from the school district becomes unorganized territory and will no longer be part of the school district or of any other school district. Section 15-460(B) states:

> When ten per cent or more of the qualified electors residing in a school district desire that the boundaries of the school district be diminished, they may present a petition to the county school superintendent setting forth the change of boundaries desired and the reasons for such change. The county school superintendent shall prepare and transmit to the governing board of the school district proposed to be diminished a report providing specific information regarding the future availability of educational programs in the area of the district to be detached and in the area which will constitute the remaining district, availability of pupil transportation services and the financial impact on taxpayers. The governing board shall mail or distribute the report to all households located in the school district. The county school

[2] A certificate of educational convenience authorizes a pupil who resides in unorganized territory to attend a school in an adjoining school district or county. A.R.S. § 15-825(A).

> superintendent shall submit the question of diminishing the school district boundaries to the qualified electors of the school district. The election shall be held as provided in § 15-459. A majority of the qualified electors voting on the question in the territory to remain in the existing school district and a majority of the qualified electors voting on the question in the territory to be excluded must approve the change. If approved, the change is effective from and after June 30 next following the election.

Your opinion stated:

> If "diminished" can mean diminished to the point that it is eliminated, then this statute would allow elimination of a district. As a result, the former district territory would become unorganized. Nothing in the statute limits the amount of territory by which a district can be diminished.
>
> . . . [I]t is our opinion that citizens of Rucker could become an unorganized territory if they followed and completed the procedures set forth in A.R.S. § 1[5]-460.B[3] for diminishing a district.

The question is whether the meaning of the word "diminished" can be construed as including "eliminated." The primary goal of statutory construction is to ascertain and give effect to the Legislature's intent in enacting the statute. *Mejak v. Granville,* 212 Ariz. 555, 557, 136 P.3d 874, 876 (2006). The statute's language is the best indicator of that intent. *Id.* When a statute's plain language is clear and unambiguous, courts give effect to that language without resorting to any other rules of statutory construction. *Ariz. Dep't of Revenue v. Salt River Project Agric. Improvement & Power Dist.,* 212 Ariz. 35, 39, 126 P.3d 1063, 1067 (App. 2006). In applying a statute, words are given their ordinary meaning, unless the Legislature has offered its own definition of the words or it appears from the context that a special meaning was intended. *Mid Kansas Fed. Sav. & Loan Ass'n of Wichita v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991); A.R.S. § 1-213. The ordinary meaning of "diminish" is "to make, or cause to seem, smaller or less." *Webster's II New Riverside University Dictionary* 378 (1984). The ordinary meaning of "eliminate" is "to get rid

[3] The opinion cites to A.R.S. § 14-460(B). The correct citation is A.R.S. § 15-460(B).

of: remove." *Id.* at 425. Because these two words have such clearly distinct meanings, one cannot read "diminish" to mean elimination. Because the plain language of A.R.S. § 15-460(B) is clear, a school district may not be eliminated through use of the procedures prescribed in that statute.

However, even if the plain language were not clear, other principles of statutory construction compel the same conclusion. "A cardinal rule of statutory interpretation is to avoid, if possible, an interpretation which renders superfluous any portion of a statute." *In re Maricopa County Superior Court No. MN 2001-001139*, 203 Ariz. 351, 354, ¶ 17, 54 P.2d 380, 383 (App. 2002). As set forth above, A.R.S. § 15-460(B) states that

> [t]he county school superintendent shall prepare and transmit to the governing board of the school district proposed to be diminished a report providing specific information regarding the future availability of educational programs in the area of the district to be detached and in ***the area which will constitute the remaining district***. . . . A majority of the qualified electors voting on the question ***in the territory to remain in the existing school district*** and a majority of the qualified electors voting on the question in the territory to be excluded must approve the change.

(Emphasis added.) The statute's references to "the remaining district" and "the territory to remain in the existing school district" indicate that the drafters of the statute intended that the procedures taken under it would not entirely eliminate the district, but, rather, make it smaller. To construe "diminish" to mean "eliminate" would render these references void or superfluous. Based on the foregoing, the only logical conclusion is that the Legislature did not intend that A.R.S. § 15-460(B) provide a means by which a school district's boundaries could be eliminated in their entirety.

Moreover, statutory construction requires that the provisions of a statute be read and construed in the context of related provisions and in light of their place in the statutory scheme. *City of Phoenix v. Superior Court*, 144 Ariz. 172, 175-76, 696 P.2d 724, 727-28 (App. 1985). Title 15, Article 3 (School District Boundary Provisions and Elections) (A.R.S. §§ 15-441 through -469) is Arizona's statutory law governing the alteration of school district boundaries and contains several provisions under which a qualifying school district may eliminate its boundaries.[4] Section 15-461(A) requires that a transporting school district that does not offer a full-time instructional program in any grade level and transports more than 350 pupils annually to an adjacent school district or school districts be "dissolve[d]." The geographic boundaries of the transporting school district are annexed to an adjacent school district. *Id.* Under A.R.S. § 15-467(A), when all the common school districts comprising a union high school district unite into one common school district, the union high school district is "deemed to be dissolved." The union high school district then becomes a high school district. Under A.R.S. §§ 15-461 and 15-467, the territory formerly within the school district(s) remains organized territory.

The incorporation of school districts also operates to dissolve school district boundaries. Under A.R.S. § 15-444, qualifying adjoining school districts may unite and form a union high school district. The boundaries of the formerly existing school districts are dissolved, and they are automatically incorporated into the new union high school district. *See Garrett v. Folsom*, 88 Ariz. 380, 384, 357 P.2d 130, 134 (1960). Under A.R.S. § 15-459, two or more qualifying school districts or parts of school districts may consolidate and become one new school district. In consolidation, two or more entities are dissolved and a new entity takes its place. Ariz. Att'y Gen. Op. I84-083. Under A.R.S. §§ 15-444 and 15-459, the territory formerly within the school district(s) remains organized territory. In short, there are many mechanisms in Title 15 whereby school district boundaries are changed or dissolved. If the Legislature had wanted A.R.S. § 15-460(B) to provide a

[4] Section 5 of the federal Voting Rights Act requires that any proposed change in a district boundary that will affect voting must be submitted to the U.S. Department of Justice for preclearance to ensure that the purpose or effect of the change will not be a denial or abridgment of the right to vote on account of race, color, or membership in a language minority group. 42 U.S.C. § 1973c; 28 C.F.R. § 51.10 (2008).

means by which a school district could be entirely eliminated, it certainly could have drafted it to so provide. It did not.

Conclusion

Section 15-460(B) does not provide a mechanism through which Rucker Elementary School District can eliminate its boundaries, thereby becoming an unorganized territory in its entirety. Having so concluded, we therefore do not reach the second question regarding the manner in which to dispose of the assets of Rucker as an unorganized territory.

Terry Goddard
Attorney General

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL September 2, 2009	No. I09-007 (R09-005) Re: A.R.S. § 15-341.01, Proposition 301, and the Voter Protection Act

To: The Honorable Tom Horne
Superintendent of Public Instruction

Questions Presented

You have asked whether Arizona Revised Statutes ("A.R.S.") § 15-341.01(B), as amended in 2007, conflicts with Proposition 301 by defining "one hundred eighty days" as "one hundred eighty days of instruction *or an equivalent number of minutes of instruction per school year based on a different number of days of instruction* approved by the school district governing board or charter school governing body." 2007 Ariz. Sess. Laws, ch. 264, § 4 (emphasis added). If the 2007 amendment to A.R.S. § 15-341.01(B) conflicts with Proposition 301, you have asked whether the amendment violates the voter protection provisions delineated in the Arizona Constitution, article IV, part 1, section 1(6) and (14) because it does not further Proposition 301's purpose.

Summary Answer

Section 15-341.01(B) as amended does not conflict with Proposition 301 by defining "one hundred eighty days" to include "an equivalent number of minutes of instruction per school year based on a different number of days of instruction." The amendment to A.R.S. § 15-341.01(B) did not repeal, amend, or supersede provisions of or appropriate or divert funding created or allocated by Proposition 301. Therefore, the Voter Protection Act's provisions delineated in the Arizona Constitution, article IV, part 1, section 1(6) and (14) do not apply to the amendment to A.R.S. § 15-341.01(B), which merely defined the meaning of the phrase "one hundred eighty days."

Background

In June 2000, the Legislature approved Senate Bill ("S.B.") 1007, which proposed a .6% increase in the state transaction privilege tax and a .6% increase in the state use tax to provide increased funding for public schools. 2000 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, §§ 37, 40. S.B. 1007 contained a number of provisions, including the addition of a 180-day school year requirement phased in over a period of five years. *Id.* §§ 5, 54. The Legislature referred only certain portions of S.B. 1007 to the 2000 general election ballot. *Id.* § 64; Ariz. Secretary of State, Ballot Propositions & Judicial Performance Review for the November 7, 2000, General Election at 169. The provisions of S.B. 1007 referred to the ballot became Proposition 301 and included the following:

- an incremental increase in the rate of the state transaction privilege tax and state use tax and directions regarding the use of those monies;
- inflation adjustments in the state aid to the education base level and other components of the revenue control limit;
- a termination of the exemption from the revenue control limit for excess utility costs;

- a limitation on the school district qualifying tax rates and the county equalization assistance for education rate; and

- a state income tax credit to mitigate the increased transaction privilege and use taxes.

2000 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 64; Ariz. Att'y Gen. Op. I01-020. All of the provisions in S.B. 1007 were contingent upon the voters' approval of Proposition 301 at the 2000 general election. 2000 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 67 (conditional enactment); Ariz. Att'y Gen. Ops. I01-020, I01-014, I01-007, n.2. The proposition passed and was implemented after May 31, 2001. *See* 2000 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 66 (indicating a delayed implementation).

The Legislature referred section 38 of S.B. 1007 to the ballot as part of Proposition 301. 2000 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 38; Ariz. Secretary of State, Ballot Propositions & Judicial Performance Review for the November 7, 2000, General Election at 169. Section 38 stated in part as follows:

> 5. After transferring monies pursuant to paragraphs 1, 2, and 3 of this subsection, one-twelfth of the following amounts shall be transferred each month to the department of education for the increased cost of basic state aid under section 15-971 due to added school days and associated teacher salary increases enacted in 2000:
>
> (a) In fiscal year 2001-2002, $15,305,900.
>
> (b) In fiscal year 2002-2003, $31,530,100.
>
> (c) In fiscal year 2003-2004, $48, 727,700.
>
> (d) In fiscal year 2004-2005, $66,957,200.
>
> (e) In fiscal year 2005-2006 and each fiscal year thereafter, $86,280,500.

A.R.S. § 42-5029 (E)(5) (added by Proposition 301, § 38); Ariz. Secretary of State, Ballot Propositions & Judicial Performance Review for the November 7, 2000, General Election at 171.

Provisions of S.B. 1007 that the Legislature did not refer to the ballot as part of Proposition 301 included section five of the bill, which added A.R.S. § 15-341.01 and stated the following regarding the number of days of school:

> A. Notwithstanding any other law, school instruction shall be conducted in each public school in this state for school sessions that total at least one hundred eighty days each school year. The superintendent of public instruction shall cause all relevant school funding formulas to be adjusted to reflect instruction on the one hundred eighty days equivalency. The department of education shall adjust the amount of state aid distributed to school districts pursuant to section 15-971 to correspond to the increased number of school days prescribed by this section.
>
> B. The legislative council shall prepare draft legislation that conforms the statutes and furthers the purposes of this section pursuant to Article IV, Part 1, Section 1, Constitution of Arizona.

2000 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 5 (codified at A.R.S. § 15-341.01). The Legislature also did not refer to the ballot section 54 of S.B. 1007, which phased in the increased number of days over a five-year period between fiscal years 2001-2002 and 2005-2006 by adding one day each fiscal year. *Id.* § 54; *see also* Ariz. Secretary of State, Ballot Propositions & Judicial Performance Review for the November 7, 2000, General Election at 169 (not including sections five and 54 in the ballot measure). Previously, school sessions generally consisted of 175 days each school year. 2000 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 54.

In 2007, the Legislature amended A.R.S. § 15-341.01(B) to state the following:

> For the purposes of this section, "one hundred eighty days" means one hundred eighty days of instruction *or an equivalent number of minutes of instruction per school year based on a different number of days of instruction approved by the school district governing board or charter school governing body.*

2007 Ariz. Sess. Laws, ch. 264, § 4 (emphasis added). Although the Legislature did not codify this language as a statutory amendment until 2007, it promulgated session laws every year between 2003 and 2006 that were virtually identical to the 2007 amendment to A.R.S. § 15-

341.01(B). *See* 2006 Ariz. Sess. Laws, ch. 353, § 14 (H.B. 2874); 2005 Ariz. Sess. Laws, ch. 329, § 9 (S.B. 1516); 2004 Ariz. Sess. Laws, ch. 278, § 9 (S.B. 1405); 2003 Ariz. Sess. Laws, ch. 264, § 41 (H.B. 2534) (all stating that the phrase "'one hundred eighty days' in section 15-341.01 . . . means one hundred eighty days of instruction or an equivalent number of minutes of instruction per school year based on a different number of days of instruction approved by the school district governing board"). These session laws were entitled "Calculation of Instructional Days," and they authorized schools "to complete the minimum number of instructional hours in less than 180 days" under an alternative calculation of time. *Id.*; Arizona H.R., House Summary as Transmitted to the Governor for H.B. 2534, 46th Leg., 1st Reg. Sess. (06/12/03); Ariz. H.R., House Summary as Transmitted to the Governor for S.B. 1405, 46th Leg., 2d Reg. Sess. (06/09/04); Ariz. H.R., House Summary as Transmitted to the Governor for H.B. 2874, 47th Leg., 2d Reg. Sess. (06/17/06); *see also* Ariz. State S., Final Amended Fact Sheet for S.B. 1516/H.B. 2767, 47th Leg., 1st Reg. Sess. (06-15-05).[1]

You have asked whether the 2007 amendment to A.R.S. § 15-341.01(B) that defined one hundred eighty days of instruction per school year as including "an equivalent number of minutes of instruction based on a different number of days" conflicts with Proposition 301, thus failing to further the purpose of the proposition in violation of the Arizona Constitution, article IV, part 1, section 1(6)(C) and (14).

[1] The Joint Legislative Budget Committee ("JLBC") recommended passage of these session laws, and the Legislature adopted the session laws at the same time that additional school days were being phased in pursuant to S.B. 1007. *See* Fiscal Year 2005 JLBC Budget at 153; Fiscal Year 2006 JLBC Budget at 191; Fiscal Year 2007 JLBC Budget at 147; Fiscal Year 2008 JLBC Budget at 208 (recommending the promulgation of the session laws); 2000 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 54 (establishing the phasing in of five additional school days between fiscal year 2001-2002 and fiscal year 2005-2006).

Analysis

I. Although the Voter Protection Act Applies to Proposition 301, It Does Not Apply to the 2007 Amendment to A.R.S. § 15-341.01(B).

The Voter Protection Act limits the Legislature's ability to alter voter-approved initiatives and referenda. Ariz. Const. art. IV, pt. 1, § 1(6), (14); Ariz. Secretary of State, 1998 Ballot Propositions for the General Election of Nov. 3, 1998 at 43; *see also Arizona Early Childhood Dev. & Health Bd. v. Brewer*, No. CV-09-0078-SA, 2009 WL 2195013, at *2 (Ariz. Sup. Ct. July 24, 2009). Specifically, the Voter Protection Act prohibits the Legislature from repealing an initiative measure approved or a referendum measure decided by a majority of the votes cast on the measure. Ariz. Const. art. IV, pt. 1, § 1(6)(B); *Brewer*, at 2009 WL 2195013, at *2. It also prohibits the Legislature from amending an initiative or referendum, appropriating or diverting funds created or allocated to a specific purpose by an initiative or referendum, or adopting any measure that supersedes in whole or in part an initiative or referendum approved or decided by a majority of votes cast thereon unless these acts further the purposes of the initiative or referendum and at least three-fourths of the members of each house of the Legislature vote to approve the measure. Ariz. Const. art. IV, pt. 1, § 1(6)(C)-(D), (14); *Brewer*, 2009 WL 2195013, at *2.

These restrictions apply to all initiative and referendum measures that the voters decided at and after the 1998 general election. Ariz. Secretary of State, 1998 Ballot Propositions for the General Election on Nov. 3, 1998, at 43 (Proposition 105, § 2). Because Proposition 301 is a referendum that passed after the Voter Protection Act's implementation, the Act applies to the proposition and the Act limits the Legislature's ability to modify those provisions of S.B. 1007 that the Legislature referred to the ballot as part of Proposition 301. *See* Ariz. Att'y Gen. Op. I01-020.

Although the Voter Protection Act applies to Proposition 301, it does not apply to the provisions in S.B. 1007 that the Legislature did not refer to the ballot and, therefore, were not part of Proposition 301. *See* Ariz. Const. art. IV, pt. 1, § 1(6)(C), (D) (prohibiting Legislature from repealing or amending initiative or referendum approved by voters). The Legislature did not refer to the ballot either section five of S.B. 1007, which added A.R.S. § 15-341.01, or section 54, which phased in the additional days of school over a five-year period. *See* 2000 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 64. In the 2007 amendment to A.R.S. § 15-341.01, the Legislature simply defined "one hundred eighty days" to include "one hundred eighty days of instruction or an equivalent number of minutes of instruction per school year based on a different number of days of instruction." A.R.S. § 15-341.01(B). Because A.R.S. § 15-341.01 was not a voter-approved measure, the Voter Protection Act does not apply to the 2007 amendment to that section.

It should be noted that the Legislature referred to the voters section 38 of S.B. 1007, which prescribed the expenditure of the increased revenues that Proposition 301 generated. *See* 2000 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 38. That section required some of the funding to be used for the increased cost of basic state aid "due to added school days and associated teacher salary increases enacted in 2000." The Legislative Council analysis and descriptive title refer to the funding for more school days, which was referred to the ballot in section 38. These references to the funding for school days in Proposition 301 do not limit the Legislature's authority to define days of instruction as it has in A.R.S. § 15-341.01.

The session laws and the 2007 amendment allowed for an alternative calculation of the 180 days of instruction, but they did not reduce the overall instructional time or appropriate or divert the funding that Proposition 301, section 38, established for the added school days.

Moreover, because Proposition 301 did not define "180 days," the session laws and the 2007 amendment did not amend Proposition 301. Nor did the amendment have the effect of repealing or superseding provisions of Proposition 301. Therefore, the Voter Protection Act's provisions do not apply to the session laws and the 2007 amendment to A.R.S. § 15-341.01(B) that included an alternative calculation of time in its definition of "180 days."

II. The Amendment to A.R.S. § 15-341.01(B) Complies with the Voter Protection Act's Provisions Even Though It Is Not Required to Do So.

Although the Voter Protection Act's provisions do not apply to A.R.S. § 15-341.01 and the amendments to it, the 2007 amendment met the Act's requirements. The 2007 amendment passed the House of Representatives with forty-nine out of sixty members and the Senate with twenty-four out of thirty members voting in favor of it, thus meeting the three-fourths vote threshold for each House of the Legislature. Bill Status Overview for 2007 Ariz. Sess. Laws, ch. 264 (H.B. 2790).

In addition, the amendment does not conflict with Proposition 301. Proposition 301 does not define what constitutes "180 days." The 2007 amendment that defines 180 days to include the equivalency in minutes for a different number of days is consistent with other statutory schemes that establish school day requirements. These statutory schemes allow for equivalent time. For example, A.R.S. § 15-341 states that a school district governing board shall

> [m]aintain the schools established by it for the attendance of each pupil for a period of not less than one hundred seventy-five school days or two hundred school days, as applicable, *or its equivalent* as approved by the superintendent of public instruction for a school district operating on a year-round operation basis, to offer an education program on the basis of a four day school week or to offer an alternative kindergarten program on the basis of a three day school week, in each school year, and if the funds of the district are sufficient, for a longer period, and as far as practicable with equal rights and privileges.

A.R.S. § 15-341(A)(2) (emphasis added). The history of this statute indicates that the statute consistently allowed for 175 school days or the equivalent of 175 school days. *See* A.R.S. § 15-341 (1988) (stating that governing boards shall maintain schools "for a period of not less than one hundred seventy-five school days, or its equivalent as approved by the superintendent of public instruction for a school district approved by the state board of education to operate on an extended school year operation basis"); Ariz. Att'y Gen. Op. I91-006 (citing A.R.S. § 15-341(A)(2) as it existed in 1991 and stating that school districts "must maintain schools for a period of not less than 175 school days or its equivalent").

Moreover, the purpose of Proposition 301 was "to increase funding to public education." Ariz. Att'y Gen. Op. I01-020. Section 38 of Proposition 301 applied additional funds to the "increased cost of basic state aid . . . due to added school days and associated teacher salary increases enacted in 2000" and specified the funding for each fiscal year beginning with the 2001-02 fiscal year. In defining 180 days, the amendment to A.R.S. § 15-341.01(B) did not reduce funding established by Proposition 301 and did not reduce the overall instructional time. It still provides for 180 days of instruction or the equivalent number of minutes of instruction per school year and still provides additional instructional time contemplated by the added days of instruction referred to in section 38 of Proposition 301.

Legislative enactments are presumed to be constitutional. *State v. Cook*, 139 Ariz. 406, 408, 678 P.2d 987, 989 (App. 1984). Any doubts in interpreting an enactment are resolved in favor of constitutionality. *State v. Arnett*, 119 Ariz. 38, 48, 579 P.2d 542, 552 (1978). Here, the 2007 amendment to A.R.S. § 15-341.01(B), which defined 180 days as "one hundred eighty days of instruction or an equivalent number of minutes of instruction per school year based upon a different number of days of instruction" is consistent with the purpose of Proposition 301 and complies with the voter protection provisions, although not required to do so.

Conclusion

Arizona Revised Statutes § 15-341.01(B) as amended does not conflict with Proposition 301 by defining "one hundred eighty days" to include "an equivalent number of minutes of instruction per school year based on a different number of days of instruction," and it does not violate the Voter Protection Act provisions delineated in the Arizona Constitution, article IV, part 1, section 1(6) and (14). Because the 2007 amendment to A.R.S. § 15-341.01(B) did not repeal, amend, or supersede provisions of or appropriate or divert funding created or allocated by Proposition 301, the Voter Protection Act's provisions delineated in the Arizona Constitution, article IV, part 1, section 1(6) and (14) do not apply to that amendment.

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STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL September 1, 2009	No. I09-006 (R09-005) Re: Daily Attendance Requirements and Reporting of Absences by Public Schools

To: The Honorable Tom Horne
Superintendent of Public Instruction

Questions Presented

1. When considered together, do Arizona Revised Statutes ("A.R.S.") §§ 15-901(A)(6)(e), -801(A) and (B), -861(A), and -901(A)(2)(c)(vi) require four hours of instruction per day for full-time high school students, contrary to the conclusion reached in Attorney General Opinion I08-007?

2. How should a high school student enrolled in a full-time instructional program be reported for purposes of daily attendance when the student attends school for three hours on some days rather than four hours and:

> (A) the student is scheduled for three hours on certain days and attends all three hours; or

(B) the student is scheduled for four hours on a given day but is absent for one hour?

3. Department of Education ("Department") policy GE-20 requires four hours of instruction per day and mandates that a "day," as contemplated for purposes of average daily attendance, must consist of at least four hours of instruction—720 hours divided by 180 days. Is the Department's definition of "day" entitled to deference because the word "day" is not defined in Arizona law?

Summary Answers

1. When considered together, A.R.S. §§ 15-901(A)(6)(e), -801(A), -801(B), -861(A) and -901(A)(2)(c)(vi) do not require that a school report a full-time high school student as absent unless he or she attends school for four hours of instruction each day. Rather, Arizona statutory law allows schools flexibility in the manner in which they report students' daily attendance by permitting them to report absences as prescribed in A.R.S. § 15-901(A)(6)(d) or (e).

2(A). A school may report the attendance of a full-time high school student enrolled in a full-time instructional program who is scheduled to attend and actually does attend school for three hours on certain days in one of two ways:

Under A.R.S. § 15-901(A)(6)(d), if the student is enrolled in four subjects, and the student attends the three hours for which he is scheduled on a given day, then no absences need be reported to the Department. However, if the school calculates attendance under the exception in A.R.S. § 15-901(A)(6)(e), the school would report one-fourth of a day's absence for each day on which the student only attended school for three hours.[1]

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[1] This opinion does not address how to report attendance for a student attending an alternative education program or a charter school operating on an approved alternative calendar under A.R.S. § 15-797.

2(B). A school may report the attendance of a full-time high school student enrolled in a full-time instructional program who attends school for three hours but is scheduled to attend four hours in one of two ways:

Under A.R.S. § 15-901(A)(6)(d), if the student is enrolled in four subjects and misses one of the four hours for which he is scheduled on a given day, an absence should be reported to the Department for the missed hour. Similarly, if the school calculates attendance under the exception in A.R.S. § 15-901(A)(6)(e), the school would report one-fourth of a day's absence to the Department for each day on which the student only attended school for three hours.

3. The Department is not entitled to deference regarding its definition of the word "day" because its definition conflicts with the statutes that define "daily attendance" and "full-time instructional program."

Background

Average daily membership ("ADM") is defined as "the total enrollment of fractional students and full-time students, minus withdrawals, of each school day through the first one hundred days or two hundred days in session, as applicable, for the current year." A.R.S. § 15-901(A)(2). It is part of a complex formula to determine funding for public schools. A.R.S. §§ 15-901, -902. ADM is calculated differently for high schools and common (elementary) schools because the definitions for fractional and full-time students vary depending on the type of school.[2] These definitions contain very specific requirements, including, but not limited to, annual hours of instruction, required number of subjects, and the parameters for instructional

[2] This opinion does not address the calculation of ADM or daily attendance for common school students.

time.[3] A student's enrollment, or ADM, must be reported to the Department in accordance with A.R.S. § 15-902(I). The ADM calculation is used to determine state aid for public schools. A.R.S. § 15-902.

The calculations of daily attendance and average daily attendance are distinct from and are governed by different statutory provisions than those that address the calculation of ADM. Average daily attendance is the actual average daily attendance through the first 100 days or 200 days in session; in contrast, ADM deals with enrollment for the first 100 days or 200 days in session. *Compare* A.R.S. § 15-901(A)(1), (A)(6) (governing average daily attendance) *with* § 15-901(A)(2) (governing ADM). A student who is enrolled full time in a high school may be in attendance or absent for all or part of a day, and this information must be reported to the Department. A.R.S. § 15-902(I), (J).

If absences reach a certain statutory threshold, the ADM of a school district or charter school is adjusted using a statutory formula. A.R.S. § 15-902. Absences for a unified school district are deemed excessive when "[ADM] through the first one hundred days . . . in session . . . of the current year has exceeded the average daily attendance through the first one hundred days . . . of the current year by more than six per cent." A.R.S. § 15-902(A). Absences for a high school district are deemed excessive when ADM through the first 100 days in session for the current year exceeds the average daily attendance through the first 100 days in session of the

[3] For example, a full-time high school student in fiscal year 2009 must be, among other things, enrolled in at least a full-time instructional program of subjects that count toward graduation as defined by the state board of education and that meet for at least a total of 720 hours during the minimum number of days required and include at least four subjects each of which, if taught each school day for the minimum number of days required in a school year, would meet a minimum of 123 hours a year, or the equivalent, or one or more subjects taught in amounts of time totaling at least 20 hours per week prorated for any week with fewer than five school days. A.R.S. § 15–901(A)(2)(b)(ii), (c)(vi). In 1989, this office opined that, pursuant to A.R.S. § 15-901(A)(2), a school district governing board may "count...[a] community college course as one of the four courses in which a high school student must be *enrolled* to be a full-time student." Ariz. Att'y. Gen. Op. I89-078 (emphasis added). The number of subjects in which a student is enrolled is part of what is used to determine the student's ADM—whether the student is enrolled as a full-time or fractional student.

current year by more than 8.5 percent. A.R.S. § 15-902(B). The adjustment of ADM may result in a loss of student funding. A.R.S. § 15-902.

Arizona law provides for alternative methods of reporting daily attendance to the Department. If a high school student is enrolled full time, Arizona law provides for two methods for calculating of daily attendance.[4] Section 15-901(A)(6)(d) states that

> [f]or high schools or ungraded schools in which the pupil is at least fourteen years of age by September 1, the *attendance* of a pupil *shall not be counted as a full day unless the pupil is actually and physically in attendance* and enrolled in and carrying four subjects, each of which, if taught each school day for the minimum number of days required in a school year, would meet a minimum of one hundred twenty hours a year, or the equivalent, that count toward graduation in a recognized high school *except as provided in* section 15-797 and *subdivision (e) of this paragraph*. Attendance of a pupil carrying less than the load prescribed shall be prorated.

(Emphasis added.) Subsection (e) of A.R.S. § 15-901(A)(6) provides another option for daily attendance and states that

> [f]or high schools or ungraded schools in which the pupil is at least fourteen years of age by September 1, the *attendance* of a pupil *may be counted as one-fourth of a day's attendance for each sixty minutes of instructional time* in a subject that counts toward graduation, except that attendance for a pupil shall not exceed the pupil's full or fractional membership.

(Emphasis added.)

In 2008, this Office issued an opinion that addressed the issue of whether, "[i]n calculating attendance of high school students for purposes of determining ADM, . . . a school district [is] required to report only absences and, if so, [whether] it [must] consider as absent those students who do not meet a daily minimum of at least four hours of attendance." Ariz. Att'y Gen. Op. I08-007. The focus of that opinion was whether the Department had statutory

[4] A.R.S. § 15-901(A)(6)(d) provides for the possibility of a third option for those schools operating an alternative education program or operating on an approved alternative calendar pursuant to A.R.S. § 15-797. As noted in footnote 1, *supra*, this opinion does not address the reporting of attendance under A.R.S. § 15-797.

authority to require that absences be reported in a manner consistent with a four-hour daily attendance requirement for full-time high school students. The opinion concluded that

> [w]hen reporting attendance of high school students for determining ADM, a school district is not limited to reporting only absences based on a requirement that a student be present a certain number of hours a day. Rather, a school district may determine full-time student status by considering annual hourly totals comprising an instructional program, as described in A.R.S. § 15-901(A)(2).

Id.[5]

The Department's GE-20 policy was published in May 2008 and revised on July 2, 2008. The revised GE-20 policy requires public schools to report absences electronically to the Department, pursuant to A.R.S. § 15-902(J). More specifically, GE-20 requires that high schools, grades nine through twelve, comply with the following procedures:

> At a minimum, statutes require all districts and charter holders to offer instruction of at least four hours a day on a five day a week schedule or five hours a day on a four day week schedule. Student attendance must be based on these statutorily mandated schedules pursuant to A.R.S. § 15-901 A 2 (a)(b)(c), unless otherwise authorized by the Superintendent of Public Instruction pursuant to A.R.S. § 15-801A.

Pursuant to GE-20,[6] public schools are required to report a student as absent if the student does not attend school for either four or five hours each day, depending on the school's calendar. GE-20 also requires that daily attendance records be submitted through the reporting of absences, rather than the reporting of actual minutes attended by students.

The GE-20 policy cites A.R.S. § 15-901(A)(2)(a),(b) and (c) in support of its four-hour per day requirement. The request for this opinion cites one of the definitions for daily attendance—A.R.S. § 15-901(A)(6)(e)—as well as A.R.S. §§ 15-801(A), -861(A) and (B), and -

[5] Attorney General Opinion I08-007 treated enrollment, or full-time student status, and attendance interchangeably. Enrollment, or ADM, and daily attendance are, in fact, defined separately in A.R.S. § 15-901.

[6] An alternative education program or a charter school that operates on an approved alternative calendar pursuant to A.R.S. § 15-797 is not required to comply with GE-20.

901(A)(2)(c)(vi) as further support for the Department's daily attendance requirement contained in GE-20. You have asked this office to revisit the conclusion reached in Attorney General Opinion I08-007 to determine whether these additional statutes support the Department's GE-20 policy requiring four hours of instruction per day during a five-day school week or five hours of instruction per day for a four-day school week for purposes of daily attendance for full-time high school students.

This office did not specifically address GE-20 in Attorney General Opinion I08-007. That opinion instead analyzed the validity of the four-hour daily attendance requirement contained therein and concluded that Arizona law did not compel a four-hour daily attendance requirement, but, rather, allowed school districts more flexibility in constructing a full-time instructional program. *See* Ariz. Att'y Gen. Op. I08-007 (citing A.R.S. § 15-901(A)(2)). This opinion responds to additional questions you raised concerning the statutory requirements for daily attendance and GE-20.

<u>Analysis</u>

I. Arizona Statutes Do Not Require High School Students to Be Reported Absent if They Are in School for Less Than Four Hours on a School Day.

Principles of statutory construction guide the analysis of whether the Department may require school districts to report a student absent if the student does not attend school for the four or five hours each day, as prescribed in GE-20. The best and most reliable indicator of the Legislature's intent is a statute's own words. *See Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). If the text or plain meaning of a statute is clear, there is no reason to consider other factors such as its legislative history to determine legislative intent. *Id.* Under the rules of statutory construction, all statutes dealing with the same subject matter must be read together in a manner that gives meaning to each statute. *City of Scottsdale v. McDowell*

Mountain Irrigation & Drainage Dist., 107 Ariz. 117, 121, 483 P.2d 532, 536 (1971); *In re Maricopa County Appeal*, 15 Ariz. App. 536, 540, 489 P.2d 1238, 1242 (1971).

Unless a school is on an approved alternative calendar under A.R.S. § 15-797, public schools may follow one of two statutory procedures to determine whether a student is in attendance on a school day. Pursuant to A.R.S. § 15-901(A)(6)(d), a school cannot count a student as in attendance for a full day unless

> the pupil is actually and physically in attendance and enrolled in and carrying four subjects, each of which, if taught each school day for the minimum number of days required in a school year, would meet a minimum of one hundred twenty hours a year, or the equivalent, that count toward graduation in a recognized high school.

Using this method, no absences would be reported to the Department for students on a day when they were present for the subjects in which they are enrolled.

Schools can also rely on A.R.S. § 15-901(A)(6)(e) to report attendance. That subsection states that "the attendance of a pupil may be counted as one-fourth of a day's attendance for each sixty minutes of instructional time in a subject that counts toward graduation." Thus, a school *may* report a student as in attendance one-quarter of a day for each 60 minutes of instructional time. Under subsection (e), a full day's attendance for a full-time high school student would be four hours.

The Legislature did not provide any directive regarding when schools should use subsection (d) or (e). Accordingly, the statute permits schools to calculate a full-time high school student's daily attendance by either of the two methods set forth in A.R.S. § 15-901(A)(6)(d) and (e).

Public schools are required to record membership and attendance on a school-by-school basis for each day school is in session and forward this information to the Department in accordance with A.R.S. § 15-902(D) and (I). Public schools must report absences to the Department as part of the attendance record. A.R.S. § 15-902(J). Accordingly, a full-time high school student should be reported as absent to the Department if the student is not in attendance as described by the daily attendance requirements contained in A.R.S. § 15-901(A)(6)(d) or (e).

These statutes do not require students to be reported absent unless they attend four hours of instruction in a day. The statutes cited in the opinion request also do not impose such a requirement. The opinion request cites statutes that set forth definitions of a school month, school holidays, a four-day school week, program requirements for a full-time high school student who is enrolled in a full-time instructional program, and one of the options for how to calculate and report daily attendance. A.R.S. §§ 15-801(A), (B), -861(A), -901(A)(2)(c)(vi) and -901(A)(6)(e). Specifically, A.R.S. § 15-801(A) establishes that a school month is 20 days or four weeks of five days each. Section 15-801(B) addresses school holidays and teacher compensation. Section A.R.S. § 15-861(A) allows for the establishment of an educational program based on a four-day school week or an alternative kindergarten program based on a three-day school week. A full-time high school instructional program is one that

> meets at least a total of seven hundred twenty hours during the minimum number of days required and includes at least four subjects each of which, if taught each school day for the minimum number of days required in a school year, would meet a minimum of one hundred twenty-three hours a year, or the equivalent, or one or more subjects taught in amounts of time totaling at least twenty hours per week prorated for any week with fewer than five school days.

A.R.S. § 15-901(A)(2)(c)(vi). The statutes cited in the opinion request do not establish a requirement that students are reported absent unless they receive four hours of instruction on a school day. On the contrary, the statutes defining "daily attendance" provide flexibility regarding how to calculate attendance.[7]

II. Scenarios Regarding the Reporting of Absences to the Department.

You have asked for an explanation of the attendance reporting for the following two scenarios: (1) a high school student enrolled in a full-time instructional program attends school for three rather than four hours on certain days and the student is scheduled for three hours and attends all three hours; and (2) a high school student enrolled in a full-time instructional program attends school for three hours rather than four hours on certain days and the student is scheduled for four hours on a given day, but is absent for one hour.

With regard to the first scenario, if a full-time high school student is actually and physically in attendance and enrolled in and carrying four subjects that meet the other criteria in A.R.S. § 15-901(A)(6)(d) and those subjects happen to meet for only three hours on certain days, then the student is actually and physically present in those subjects, and the student may be counted as in attendance for the entire day with no absences reported to the Department. A.R.S. § 15-901(A)(6)(d). Alternatively, the school may count the student's attendance as one-fourth of a day for each sixty minutes of instruction in accordance with A.R.S. § 15-901(A)(6)(e). Under this second alternative, because the student attended only three hours each day, one-fourth of a day's absence should be reported to the Department.

Regarding the second scenario, on a given day, if this full-time high school student is not actually and physically present in one of the subjects in which he or she is enrolled, the student

[7] The Legislature has, in other instances, specifically required attendance for four hours each school day. *See* Ariz. Att'y. Gen. Op. I08-007 (citing A.R.S. § 15-901(A)(6)(f) (stating that "for homebound or hospitalized, a full day of attendance may be counted for each day during a week in which the student receives at least four hours of instruction.")). The Legislature has not done so here. *See Padilla v. Industrial Comm'n*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976) (stating that when construing a statute, one presumes that what the Legislature means, it will say).

should be reported as absent for that subject to the Department under A.R.S. § 15-901(A)(6)(d). Alternatively, under A.R.S. § 15-901(A)(6)(e), the school may count the student's attendance as one-fourth of a day for each sixty minutes of instruction. Under this alternative, because the student only attended school for three hours, one-fourth a day's absence should be reported to the Department.

III. The Department's Definition of a "Day" in GE-20 Is Not Entitled to Deference Because It Conflicts with the Statutes Governing Attendance.

The Department has the authority to "adopt guidelines necessary to implement laws applying to the school districts." A.R.S. § 15-239 (A)(1), (B). When a statute is "silent or ambiguous with respect to the specific issue," the agency's interpretation must be upheld when it is "based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (holding that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer); *Barnhart v. Walton*, 535 U.S. 212, 217-18 (2002); *see Arizona Water Co. v. Arizona Dep't of Water Res.*, 208 Ariz. 147, 154-56, 91 P.3d 990, 997-99 (2004) (stating that circumstances "in which the legislature has not spoken definitively to the issue at hand, considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.") (internal quotation marks omitted); *Stearns v. Arizona Dep't of Revenue*, 212 Ariz. 333, 336, 131 P.3d 1063, 1066 (App. 2006).

The Department's GE-20 policy defines "day" in the following manner:

> At a minimum...all districts and charter holders . . . offer instruction of at least four hours a day on a five day a week schedule or five hours a day on a four day week schedule. Student attendance must be based on these statutorily mandated schedules. . . unless otherwise authorized by the Superintendent of Public Instruction.

The Department's definition is derived from simple math using the required elements for instruction from A.R.S. § 15-901:

$$\frac{\text{720 hours of instruction per year}}{\text{180 days per year (5 days a week)}} = \text{4 hours of instruction per day}^{8}$$

The Department's policy, however, ignores the definitions of "full-time instructional program" and "daily attendance," which provide multiple options for the education of full-time high school students, as well as statutory law allowing for flexibility in the number of school days per school year. The definition of "full-time instructional program" for fiscal year 2005-2006 and each fiscal year thereafter allows a school to have:

> an instructional program that meets at least a total of seven hundred twenty hours during the minimum number of days *and* includes at least four subjects each of which, *if taught each school day for the minimum number of days required in a school year*, would meet a minimum of one hundred twenty-three hours a year, *or* the equivalent, *or* one or more subjects taught in amounts of time totaling at least twenty hours per week prorated for any week with fewer than five school days.

A.R.S. § 15-901(A)(2)(c)(vi) (emphasis added). The definition of "daily attendance" also provides similar options to public schools. A.R.S. § 15-901 (A)(6)(d), (e). Moreover, although A.R.S. § 15-341.01 requires 180 days of instruction each school year, that statute defines 180 days as "one hundred eighty days of instruction *or an equivalent number of minutes of instruction per school year based on a different number of days of instruction.*" A.R.S. § 15-341.01(B) (emphasis added). Section 15-341.01 does not have a four-hour per day requirement, and its language clearly contemplates that a school district can satisfy the 720-hour instruction time requirement in an alternative number of school days. In short, the Department's four-hour

[8] Pursuant to A.R.S. § 15-861(B), the Department's definition of a "day" for a school operating on a four-day school week is increased to 5 hours per day. Elements from A.R.S. § 15-901 still provide the math upon which the Department's definition is based.

per day rule conflicts with these statutes. The Legislature could have adopted a four-hour per day bright-line rule, but it has not done so.

GE-20 limits the calculation of daily attendance in a manner that conflicts with the statutory scheme by creating a bright-line rule requiring full-time high school students to attend school at least four hours per day in order to be counted as in attendance for that day. *See* A.R.S. § 15-901(A)(6)(d). Simple math may have guided the Department's creation of its policy. However, the Department's narrow construction of a "day" conflicts with the statutory language defining "daily attendance" and "full-time instructional program."

The plain language of the statutes that govern enrollment and attendance do not require that public schools provide instruction for at least four hours each day to the exclusion of other alternatives for full-time instructional programs or the calculation of daily attendance. The Legislature provided public schools with several options as to how to provide a full-time instructional program and how to calculate daily attendance. Because a four-hour per day rule conflicts with the current statutes, the Department's definition of "day" in GE-20 as at least four hours per day of instruction is not entitled to deference. A legislative change would be needed to impose this requirement.

Conclusion

When considered together, A.R.S. §§ 15-901(A)(6)(e), -801(A), -801(B), -861(A) and -901(A)(2)(c)(vi) do not require that a school report a full-time high school student as absent unless he or she attends school for four hours of instruction each day. Rather, Arizona statutory law allows schools flexibility in the manner in which they report students' daily attendance by permitting them to report absences as prescribed in A.R.S. § 15-901(A)(6)(d) or (e).

A school may report a full-time high school student enrolled in a full-time instructional program who is scheduled to attend and actually does attend school for three hours on certain days in one of two ways:

Under A.R.S. § 15-901(A)(6)(d), if the student is enrolled in four subjects, and the student attends the three hours for which he is scheduled on a given day, then no absences need be reported to the Department. However, if the school calculates attendance under the exception in A.R.S. § 15-901(A)(6)(e), the school would report one-fourth of a day's absence for each day on which the student only attended school for three hours.

A school may report a full-time high school student enrolled in a full-time instructional program who attends school for three hours but is scheduled to attend four hours in one of two ways:

Under A.R.S. § 15-901(A)(6)(d), if the student is enrolled in four subjects and misses one of the four hours for which he is scheduled on a given day, an absence should be reported to the Department for the missed hour. Similarly, if the school calculates attendance under the exception in A.R.S. § 15-901(A)(6)(e), the school would report one-fourth of a day's absence for each day on which the student only attended school for three hours.

Finally, the Department is not entitled to deference regarding its definition of the word "day" because its definition conflicts with the statutes that define "daily attendance" and "full-time instructional program." A legislative change is needed to implement this policy.

Terry Goddard
Attorney General

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL September 1, 2009	No. I09-005 (R09-025) Re: The Arizona Bar Foundation's Beneficial Interest in and Exclusive Right to Interest Earned on Trust Accounts in IOLTA Program under Arizona Supreme Court Rule 43

To: David K. Byers
Administrative Director of the Courts

Question Presented

You have asked whether, under Arizona law, the Arizona Foundation for Legal Services and Education ("Arizona Bar Foundation") will own the entire beneficial interest in and will have exclusive right to the interest income earned on trust accounts required to be established by attorneys pursuant to the provisions of Rules of the Supreme Court of Arizona, Rule 43.

Summary Answer

Yes. The Arizona Bar Foundation will own the entire beneficial interest in and will have the exclusive right to all interest income, minus a reasonable service charge or fee, earned on trust accounts to be established by attorneys in conformance with Arizona Supreme Court Rule 43.

Analysis

The Arizona Supreme Court has established an Interest on Lawyers Trust Accounts (IOLTA) program under Rule 43, Arizona Rules of the Supreme Court.[1] Pursuant to Rule 43, a lawyer must place funds belonging to a client or third person in connection with representation into one or more trust accounts that are labeled as such. Ariz. R. Sup. Ct. 43(a). These trust accounts must be interest-bearing accounts located at regulated financial institutions on which withdrawals or transfers can be made on demand. Rule 43(f)(1).[2] In addition, Rule 43(f)(2) provides that

> [a] lawyer or law firm receiving client funds shall maintain a pooled interest-bearing or dividend-earning trust account for deposit of client funds unless the funds are expected to earn net income for the client in excess of the costs incurred to secure such income. *The interest or dividends accruing on this account, net of any reasonable service or other charges or fees imposed by the financial institution or investment company in connection with the account, shall be paid by the financial institution or investment company to the Arizona Foundation for Legal Services and Education*, and shall be used solely for the following purposes: to pay the actual administrative costs of this interest or earnings on lawyers' trust accounts (IOLTA) program; to fund programs designed to assist in the delivery of legal services to the poor; to support law-related education programs designed to teach young people, educators and other adults about the law, the legal process and the legal system; to fund studies or programs designed to improve the administration of justice; and to maintain a reasonable reserve therefor.

(Emphasis added.) Rule 43(f)(5) also compels lawyers to direct the bank or investment company at which the trust accounts are located to do the following:

> A. To remit interest or dividends, net of any reasonable service or other charges or fees imposed by the institution or company in connection with the account, as computed in accordance with the institution's or company's standard accounting practice, at least quarterly, to the Arizona Foundation for Legal Services and Education, such institution or company

[1] In 2003, the United States Supreme Court held that the placement of client funds into IOLTAs and the transfer of the interest income generated to non-profit organizations designed to provide education and legal services to the poor did not violate the Fifth Amendment. *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003).

[2] Rule 43(f)(1)(B) also allows a lawyer the alternative of utilizing under certain circumstances "United States Treasury obligations and repurchase agreements fully collateralized by such obligations."

being permitted to remit the interest and dividends on all such accounts to the Arizona Foundation for Legal Services and Education in one payment; and

B. To transmit with each remittance to the Arizona Foundation for Legal Services and Education a statement showing the name of the lawyer or law firm on whose account the remittance is sent, the rate of interest applied or the dividends earned, and any service or other charges and fees imposed, with a copy of such statement to be transmitted to the lawyer or law firm. The manner of statement shall be determined by the Foundation.

Financial institutions that participate in the IOLTA program must be approved by the Arizona State Bar and the Bar Foundation, which create the rules governing the approval and the termination of approved status for such institutions. Ariz. R. Sup. Ct. 43(g). Those organizations maintain and annually publish a list of approved participating financial institutions. *Id.* A lawyer who is an Arizona State Bar member may be suspended for failure to comply with Rule 43. Ariz. R. Sup. Ct. 43(h).

Because Rule 43 requires that the client funds be placed in accounts that are interest-bearing and from which the funds may be withdrawn on demand, the IOLTA program is feasible only if client funds placed in trust accounts established by attorneys pursuant to Rule 43 qualify under 12 U.S.C. § 1832(a)(2) for deposit in negotiable order of withdrawal accounts, commonly referred to as "NOW" or "Super NOW" accounts, and established in 1980 by Congress' passage of the Consumer Checking Account Equity Act, Pub. L. No. 96-221, 94 Stat. 132, 145-150.[3] This legislation authorized banks and financial institutions to offer NOW accounts, which, unlike "traditional" checking accounts, allow the earning of interest income on funds subject to withdrawal by negotiable instruments. However, Congress restricted the use of NOW and Super

[3] Before the passage of this law in 1980, attorneys usually held such client funds in noninterest-bearing, pooled accounts; these accounts were noninterest bearing because federal law prohibited the payment of interest on checking accounts. *See* 12 U.S.C. §§ 371a, 1464(b)(1)(B), 1828(g); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 160 (1998).

NOW accounts. Section 303 of the Consumer Checking Account Equity Act of 1980, 12 U.S.C. § 1832, provides in pertinent part as follows:

> (a) Authority of depository institution; applicability
>
> (1) Notwithstanding any other provision of law but subject to paragraph (2), a depository institution is authorized to permit the owner of a deposit or account on which interest or dividends are paid to make withdrawals by negotiable or transferable instruments for the purpose of making transfers to third parties.
>
> (2) Paragraph (1) shall apply only with respect to deposits or accounts which consist solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, or other similar purposes and which is not operated for profit.

Thus, a "NOW" or "SUPER NOW" account may be maintained only if the entire beneficial interest in such an account is held by an individual or individuals or a nonprofit organization as defined in the Internal Revenue Code at 26 U.S.C. § 501(c)(3).

In December 2002, the Internal Revenue Service reaffirmed the Arizona Bar Foundation's federal income-tax exemption under section 501(c)(3) of the Internal Revenue Code. *See* Letter from John E. Ricketts, Director, TE/GE, Internal Revenue Service, to Arizona Foundation for Legal Services & Education (Dec. 13, 2002). As noted above, under Rule 43 of the Arizona Supreme Court, a lawyer must establish a trust account in a manner that assures that the interest income derived from the funds deposited pursuant to the IOLTA program will not be remitted to the attorney, a law firm, or the client. Instead, the interest must be remitted to a third party, the Arizona Bar Foundation, a section 501(c)(3) organization.

Thus, the only remaining issue is whether the Arizona Bar Foundation owns the "entire beneficial interest" in the interest income derived from such an account. While Arizona courts have not construed the term "beneficial interest" as used in this context, case law has previously defined the term as profit, benefit or advantage resulting from contract or ownership of estate as of estate as distinct from legal ownership or control. *Christiansen v. Dep't of Soc. Sec.*, 131 P.2d 189, 191 (Wash. 1942); *see also In re Naarden Trust*, 195 Ariz. 526, 529, ¶ 11, 990 P.2d 1085, 1088 (App. 1999) (noting that, while a trustee holds legal title to the trust res, the beneficiary of a trust "gains a beneficial interest in the trust property"); Restatement (Third) of Trusts § 42, cmt. A (2003) ("[B]eneficiaries hold the beneficial interests (or 'equitable title') in the trust property, while the trustee (ordinarily) holds 'bare' legal title to the property."). This accords with the definition of "beneficial interest" in *Black's Law Dictionary* 142 (5th ed. 1979): "Profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control."

Lawyers depositing funds into interest-bearing accounts must comply with Rule 43 by directing the financial institutions holding the deposits to remit the entire amount of interest, minus a reasonable service charge or fee, to the Arizona Bar Foundation. The result of Rule 43's directive is that the Arizona Bar Foundation has an exclusive interest in receiving all income from any pooled interest-bearing accounts established by lawyers and law firms. Although the attorney acting on behalf of the client retains the legal interest in the funds, the Arizona Bar Foundation holds the entire beneficial interest in and will have the exclusive right to the interest earned upon such accounts.[4]

[4] We note that several other state attorneys general have come to the same conclusion with respect to the issue of whether their states' bar foundations own the entire beneficial interest in income interest derived from client funds deposited in lawyer trust accounts pursuant to IOLTA program requirements. *See, e.g.*, Ind. Att'y Gen. Op. No. 98-03; 63 W. Va. Att'y Gen. Op. No. 33; 1987-1988 Mich. Att'y Gen. Op. No. 6462; Mo. Att'y Gen. Op. No. 62-85.

Conclusion

Pursuant to Rule 43, Rules of the Arizona Supreme Court, the Bar Foundation will own the entire beneficial interest in and have the exclusive right to interest earned, minus a reasonable service charge or fee, on funds deposited in trust accounts in the IOLTA program.

Terry Goddard
Attorney General

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL June 30, 2009	No. I09-004 (R08-014) Re: Treatment of SWBPI Funds Received by Counties Under A.R.S. § 42-17106

To: The Honorable Michael B. Whiting
Apache County Attorney

Question Presented

The United States Bureau of Justice Assistance Southwest Border Prosecution Initiative (SWBPI) provides funds to eligible jurisdictions in the four southwest border states to reimburse costs of prosecuting cases that the federal government initiated but subsequently referred to a state agency for prosecution. You have asked whether a county may treat SWBPI monies as grant funds and spend them in the fiscal year the funds are received, or whether the county must include them in the budget.

Summary Answer

A county must include the SWBPI funds in the budget before spending them. Section 42-17106(A), Arizona Revised Statutes ("A.R.S."), prohibits a county from spending money in excess of the amount stated for each purpose in the county's adopted budget regardless of whether the county has received at any time, or has on hand, monies or revenue in excess of the amount required to meet expenditures, debts, obligations, and liabilities that are incurred under the budget. A county may expend federal grant monies that are not in the budget if the county is merely a conduit for those funds. Here, however, the county is not merely a conduit for these monies because there are no limitations on how the county may spend the SWBPI funds.

Background

In 2005, Congress provided thirty million dollars for the SWBPI through the Department of Justice Appropriations Act. These funds are to "to reimburse State, county, parish, tribal, or municipal governments only for costs associated with the prosecution of criminal cases declined by local United States Attorneys offices." Pub. L. No. 108–447, 118 Stat. 2809, 2863 (2004). The SWBPI provides funds to eligible jurisdictions in the four southwest border states using a uniform amount for qualifying criminal cases that were resolved after October 1, 2004. Pub. L. No. 107–77, 115 Stat. 748, 762-63 (2001); Bureau of Justice Assistance, Southwest Border Prosecution Initiative Program (SWBPI), http://www.ojp.usdoj.gov/BJA/grant/southwest.html. County and state governments in the four border states of Arizona, California, New Mexico, and

Texas are eligible for the program, and the local governments receiving funds may use them for any lawful purpose. *See* Office of the Inspector General, Audit Report GR-60-07-002, *Office of Justice Programs Southwest Border Prosecution Initiative Funding Received by the Yuma County Attorney's Office* (March 2007). Federally initiated criminal cases that are referred to a county are eligible if prosecuted by a state or county prosecutor and resolved during one of the prescribed periods. *Id.*

Analysis

Section 42-17106(A)(1) prohibits counties, cities, and towns from spending money for any purpose not included in its budget. Section 42-17106(A)(2) precludes local governments from spending money or incurring a debt in excess of the amount set aside for each purpose in its budget, "regardless of whether the county, city or town has received at any time, or has on hand, monies or revenue in excess of the amount required to meet expenditures" in its budget.[1]

This office previously concluded that this statute governs a county's expenditure of funds received from the federal government as payment in lieu of taxes. *See* Att'y Gen. Op. 78-132. In that opinion, the Attorney General noted that, under pre-1943 statutes, "if funds were available from a source other than taxes levied by the local government, the funds could be spent even though not included in the budget." *See* Ariz. Att'y Gen. Op. 78-132 (citing *Pima County v. Grossetta*, 54 Ariz. 530, 97 P.2d 538 (1939); *American-La France & Foamite Corp. v. City of*

[1] The governing body can transfer monies between budget items if certain conditions apply. *See* A.R.S. § 42-17106(B).

Phoenix, 47 Ariz. 133, 54 P.2d 258 (1936)). In 1943, however, the Legislature specifically amended those statutes to preclude expenditures in excess of the budget "'irrespective of whether the county or city at any time has received or has on hand funds or revenues in excess of those required to meet debts, obligations and liabilities incurred under such budget.'" *Id.* (quoting 1943 Ariz. Sess. Laws, ch. 38).

Opinion 78-132 distinguished a prior opinion, Attorney General Opinion 67-15, in which the Attorney General opined that federal grant money falls outside statutory budget limitations:

> [W]e do not believe that the result of [Attorney General Opinion 67-15 is] necessarily incorrect. The federal objectives sought by each grant must be analyzed to determine the purpose of the expenditure. If the county is merely a conduit for expenditure of the funds, the federal objective governs the expenditure. Since the legislative intent of the Budget Law would not be frustrated where the county is merely a custodian of federal funds and thereby a conduit for their expenditure, such grants need not be anticipated in the budget.

Ariz. Att'y Gen. Op. 78-132. In concluding that funds that the county receives from the federal government in lieu of tax payments must be included in the county budget, the Opinion noted that the federal statute setting forth the scheme for payments to local governments explicitly stated that the local governments could use the funds for "'any governmental purpose.'" *Id.* (quoting 31 U.S.C. § 1601 (Pub. L. No. 94-565, 90 Stat. 2662 (1976)). Thus, because the counties were not directed by the federal government to use the monies from federal payments in lieu of taxes for any particular purpose, they were not mere custodians or conduits for the federal funds. Therefore, the monies had to be included in the budget.

That conclusion comports with the result reached in *Navajo Tribe v. Arizona Department of Administration*, 111 Ariz. 279, 528 P.2d 623 (1974). In that case, the Navajo Nation, the City of Phoenix, and the City of Tucson each separately contracted with the U.S. Department of Labor for the administration of a Navajo-focused job training and employment program through the Arizona Department of Economic Security ("DES"), which entered into a subcontract with the tribe and cities for that purpose. *Navajo Tribe*, 111 Ariz. at 280, 528 P.2d at 624. Under the terms of the contracts, the tribe and cities were to reimburse DES with federal funding for the costs of administering the program. *Id.* However, once the Nation and cities provided reimbursement from federal funds to the state, the Arizona Department of Administration refused to pay DES without an appropriation. *Id.* The tribe and City of Phoenix brought a special action lawsuit against the Department of Administration to force the payment of the funds to DES for the administration of the program. *Id.* The Court held that, because the contractual language with the U.S. Department of Labor mandated that certain of the funds would be used to reimburse the subcontracting agency, DES, for administrative costs, the monies had never become "public funds" over which the State had control. *Id.* Therefore, the court concluded that the Department of Administration should pay DES the federal monies that agency incurred in fulfilling its contractual duties and for which specific purpose the federal government had made those funds available. *Id.* at 280-81, 528 P.2d at 624-25.

In this particular case, Apache County is receiving SWBPI funds as reimbursement for monies it already has spent on criminal prosecutions referred to the County by the federal government. Like the federal in-lieu-of-taxes payments analyzed in Opinion 78-132, the federal government has placed no restrictions on the use of SWBPI funds. Nor is there a guarantee that the County will be fully compensated for expenditures incurred in prosecuting cases referred by the federal government. Given the nature of SWBPI funds, the County must include these monies in the budget as A.R.S. § 42-17106 requires.

Conclusion

Pursuant to A.R.S. § 42-17106, a county must include SWBPI monies in the budget before the county may spend those monies.

Terry Goddard
Attorney General

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL June 1, 2009	No. I09-003 (R09-004) Re: Calculation of number of signatures of qualified electors for petition for incorporation of city or town

To: The Honorable Robert Meza
Arizona House of Representatives

Questions Presented

Sections 9-101 to -104, Arizona Revised Statutes ("A.R.S."), govern the incorporation of cities and towns. You have asked whether, in calculating the number of signatures needed to meet the statutory requirements of A.R.S. § 9-101(A) or (B), the number of qualified electors residing in the community is determined as of the date that a copy of the incorporation petition is filed with the county recorder or elections department pursuant to A.R.S. § 9-101(C) or as of the date that the completed petition is filed with the clerk of the board of supervisors.

Summary Answer

The number of qualified electors residing in a community is determined as of the date that the completed incorporation petition is filed with the clerk of the board of supervisors.

Background

The Arizona Constitution states that "the Legislature, by general laws, shall provide for the incorporation and organization of cities and towns." Ariz. Const. art. XIII, § 1. These general laws are codified in A.R.S. §§ 9-101 to -104.

Section 9-101 contains the procedures by which a community may seek incorporation. Subsection A sets forth the requirements for incorporation by petition:

> When two-thirds of the qualified electors residing in a community . . . petition the board of supervisors, setting forth the metes and bounds of the community, and the name under which the petitioners desire to be incorporated, and praying for the incorporation of the community into a city or town, and the board is satisfied that two-thirds of the qualified electors residing in the community have signed the petition, it shall, by an order entered of record, declare the community incorporated as a city or town.

Subsection B provides an alternate method of incorporation through an election. The requirements for incorporation by election are as follows:

> When ten per cent of the qualified electors residing in a community . . . petition the board of supervisors in the manner prescribed in subsection A of this section, praying for the calling of an election . . ., the board shall within sixty days after filing the petition call the election, and the election shall take place on a date prescribed by § 16-204 but not more than one hundred eighty days after the petition is filed, except that no such election shall be called within twelve months from the date of a previous election for incorporation of substantially the same territory. Only qualified electors of the community shall vote on this question. If a majority of qualified electors voting thereon votes for incorporation, then the board of supervisors shall, by an order entered of record, declare the community incorporated as a city or town.

Subsection C of A.R.S. § 9-101 sets the procedural requirements for the proponents of incorporation to gather the necessary signatures

> Prior to obtaining any signatures on a petition required by subsection A or B of this section, a copy of such petition shall be filed with the county recorder or, in a county having an elections department, with the county elections department. The petition shall state its purpose clearly and

> concisely and shall be in the form and signed and verified as generally provided for initiative petitions. Petitioners shall have one hundred eighty days from the date of such filing to obtain the required number of signatures.

Before collecting any petition signatures, petitioners first must file a copy of the incorporation petition with the county recorder or the county elections department. A.R.S. § 9-101(C). The petition must state its purpose "clearly and concisely." *Id.* Furthermore, its form must be similar to that of an initiative petition, and it must be signed and verified "as generally provided for initiative petitions." *Id.* Once this copy is filed, petitioners have 180 days to obtain the required number of signatures. *Id.* As set out in A.R.S. § 9-101(A), to incorporate without an election, the required number of signatures for petitions of incorporation is "two-thirds of the qualified electors[1] residing in a community." Under A.R.S. § 9-101(B), an incorporation through an election requires "ten percent of the qualified electors residing in a community." The petition is filed with the board of supervisors. A.R.S. § 9-101(A) & (B).

Analysis

You have asked whether the number of signatures necessary to satisfy A.R.S. § 9-101(A) or (B) is based on the number of qualified electors as of the date that a copy of the petition is filed with the county recorder or county elections department or as of the date the completed petition is filed with the clerk of the board of supervisors. This determination requires an examination of the statute's language. If that language is plain and unambiguous, then the text of

[1] In Arizona, a "qualified elector" is defined as follows:

> A person who is qualified to register to vote pursuant to § 16-101 and who is properly registered to vote shall, if he is at least eighteen years of age on or before the date of the election, be deemed a qualified elector for any purpose for which such qualification is required by law, except as provided in § 16-126. A person continues to be a qualified elector until that person's registration is canceled pursuant to § 16-165 or until that person does not qualify as a resident as prescribed by § 16-101, subsection B.

A.R.S. § 16-121(A).

the provision is followed as written, and no extrinsic matter is considered. *Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, 43, ¶16, 178 P.3d 511, 515 (App. 2008); *Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994). If the provision's language is ambiguous, other principles of construction are used to determine legislative intent. *Bentley v. Building Our Future*, 217 Ariz. 265, 270, ¶13, 172 P.3d 860, 865 (App. 2007). Language is ambiguous if there is more than one rational or reasonable interpretation. *Id.*

The language of A.R.S. § 9-101 strongly suggests that the crucial date is the date on which the completed petition is filed with the board of supervisors. "When [the specified number] of the qualified electors residing in a community . . . petition the board of supervisors," the board takes certain action, depending on whether the petition is filed under A.R.S. § 9-101(A) or (B).[2] Subsections A and B require that the board of supervisors take action—by declaring the incorporation or setting an election—when they have determined that the required number of qualified electors have filed the petition. The language of subsections A and B refers to that present event, not the past event described in subsection C when the proponents filed a form of the petition with the county recorder. Thus, the signature requirement is based on the number of qualified electors in the community on the date the competed petition is submitted to the clerk of the board of supervisors.

The legislative history confirms this analysis. The Legislature added subsection C to A.R.S. § 9-101 in 1979. 1979 Ariz. Sess. Laws ch. 22, § 1. Until 1979, the only possible date to calculate the number of qualified electors in the community was the date on which the completed incorporation petition was filed with the board of supervisors pursuant to subsections A or B.

[2] The phrase "petition the board" as used in A.R.S. § 9-101(A) and (B) means to file the completed petition with the clerk of the board of supervisors. *See Colquhoun v. City of Tucson*, 55 Ariz. 451, 456-57, 103 P.2d 269, 272 (1940) (holding that predecessor incorporation statute's language "shall petition the board" means filing petition with clerk of board of supervisors).

Nothing in subsection C shows any legislative intent to change that. Subsection C's evident purpose is to set a time limit on obtaining signatures. *Minutes of Meeting: Hearing on H.B. 2369 Before the Committee on Counties & Municipalities, 34th Leg., 1st Reg. Sess. 3 (Feb. 22, 1979); see also Minutes of Meeting: Hearing on H.B. 2369 Before the Committee on Government, 34th Leg., 1st Reg. Sess. 2 (March 21, 1979).* It was enacted to solve the problems "that arise when a petition is circulated for a long period of time." *Minutes of Meeting: Hearing on H.B. 2369 Before the Committee on Government* at 2. Before the 1979 amendment, there was no limit on the time within which petitions could be circulated, and thus an individual could "forget and sign the petition twice or an individual who [might] have been a registered voter at the time of signing the petition [might] have allowed [that] status to lapse." *Id.* A petition might have been in circulation for years before being filed. These are the types of problems that A.R.S. § 9-101(C) was intended to eliminate.

The court of appeals confirmed this analysis in *Synder v. Lena*, 145 Ariz. 583, 586, 703 P.2d 527, 530 (App. 1985). In *Snyder*, the court of appeals discussed A.R.S. § 9-101(C)'s enactment and stated that the filing of the unsigned petition as A.R.S. § 9-101(C) requires was intended to be a procedural first step "required solely to begin the 180-day period for the obtaining of signatures." *Id.* "It is obvious that the action that confers jurisdiction upon the board of supervisors is the filing of the signed petition that meets all the statutory requirements of either § 9-101(B) or of both §§ 9-101 and 9-101.01." *Id.* Therefore, the date on which a copy of the petition is filed with the county recorder or department of elections as set out in A.R.S. § 9-101(C) merely establishes a starting point for the 180-day time limit within which the petitioners have to gather the requisite number of signatures. The number of qualified electors is calculated when the completed petitions are submitted to the board under subsection A or B.

A previous Arizona Attorney General opinion addressing A.R.S. § 9-102, the disincorporation statute, also supports this conclusion. Ariz. Att'y Gen. Op. No. I84-104. That opinion addressed the method of calculating "the total number of signatures needed to comprise two-thirds of the qualified electors" and concluded that A.R.S. § 9-102's language implied that "the two-thirds figure will be determined when the petitions are submitted to the supervisors of the county." *Id.*

Thus, the signature requirements for an incorporation petition under A.R.S. § 9-101(A) or (B) is based upon the number of qualified electors residing in the community on the date that the petition is filed with the board of supervisors.

Conclusion

The procedures set out in A.R.S. § 9-101 require those seeking to incorporate a community to first file a copy of the petition with the county recorder or county elections department and then to submit the completed petition to the clerk of the board of supervisors within 180 days from that initial filing date. Under A.R.S. § 9-101(A), the subsection providing for incorporation by petition, a successful petition must have the signatures of two-thirds of the qualified electors residing in the community. Alternatively, under A.R.S. § 9-101(B), the subsection providing for incorporation by election, a successful petition must have the signatures of ten percent of the qualified electors. The necessary percentage of the qualified electors is calculated based on the total number of qualified electors residing in the community on the date on which the completed incorporation petition is filed with the clerk of the board of supervisors.

Terry Goddard
Attorney General

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL March 27, 2009	No. I09-002 (R08-048) Re: Application of Arizona Merchandising Businesses For the Blind Act

To: Linda Blessing, Acting Director
Arizona Department of Economic Security

Charles L. Ryan, Director
Arizona Department of Corrections

Questions Presented

DES has asked the following question:

1. If the Arizona Department of Economic Security ("DES") has surveyed and identified locations in state prison centers where licensed blind vendors properly and satisfactorily may operate merchandising businesses, (a) must the Arizona Department of Corrections ("ADOC") grant space to DES free of charge for the operation of such a business under Arizona Revised Statutes ("A.R.S.") § 23-504, or (b) may ADOC solicit and accept bids for operation of such a business from prospective vendors pursuant to the Arizona Procurement Code, without regard to A.R.S. § 23-504?

ADOC has asked the following related questions:

2. Does A.R.S. § 23-504 require ADOC to grant space to DES for operation of a merchandising business by a blind vendor, even if doing so would deprive the ADOC special services or inmate store proceeds funds of commissions they historically have received from operation of vending machines in institutions?

3. Does A.R.S. § 23-504 require ADOC to grant space to DES for operation of a merchandising business by a blind vendor, even if the vendor intends to subcontract with another business to provide certain operations services?

Summary Answers

1. If DES has surveyed state prison centers and has identified locations where licensed blind vendors properly and satisfactorily may operate merchandising businesses, including vending machine businesses, then A.R.S. § 23-504 requires ADOC to grant space to DES for the operation of such a business and to cooperate with DES in installation of the business. ADOC may not charge any assessment for the use of the space, and it may not solicit or accept bids for the use of the space from prospective vendors pursuant to the procurement code.

2. ADOC must grant the space to DES for operation of a merchandising business by a blind vendor, even if doing so would deprive the ADOC special services or inmate store proceeds funds of commissions they historically have received from operation of vending machines in institutions.

3. ADOC must grant the space to DES for operation of a merchandising business by a blind vendor, even if the vendor intends to subcontract with another business that will provide

certain operations services, as long as the vendor retains the ability to control or manage the business.

Background

A. Statutory History

In 1974, the Arizona Legislature enacted A.R.S. § 23-504, entitled "Merchandising Businesses For the Blind." This law and similar statutes in other states, which establish a preference to the blind in the operation of merchandising businesses on State, county, and local governmental property, are modeled after the federal Randolph-Sheppard Act, 20 U.S.C. §§ 107 to 107f, and are known informally as mini-Randolph-Sheppard Acts.

In 1936, Congress enacted the federal Randolph-Sheppard Act to "authorize the operation of [vending] stands in Federal buildings by blind persons [and] to enlarge the economic opportunities of the blind." *See* S. Rep. No. 93-937, at 5 (1974); *see also* Pub. Law 74-732, 49 Stat. 1559 (1936). This Act was intended to enhance employment opportunities for trained, licensed blind persons to operate vending facilities on federal property. *Kentucky v. United States*, 62 Fed. Cl. 445, 448 (2004). The United States Department of Education ("DOE") prescribes regulations implementing the Act. *See* 34 C.F.R. §§ 395.1-395.38. Under the Act, state rehabilitation agencies recruit, train, license and place visually impaired individuals to operate vending facilities located on federal and other properties. The states grant licensed blind individuals authority to operate specified vending activities in particular locations.

In its original form, the Act granted a preference to blind vendors to establish vending stands. After the development and proliferation of automatic, coin-operated vending machines, concern grew that blind vendors were being "fenced out" of their livelihood by vending machines that employees of various government buildings housing the vendors had installed.

See S. Rep. No. 93-937, at 5-7. In response, Congress amended the Act in 1954 to provide blind vendors already operating stands with a preference in the operation of any coin-operated vending machines in their respective federal buildings. *Id.* at 14.

In 1974, Congress, disenchanted that the program had not reached its full potential, again amended the Act, granting blind vendors a priority, rather than a mere preference, in operating all vending facilities in federal buildings, rather than merely vending stands.[1] *Id.* at 14, 25, 30; *see also* Pub. Law 93-516, 88 Stat. 1617 (1974). Congress believed that, prior to the 1974 amendment, agencies had failed to accord blind vendors the "preference" it had envisioned. *See* S. Rep. No. 93-937, at 14-15. The 1974 amendment also directed DOE, which administers the act, to promulgate regulations to ensure that, whenever feasible, one or more vending facilities were established on all federal properties. *NISH v. Cohen,* 247 F.3d 197, 200 (4th Cir. 2001). Finally, the 1974 amendments added a requirement that, with certain exceptions, income derived from vending machines on federal property be shared in specified percentages with blind vendor licensees or, if there was no licensee on the property, with state agencies for the blind. *See* S. Rep. No. 93-937, at 29; 20 U.S.C. § 107d-3; *see also Okla. Dep't of Human Servs. v. Weinberger,* 741 F.2d 290, 291 (10th Cir. 1983). This is commonly referred to as "the income-sharing provision."

By changing the blind vendor program's procurement "preference" to a "priority" and adding the income-sharing provision, Congress intended to "remov[e] some of the major obstacles to the growth of the blind vendor program" and to strengthen the program by assuring "that one or more blind vendors have a *prior right* to do business on [federal] property, and

[1] The 1974 amendments replaced the term "vending stand" with the term "vending facility" and expressly defined it to include automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and other equipment that DOE might prescribe by regulation. *See* S. Rep. No. 93-937, at 41; 20 U.S.C. § 107e(7). Arizona's regulation similarly defines the term broadly. *See* Arizona Administrative Code ("A.A.C.") R6-4-301(22). The Arizona regulation also expressly includes the vending of lottery chances authorized by State law.

furthermore that, to the extent that a . . . non-blind operated vending machine competes with or otherwise economically injures a blind vendor, every effort must be made to eliminate such competition or injury." *See* S. Rep. No. 93-937, at 15.

Section 23-504, A.R.S., provides as follows:

> A. The department of economic security shall make surveys of merchandising business opportunities for and license persons who have no vision or acuity, or have a central visual acuity of 20/200 or less in the better eye, with the best correction by single magnification, or who have a field defect in which the peripheral field has been contracted to such an extent that the widest diameter of visual field subtends an angular distance no greater than 20 degrees, to operate such businesses on state, county or municipal property where such businesses may be properly and satisfactorily operated by blind persons all in accordance with the provisions of the Randolph-Sheppard act, as amended by Public Law 93-516, title 20, United States Code, sections 107 through 107f. For the purposes of this section "merchandising business" shall include but not be limited to food service operations, including cafeterias, snack bars and vending machines for food and beverages and souvenir and gift shops.
>
> B. The head or governing body of each department or agency and of each county or municipality or other local government entity having control of state, county or other local government property shall cooperate with the department of economic security in surveys of property under their control to find suitable locations for the operation of merchandising businesses by blind persons, and after it has been determined that there is need for a merchandising business and after the department of economic security has determined that such a business may be properly and satisfactorily operated by a blind person grant space to the department of economic security for the operation of a merchandising business by a licensed blind person and cooperate with the department of economic security in the installation of such merchandising business.
>
> C. Notwithstanding the provisions of section 41-792.01, the head or governing body of each department or agency of the state and of each county or city having control of public property shall not charge any rent or other assessment for the use or occupancy of the space granted for the operation of merchandising businesses by licensed blind persons.

When the Legislature enacted A.R.S. § 23-504 in 1974, it modeled the statute on the pre-1974 version of the federal Randolph-Sheppard Act. *See* Ariz. Att'y Gen. Op. I78-171. In 1985, the Legislature amended the statute to incorporate, at least in part, the 1974 amendments to the federal Act. *See* 1985 Ariz. Sess. Laws, ch. 281, § 1 (adding the words "as amended by Public Law 93-516" to section A's reference to the Randolph-Sheppard Act). There is no legislative history discussing why the Legislature made the change or what it intended by the change, because it made the change via a strike-everything floor amendment to an unrelated bill.[2] *See* DeLong Floor Amend., Sen. Amends. to H.B. 2417, 37th Legis. 1st Reg. Sess. (4/11/85).

As noted above, A.R.S. § 23-504 establishes a preference to the blind in the operation of merchandising businesses on State, county and local government property in Arizona.[3] The statute requires DES to survey merchandising business opportunities on State, county and local government properties to determine whether there is need for a merchandising business and whether such a business properly and satisfactorily may be operated by a blind person. A.R.S. § 23-504(A). The statute also requires DES to license blind persons to operate such businesses. *Id.* After DES has determined that a merchandising business may be properly and satisfactorily operated by a blind person, the statute requires the State agency or other local government entity having control of the affected government property to "grant space to [DES] for the operation of a merchandising business by a licensed blind person and cooperate with [DES] in the installation of such merchandising business." A.R.S. § 23-504(B).

The regulations implementing the Arizona act are set forth at Arizona Administrative Code ("A.A.C.") R6-4-301 to -325. In Arizona the blind vendors program is administered by the Business Enterprise Program ("BEP") of the Rehabilitation Services Administration within DES.

2 The Legislature did not intend to incorporate the income-sharing provisions of the Randolph-Sheppard Act when it added the reference to that Act's 1974 amendments. *See* Ariz. Att'y Gen. Op. I90-016. Accordingly, the income-sharing provisions apply only when implementing the Randolph-Sheppard Act on federal property and not when implementing A.R.S. § 23-504 on State and local government property.

3 Although A.R.S. § 23-504 requires DES to survey merchandising business opportunities and to license blind persons to operate such businesses on state property "all in accordance with" the federal Randolph-Sheppard Act, the federal Act's grant of an absolute priority to blind persons applies only to vending facilities located on *federal* property. *See* 20 U.S.C. § 107; *see also* Ariz. Att'y Gen. Op. I90-016 (stating that federal Act imposes duties with respect to blind vending facilities on federal property only).

See A.A.C. R6-4-301(4). BEP prepares and enters into grantor's agreements with State agencies that grant space for the blind vendors program. A.A.C. R6-4-301(11); A.A.C. R6-302(C). BEP also prepares and enters into operator's agreements with blind vendor licensees that regulate the terms and conditions under which particular businesses will be managed. A.A.C. R6-4-301(2), (5); A.A.C. R6-4-312.

B. Factual Background

Pursuant to A.R.S. § 23-504, DES has surveyed ADOC facilities throughout the State and determined that the facilities are suitable for operation of merchandising businesses by the visually impaired.

In its vending machine solicitations, ADOC historically has required vendors to pay commissions and has deposited these commissions into either the inmate store proceeds fund provided for in A.R.S. § 41-1604.02 or the special services fund provided for in A.R.S. § 41-1604.03. ADOC asks whether it can require the blind vendors to pay commissions as a condition of granting the space.

The proposed grantor's agreement between DES and ADOC would permit blind vendors to subcontract for certain operations services. ADOC asks whether the subcontract provision means that the blind vendors should be required to compete on the same basis as other vendors to provide the service.

Analysis

A. Section 23-504 Requires ADOC to Grant Space to DES for the Operation of Vending Facilities by a Licensed Blind Person; ADOC Cannot Accept Bids Under the Arizona Procurement Code.

The primary goal in interpreting a statute is to discern and give effect to legislative intent. *Way v. State*, 205 Ariz. 149, 153, ¶ 10, 67 P.3d 1232, 1236 (App. 2003). If the statutory language is "'plain and unambiguous leading to only one meaning,'" statutory construction principles direct courts to abide by that meaning unless an absurdity would result. *In re Maricopa County Superior Court No. MH2003-000240*, 206 Ariz. 367, 369, ¶ 6, 78 P.3d 1088, 1090 (App. 2003) (quoting *Sloatman v. Gibbons*, 104 Ariz. 429, 430-31, 454 P.2d 574, 575-76 (1969), *vacated in part on other grounds*, 402 U.S. 939 (1971)). Courts ordinarily interpret "shall" to mean a provision is mandatory. *Id.* As applied to each part of DES's multipart question, the language of A.R.S. § 23-504 is clear, unambiguous, and mandatory.

1. The Duty to Grant the Space

A.R.S. § 23-504(B) expressly requires that an agency having control of affected property "*shall . . . grant space* to the department of economic security for the operation of a merchandising business by a licensed blind person and cooperate with the department of economic security in the installation of such merchandising business," once the following has been determined: (1) there is need for a merchandising business and (2) such a business properly and satisfactorily may be operated by a blind person. (Emphasis added.)

Here, DES has made both determinations.[4] Accordingly, since the two predicates have been satisfied, the unambiguous and mandatory language of the statute requires ADOC to grant space to DES as requested for the operation of a merchandising business by a licensed blind person.[5]

[4] The statute does not establish the factors that DES should consider in determining whether a business properly and satisfactorily may be operated by a blind person. The implementing regulations do list factors DES must consider in conducting surveys with the purpose of determining whether a property meets the requirements for a satisfactory site for a merchandising business. A.A.C. R6-4-302(A). But the regulations do not identify the factors DES should consider in determining whether a business properly and satisfactorily may be operated by a blind person. We do not attempt to make such a determination here, because DES, as the agency with the expertise and the responsibility for implementing the statute, should make this determination in the first instance by rulemaking.

[5] The statute does not establish that a State agency has any right to challenge a DES determination that a business properly and satisfactorily may be operated by a blind person on property controlled by the agency. Judicial review of administrative decisions is not a matter of right except when authorized by law. *Allen v. Graham*, 8 Ariz. App. 336, 337, 446 P.2d 240, 241 (1968). The statute and regulations are also silent regarding the procedure or standard under which such a challenge, if it could be asserted, would be decided. *See* A.R.S. § 23-504; A.A.C. R6-4-301 to - 325. With certain exceptions not applicable here, DES determinations are not appealable agency actions. A.R.S. § 41-1092.02(A)(9). A DES determination that a business properly and satisfactorily may be operated by a blind

This requirement clearly satisfies the Legislature's stated intent in enacting A.R.S. § 23-504:

> As introduced, S.B. 1261 is an emergency measure that would require the Department of Economic Security (DES) to license blind or near-blind persons who operate merchandising businesses on state, county or municipal property. The bill would also require public agencies controlling such property to cooperate with DES in making surveys to find suitable business locations for blind persons. Such agencies would also be *required to grant space to DES* for the operation of businesses by the blind and to cooperate with the department in the installation of such businesses. The establishment and operation of these businesses would be conducted in accordance with the Federal Randolph-Sheppard Act.

See Ariz. Legislative Council Summary Analysis of S.B. 1261 (2/22/74) (emphasis added).

2. *Effect of the Arizona Procurement Code*

As set forth in the previous subsection, pursuant to the language in A.R.S. § 23-504, if DES has determined that there is need for a merchandising business and that such a business properly and satisfactorily may be operated by a blind person, then ADOC must grant the space to DES. Section 23-504 does not contemplate further solicitation and acceptance of bids from prospective vendors pursuant the competitive bidding requirements of A.R.S. § 41-2533, the Arizona Procurement Code, once the two predicates have been satisfied. The procurement code itself provides that its competitive bidding requirements apply "unless otherwise authorized by

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person is also not a contested case because no Arizona law entitles state agencies to an administrative hearing before DES makes its determination. A.R.S. § 41-1001(4). Therefore, the hearing requirements in Articles 6 and 10 of the Administrative Procedure Act would not apply. *See* A.R.S. §§ 41-1067, -1092.02(A). Similarly, the Administrative Review Act would not apply, because a DES determination under A.R.S. § 23-504 does not constitute a "case" or "proceeding." *See Ariz. Bd. of Regents ex rel. Univ. of Ariz. v. State ex rel. Ariz. Pub. Safety Ret. Fund Manager Adm'r*, 160 Ariz. 150, 154, 771 P.2d 880, 884 (App. 1989); A.R.S. § 12-902 (Administrative Procedure Act applies only to "decisions"); A.R.S. § 12-901(2) (defining "decision"). It appears that the only formal method that may be available to challenge a DES determination would be by special action. We do not render an opinion on whether there exists a valid substantive basis on which an agency could challenge a DES determination by special action. Such a review, if it were permitted, would be limited, and a court would determine only "whether the administrative action was arbitrary, capricious or an abuse of discretion and [would] only intervene where no evidence exists to support the decision." *Justice v. City of Casa Grande*, 116 Ariz. 66, 67, 567 P.2d 1195, 1196 (App. 1977); *accord Johnson v. Pointe Cmty. Ass'n, Inc.*, 205 Ariz. 485, 488, 73 P.3d 616, 619 (App. 2003); A.R.S. § 12-910(E). There may be alternative methods by which DES and an affected agency could negotiate a compromise informally with or without assistance from a paid neutral. We do not in this Opinion analyze the legality or efficacy of such alternative methods.

law." A.R.S. § 41-2532. Further, the procurement code does not apply here, because it "applies only to procurements." A.R.S. § 41-2501(A). "Procurement" means "buying, purchasing, renting, leasing or otherwise acquiring any materials, services, construction or construction services" and all related functions. A.R.S. § 41-2503(31). Because A.R.S. § 23-504 does not require DOC to spend public funds, but requires it only to grant space to DES for the operation of merchandising businesses that DES determines can be operated by blind persons, the procurement code does not apply.[6]

3. *Prohibition Against Charging For Use of the Space*

The plain language of the statute also prohibits ADOC from charging DES or the blind vendor any rent or other assessment for the use of the space. The statute expressly provides that agencies "having control of public property *shall not* charge any rent or other assessment for the use or occupancy of the space granted for the operation of merchandising businesses by licensed blind persons." A.R.S. § 23-504(C) (emphasis added); *accord Minn. Dep't of Jobs & Training v. Riley,* 18 F.3d 606, 609 (8th Cir. 1994) (holding the Randolph-Sheppard Act prohibits a federal agency from charging commissions on sales from blind vendor operations, relying on statutory language and Congress's concerns stated when amending the Act in 1974 "with federal agency abuses of blind vendor's operations, like forcing blind vendors to pay commissions").

B. The Statutes Governing Special Services Fund and Inmate Store Proceeds Fund Do Not Require That Commissions from Vending Machines in Visitor Areas Be Deposited into the Funds.

In its opinion request, ADOC states that A.R.S. § 41-1604.03 requires it to establish a special services fund and to deposit into it commissions from operation of vending services in institutions. Granting space to DES for operation of blind vending services would deprive the

[6] The procurement code does, however, apply to BEP's expenditure of funds for rehabilitation services pursuant to the Randolph-Sheppard Act except when procurement code conflicts with requirements of the federal Act, under which the State receives federal grant monies to implement the federal Act. *See* Ariz. Att'y Gen. Op. I88-132

special services fund of the revenue it historically has received from vending service commissions.

Section 41-1604.03 does establish a special services fund. However, the statute does not require that funds from the operation of merchandising businesses be deposited into it. Thus, there is no conflict between A.R.S. §§ 23-504 and 41-1604.03, and commissions from the vending machines need not be deposited into the special services fund.

ADOC also asks whether A.R.S. § 41-1604.02 evidences the Legislature's intent that vending machine commissions be deposited into the inmate store proceeds fund. Section 41-1604.02 permits ADOC to establish inmate stores at institutions, requires ADOC to enter into contracts with private entities to establish and maintain such stores, and requires all profits derived from the State's portion of privatization of such stores to "be deposited into an inmate store proceeds fund." *Id.*

Although the statute does not precisely define "inmate store," it does state that an inmate store shall offer sundries "for sale to the persons confined." A.R.S. § 41-1604.02(A). Thus, an inmate store is a store that is available to inmates. The vending machines that are the subject of the contract at issue, by contrast, are located in visitor areas that are off limits to inmates and require the use of currency, which prisoners are not permitted to have.

Because A.R.S. §§ 41-1604.02 and -1604.03 appear to have no application to the issue at hand, it is unnecessary to evaluate whether the requirements of A.R.S. § 23-504 would have priority over the requirements of A.R.S. §§ 41-1604.02 or -1604.03. As stated, ADOC must grant the space to DES, and the plain language of the statute prohibits ADOC from charging DES or the blind vendor any rent or other assessment for the use of the space. A.R.S. §§ 23-504(B), (C). Thus, ADOC must comply with A.R.S. § 23-504 even if doing so would deprive the special services or inmate store proceeds funds of commissions they historically have received from operation of vending machines in institutions.

C. Subcontracting by Blind Vendors Constitutes "Operation" of Merchandising Business.

Section 23-504 requires that, once the prerequisites have been met, ADOC must grant space to DES for "the *operation* of a merchandising business by a licensed blind person." A.R.S. § 23-504(B) (emphasis added). ADOC asks whether a blind vendor is "operating" a merchandising business within the statute's meaning if it subcontracts out part or most of the operations services.

Although the statute and the regulations repeatedly use various forms of the term "operation," they do not define the term, and no reported Arizona opinion applying the statute has defined it. *See, e.g.,* A.R.S. § 23-504 (using the term in every subsection); A.A.C. R6-4-301, -311, -312, -315, -318, -319, -321. Because the Legislature modeled our statute after the federal Act and both the State and federal acts use the term "operate" similarly, the Randolph-Sheppard Act and federal cases that apply it provide guidance in ascertaining the meaning of the term. *See Estate of Walton,* 164 Ariz. 498, 500, 794 P.2d 131, 133 (1990) (federal interpretations are persuasive when Arizona courts interpret state counterparts to federal statutes).

Little guidance exists, but what is available indicates that the terms "operate" and "operation" as used in the Randolph-Sheppard Act have been interpreted to mean "manage" and "control." In *Washington State Department of Services for the Blind v. United States*, the court decided that a contract for custodial services in an Army cafeteria was not a contract for "operation" of the facility within the meaning of the Randolph-Sheppard Act. 58 Fed. Cl. 781, 796-97 (2003). The Department of Defense ("DOD") had argued that the plain meaning of "operate" was to "cause to function," that the word connotes a distinctly executive function, that the function of a cafeteria is to serve food, and that providing custodial services does not rise to the level of "operating" a cafeteria. *Id.* at 789-90. In reaching its decision, the court extensively analyzed the meaning of the term "operate" as used in the statute and implementing federal regulations and also considered the legislative history, policy pronouncements by DOE (the agency charged with implementing the act), arbitration panel decisions, and the absence of guidance by DOE before concluding that there was no clear answer. *Id.* at 796. Because DOE's policy provided that DOD was entitled to determine on a case-by-case basis whether the Randolph-Sheppard Act applied, the court deferred to DOD's judgment and held that its determination had been reasonable. *Id.* at 796-97; *see also Miss. Dep't of Rehab. Servs. v. United States,* 61 Fed. Cl. 20, 30 (2004) (holding that the Navy's solicitation of a food services contract called for "operation" of a cafeteria within the meaning of Randolph-Sheppard Act, even though the Navy retained control over menu selection, purchase of food supplies, and quality control, because the contractor would be in charge of day-to-day management of the facility); *cf. Southfork Sys., Inc. v. United States,* 141 F.3d 1124, 1135 (Fed. Cir. 1998) (rejecting without explaining its reasoning a sighted vendor's claim that the Texas Commission for the Blind should not be given Randolph-Sheppard priority because Commission contemplated using sighted subcontractors).

Interpreting the term "operate" to require only the executive function of managing or controlling a business has been found appropriate under a wide variety of other statutes. *See Lario Enters., Inc. v. State Bd. of Tax Appeals,* 925 P.2d 440, 445 (Kan. App. 1996) (city qualified for tax exemption because it "operated" the property at issue even though it entered into a management agreement by which it designated another company to operate and manage the facility on its behalf); *see also Neff v. Am. Dairy Queen Corp.,* 58 F.3d 1063, 1066 (5th Cir.

1995) (holding that a franchisor with limited control over a franchisee's store could be held liable under the Americans With Disabilities Act for "operating" a place of public accommodation if the franchisor had a right to control the allegedly discriminatory conditions); *Ashland Refining Co. v. Fox,* 11 F. Supp. 431, 433 (S.D.W.V. 1935), *aff'd sub nom. Gulf Refining Co. v. Fox,* 297 U.S. 381 (1936) (holding that a refining company "operated" and "controlled" gas stations within the meaning of a tax statute, because lease and agency agreements between the company and station operators, which permitted station operators to manage station but permitted either party to terminate agreement at any time, gave the company "substantial control of the situation"); *United States v. High Point Chem. Corp.,* 7 F. Supp. 2d 770, 777 (W.D. Va. 1998) (holding that an individual corporate officer could be held liable as an "operator" of a company under the Comprehensive Environmental, Response, Compensation and Liability Act if the officer had the authority and ability to control or direct management of the company).

When the Legislature has not spoken definitively to the issue at hand, "'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.'" *Ariz. Water Co. v. Ariz. Dep't of Water Res.,* 208 Ariz. 147, 154, ¶ 30, 91 P.3d 990, 997 (2004) (quoting *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). DES has been entrusted to administer both A.R.S. § 23-504 and the Randolph-Sheppard Act. Accordingly, its interpretation must be accorded some deference. The conclusion reached in this opinion, that "operation" of a business includes the subcontracting of some or perhaps even most of the operations work involved, is consistent with the DES interpretation of A.R.S. § 23-504.

The principal rule of statutory interpretation is to determine and give effect to legislative intent. *Bigelsen v. Ariz. State Bd. of Med. Exam'rs,* 175 Ariz. 86, 90, 853 P.2d 1133, 1137 (App. 1993). When legislative intent is not entirely clear from the statutory language, courts look to the policy behind the statute and the statute's context, subject matter, effects, and consequences. *Id.* It is clear from the long history of the Randolph-Sheppard Act, on which the Arizona statute was modeled, and from the Arizona Legislature's express incorporation of the 1974 amendments to the federal Act, that the Legislature intended that the statute be given broad application to fulfill its policy objective of enlarging economic opportunities for the visually impaired. Concluding that blind vendors may "operate" a merchandising business by subcontracting out some of the work is consistent with such an application.

Finally, courts will avoid statutory interpretations that lead to absurd results the Legislature could not have anticipated. *City of Phoenix v. Superior Court,* 144 Ariz. 172, 177, 696 P.2d 724, 729 (App. 1985). Given the prevalence of subcontracting in today's business world and the practical obstacles that requiring a blind vendor to perform all or most operations work would create, it is unlikely that the Legislature intended to prohibit a blind vendor from subcontracting for some or perhaps even most of the operations work involved in the business, as long as the blind vendor retains control over the business.

Conclusion

ADOC must grant the space requested by DES for operation of a merchandising business by a licensed blind vendor; ADOC cannot require the blind vendor to pay commissions for using the space, nor can it solicit and accept competitive bids from sighted vendors pursuant to the procurement code. ADOC must grant the space even if the blind vendor intends to subcontract out some or most of the operations work, as long as the blind vendor retains the ability to control or manage the business.

Terry Goddard
Attorney General

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL February 17, 2009	No. I09-001 (R07-035) Re: Admissibility And Tuition Payment of A Child Who Resides With A Legal Guardian Within A School District

To: Candyce B. Pardee
Deputy County Attorney
Cochise County Attorney's Office

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), you submitted for review an opinion that you prepared for the Superintendent of the Douglas Unified School District. We are revising the conclusion reached and issue this opinion to provide guidance concerning this matter to all school districts within Arizona.

Questions Presented

Can a child who resides with a legal guardian but whose parents reside out of State attend the school district in which his legal guardian resides without paying tuition?

Summary Answer

A child who resides with a legal guardian who was not appointed solely to avoid the payment of tuition may attend the school district in which the legal guardian resides without paying tuition. Pursuant to Arizona law, the residence of the person having legal custody of the child is considered the child's residence for school admission purposes, and school districts must admit resident children between the ages of six and twenty-one without payment of tuition.

Analysis

The State is required to provide children between the ages of six and twenty-one with a system of free public education. *See* Ariz. Const. art. XI, §§ 1, 6. As a general rule, only students who are to be considered State residents are entitled to attend the public school system tuition free. *Sleeseman v. State Bd. of Educ.*, 156 Ariz. 496, 498, 753 P.2d 186, 188 (App. 1988) (stating that "the right to a tuition-free public education is reserved to residents of this state").

Pursuant to A.R.S. § 15-824(B), a student's residence is "[t]he residence of the person having legal custody of the pupil." Legal custody is defined as the "[c]ustody exercised by the natural or adoptive parents with whom a student resides" or "[c]ustody granted by order of a court of competent jurisdiction to a person with whom a student resides unless the primary purpose for which custody was requested was to circumvent the payment of tuition." A.R.S. § 15-824(G)(2)(a), (b); *see also Chapp v. High School Dist. No.1 of Pima County*, 118 Ariz. 25, 27, 574 P.2d 493, 495 (App. 1978) ("'[A child's] residence is that of his parents, or the one of them who has legal custody of him, or if neither parent has legal custody, the one who stands in the relation of loco parentis to him.'" (quoting *In Re Webb's Adoption*, 65 Ariz. 176, 179, 177 P.2d 222, 224 (1947)).

Once residency has been established within the school district, Arizona law requires that a school district admit students between the ages of six and twenty-one who reside within its boundaries and qualify for enrollment in one of the grades or programs offered in the school. A.R.S. § 15-821(A). Therefore, if a student's natural parents reside outside of the state and the student "lives with a guardian in the school district and the guardian was not appointed solely to avoid the payment of tuition then the district must admit the child without charging tuition." Ariz. Att'y Gen. Op. I79-173.

Your opinion concluded that, pursuant to A.R.S. § 15-823(C), when a child whose parents reside out of State and who has a legal guardian who resides in the district but who is not a "grandparent, brother, sister, stepbrother, stepsister, aunt or uncle," the school district may require the payment of tuition. The statute's language, however, does not support this conclusion. Section 15-823(C) states that

> [t]he governing board shall admit children who are residents of the United States ***but who are nonresidents of this state*** without payment of tuition if evidence indicates that the child's physical, mental, moral or emotional health is best served by placement with a grandparent, brother, sister, stepbrother, stepsister, aunt or uncle who is a resident within the school district, unless the governing board determines that the placement is solely for the purpose of obtaining an education in this state without payment of tuition.

(Emphasis added.) As it states, this subsection applies to children "who are nonresidents of this state." Thus, the subsection does not apply to a child for whom legal custody has been granted to a guardian who resides within the school district, because the residence of such a child is defined by statute to be the same residence as that of his or her legal guardian. A.R.S. § 15-824(B) ("The residence of the person having legal custody of the pupil is considered the residence of the pupil. . . ."). Rather, the subsection applies to children who are residents of the United States, whose parents are nonresidents of this State, and who are living with one of the enumerated family members in the district in a nonguardianship arrangement wherein the family member has not been granted legal custody.

In sum, Arizona statutes, case law, and an Attorney General's Opinion have all made clear that "[i]f the child resides with the natural parent or court-appointed guardian within the district, then the district must admit the child without charging tuition." *See* Ariz. Att'y Gen. Op. I79-173.

Conclusion

A child who resides with a legal guardian who was not appointed to circumvent the payment of tuition may attend the school district in which the legal guardian resides without paying tuition.

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