

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>July 21, 2003</p>	<p>No. I03-001 (R03-014)</p> <p>Re: Guidelines Governing Waivers from English Immersion Programs</p>
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TO: The Honorable Pete Rios
Arizona State Senate

The Honorable John Loredo
Arizona House of Representatives

Question Presented

You have asked whether Arizona Revised Statutes (“A.R.S.”) § 15-756(B) authorizes the Guidelines that the Superintendent of Public Instruction (“Superintendent”) issued on February 12, 2003 concerning waivers from English immersion programs (the “Guidelines”).

Summary Answer

Section 15-756(B), A.R.S., authorizes the Department of Education ("Department") to develop guidelines for monitoring public schools to ensure compliance with State and federal laws governing English language learners. Those portions of the Guidelines that address the requirements for waivers under A.R.S. § 15-753(B)(2) and (3) are consistent with this statutory authority.

Any guidelines for monitoring issued by the Superintendent that concern waivers under A.R.S. § 15-753(B)(1) must be consistent with testing requirements that the Board adopts under

A.R.S. § 15-756(A)(1) and with the requirements in A.R.S. § 15-753(B)(1) regarding scores on the relevant tests. The Board must determine which standardized tests or other procedures are used to determine English proficiency. In addition, the minimum test scores for a (B)(1) waiver, although an appropriate subject for monitoring guidelines, must be supported by facts that establish that the scores are the average for students at the appropriate grade level, as required by statute.¹

Background

Proposition 203.

In November 2000, Arizona voters approved Proposition 203, an initiative that requires public schools to use specific methods for English-language instruction. Codified as A.R.S. §§ 15-751 through 15-755, Proposition 203 generally requires that “all children in Arizona public schools shall be taught English by being taught in English and all children shall be placed in English-language classrooms.”² In addition, students who are English language learners (“ELLs”)³ must, subject to limited exceptions, be educated in “sheltered English immersion [classes] during a temporary transition period not normally intended to exceed one year.” A.R.S. § 15-752.

Proposition 203 permits parents to apply for waivers from these requirements. A.R.S. § 15-

¹You also asked whether the Guidelines constitute a "rule" under A.R.S. § 41-1001(17) and are, therefore, subject to rulemaking requirements under the Arizona Administrative Procedures Act. The Legislature has established specific procedures for making this determination. Section 41-1033 prescribes a procedure for petitioning the agency to determine whether an agency policy or practice is a rule within the Administrative Procedures Act. Alternatively, the question may be answered through a declaratory relief action pursuant to A.R.S. § 41-1034. Because these specific statutory procedures have been established to determine whether an agency policy is a rule, the question is not addressed in this Opinion. Attorney General's Opinions address only questions of law relating to the office of the official requesting the Opinion. A.R.S. § 41-193(A)(7).

²An “English language classroom” is “a classroom in which English is the language of instruction used by the teaching personnel, and in which such teaching personnel possess a good knowledge of the English language. English language classrooms encompass both English language mainstream classrooms and sheltered English immersion classrooms.” A.R.S. § 15-751(2).

³An ELL is “a child who does not speak English or whose native language is not English, and who is not currently able to perform ordinary classroom work in English.” A.R.S. § 15-751(5).

753. If a waiver is granted, a child is “transferred to classes teaching English and other subjects through bilingual education techniques or other generally recognized educational methodologies.” A.R.S. § 15-753. Waivers must be approved annually “with prior written informed consent” of the child's parents or legal guardians. *Id.* These waivers may be granted for children who: (1) “already possess[] good English language skills, as measured by oral evaluation or standardized tests of English vocabulary comprehension, reading and writing, in which the child scores approximately at or above the state average for his grade level or above the 5th grade average, whichever is lower;” (2) are age 10 years or older and for whom an alternate course of study would be “better suited to the child’s overall educational progress,” or (3) have special individual needs. A.R.S. § 15-753(B)(1)-(3).

Proposition 203 also requires standardized testing of students in second grade and higher to monitor academic progress. A.R.S. § 15-755. The Superintendent is responsible for selecting the test that will be used for this purpose. *Id.*

Subsequent Legislation Concerning English Proficiency.

After the voters approved Proposition 203, the Legislature enacted A.R.S. § 15-756, which addresses the responsibilities of the Board and the Department concerning English language proficiency and programs for ELLs. *See* 2001 Ariz. Sess. Laws, 2nd Spec. Sess., Ch. 9, §1. The 2001 legislation that included A.R.S. § 15-756 was enacted to comply with *Flores v. Arizona*, 172 F. Supp. 2d 1225, 1238 (D. Ariz. 2000), which establishes the State's responsibilities under the federal Equal Educational Opportunities Act, 20 U.S.C. § 1703. *See* Arizona State Senate Fact Sheet for HB 2010, 45th Legis. 2nd Spec. Sess (2001).

Section 15-756 requires that the Department develop guidelines for the “monitoring of school districts and charter schools for the purposes of ensuring compliance with all federal and state laws regarding English learners.”⁴ A.R.S. § 15-756(B). This responsibility includes a requirement for certain reports with information specified by statute. *Id.* This statute also establishes the Board's responsibilities that include prescribing “the manner in which”:

- the primary or home language of a student is identified;
- the “English language proficiency of all pupils with a primary or home language other than English shall be assessed through the administration of English language proficiency exams,”
- ELLs are reassessed to determine English language proficiency; and
- former ELLs are evaluated.

A.R.S. § 15-756(A) (1)-(4).

The Content of the Guidelines.

On February 12, 2003, the Superintendent published the Guidelines for the implementation of Arizona’s English language immersion requirements. Some portions of the Guidelines simply restate relevant portions of the statutes. Other portions of the Guidelines describe the documentation that schools must provide to justify a waiver under A.R.S. § 15-753(B)(2) and (3). The Guidelines and the attachments to the Guidelines also set forth minimum test scores that children must achieve to have “good English language skills” necessary to qualify for a waiver under A.R.S. § 15-753(B)(1). The Guidelines define “good English language skills” as achieving test scores on any one of the tests in the “fluent to advanced English speaker” category.

⁴In addition to its specific responsibility for monitoring for compliance with the laws governing ELLs, the Department has general authority to “monitor school districts to ascertain that laws applying to the school districts are implemented as prescribed by law.” A.R.S. § 15-239(A)(1).

Analysis

Whether the establishment of the Guidelines is within the Superintendent's authority is determined by an analysis of the relevant statutes. The primary purpose of statutory construction "is to effectuate the intent of those who framed the provision and, in the case of an [initiative], the intent of the electorate that adopted it." *Calik v. Kongable*, 195 Ariz. 496, 498, 990 P.2d 1055, 1057 (1999) (quoting *Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994)). The best indicator of a statute's meaning is its language. *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993). When the statutory language is not clear, a statute's history, context, subject matter, spirit and purpose may be examined to determine its meaning. *Wyatt v. Wehmueller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991). In addition, statutes are interpreted "in such a way as to achieve the general legislative goals that can be adduced from the body of legislation in question." *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996) (quoting *Dietz v. Gen. Elec. Co.*, 169 Ariz. 505, 510, 821 P.2d 166, 171 (1991)). This Opinion integrates the requirements of Proposition 203 with the responsibilities of the Board and the Superintendent as established by the Legislature after voters approved the Proposition.

At issue here is the scope of the Superintendent's authority under A.R.S. § 15-756(B), which requires the Department to establish guidelines for monitoring and to ensure compliance with state and federal laws regarding the education of ELLs. The obligation to monitor for compliance with state and federal laws regarding the education of ELLs includes the authority to monitor for compliance with the waiver requirements established by A.R.S. § 15-753. The waiver provisions are state laws regarding the education of ELLs. In addition, because "all executive, administrative and ministerial functions of the [D]epartment are vested" in the Superintendent (A.R.S. § 15-

231(B)), the Superintendent has the authority to adopt guidelines to fulfill the Department's responsibilities under A.R.S. § 15-756(B).

Section 15-756(B), however, does not define the Superintendent's monitoring responsibility or the term "monitoring." When the Legislature does not define words, and it does not appear from the context of a statute that a special meaning was intended, words are to be given their ordinary meaning. *See Mid Kansas Fed. Sav. and Loan Ass'n v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991). Webster's Dictionary defines "monitor" to mean "to check systematically or scrutinize for the purpose of collecting specified categories of data" or "to keep watch over: supervise." WEBSTER'S II NEW COLLEGE DICTIONARY 708 (1999). Applying this definition, the authority of the Superintendent and the Department to monitor to ensure compliance with laws affecting ELL's contemplates oversight responsibility.⁵

1. Documentation Requirements for a Waiver Under A.R.S. § 15-753(B)(2) and (3).

Portions of the Superintendent's Guidelines address the waivers for children over ten years of age, A.R.S. § 15-753(B)(2), and children with special needs, A.R.S. § 15-753(B)(3). The Guidelines address the documentation that schools must maintain regarding waivers that are granted. These Guidelines are within the Superintendent's authority pursuant to A.R.S. § 15-756(B) to monitor for compliance with the laws governing ELLs.

⁵Although "monitoring" is not specifically defined in chapter 7 of title 15, A.R.S., a state's authority to monitor for compliance generally involves such powers as conducting program reviews, inspecting documentation, and issuing corrective action or improvement plans when noncompliance or program violations are discovered. *Compare* 34 C.F.R. § 300.556 (outlining state education agency monitoring for local education agency compliance with the federal Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1487); 7 C.F.R. § 210.18 (setting forth procedures for administrative reviews of compliance with the National School Lunch Program that state agencies conduct).

2. Requirements for Waivers Under A.R.S. § 15-753(B)(1).

The analysis of the Guidelines concerning waivers for children who possess “good English language skills” (“(B)(1) waivers”) is more difficult. Those Guidelines do not focus on documentation required to establish compliance with the statutory requirements. They specify tests that will be used and the scores on those tests that will determine whether students qualify for waivers. The Department's monitoring responsibilities under A.R.S. § 15-756(B) do not contemplate prescribing tests and scores because monitoring generally involves oversight to ensure compliance with established requirements, rather than determining what the requirements are. *See supra* at 5, 6 (discussion of “monitoring”).

a. Designating Tests.

In Appendix A to the Guidelines, three tests are specified, as well as the test scores that are necessary for a child to be eligible for a waiver. The analysis of the Department's authority to specify the tests to determine eligibility for (B)(1) waivers is complicated, in part, because Proposition 203 itself did not assign the Superintendent, the Department, or any other State entity or officer the responsibility of designating tests for this purpose. *See* A.R.S. §§ 15-751 to -753. In contrast, Proposition 203 specifically assigned the Board authority regarding waivers for children with special needs. A.R.S. § 15-753(B)(3) (referring to “guidelines established by and subject to the review of the local governing board and ultimately the state board of education”). In addition, Proposition 203 specifically assigned to the Superintendent the responsibility for selecting a test to be implemented annually to monitor academic progress. A.R.S. § 15-755. However, it did not give the Superintendent similar authority regarding tests to determine “good English language skills.” *See Bates v. U.S.*, 522 U.S. 23, 29 (1997) (“[W]here Congress includes particular language in one

section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (citations and internal quotations omitted). Moreover, Proposition 203 repealed the statutes that had given the Superintendent the authority to establish requirements for determining English language proficiency. *See Ariz. Att’y Gen. Op. I00-027.*

The Legislature subsequently established responsibilities for testing and monitoring the education of ELLs in A.R.S. § 15-756. That statute assigned to the Board the responsibility for “prescrib[ing] the manner in which . . . English language proficiency of all pupils with a primary or home language other than English [will] be assessed through the administration of English language proficiency exams,” as well as the process of reassessing the proficiency of English language learners. A.R.S. § 15-756(A)(2), (3). While giving the Board the responsibility for prescribing certain tests concerning English-language proficiency, the same statute assigned the Department the responsibility for “developing guidelines for . . . monitoring” schools “for the purposes of ensuring compliance with all federal and state laws regarding English learners.” A.R.S. § 15-756(B).

Section 15-756 does not specifically address the waivers authorized in Proposition 203. However, the statutory scheme directs that the Board is responsible for prescribing the relevant tests concerning English-language proficiency, and gives the Department the responsibility for monitoring for compliance. In light of this statutory division of responsibilities, the Superintendent’s guidelines issued under A.R.S. § 15-756(B) may specify tests only if those tests have been previously designated by the Board pursuant to its authority under A.R.S. § 15-756(A).⁶

⁶It might be argued that the requirement that the Board’s authority under A.R.S. § 15-756(A) does not extend to tests to determine eligibility for waivers under A.R.S. § 15-753(B)(1) because the testing in A.R.S. § 15-756(A) focuses on identifying and monitoring English learners, not identifying students who may qualify for waivers under A.R.S. § 15-753(B)(1). Although the statutory language is not clear, establishing the testing

Consequently, as the Board adopts rules and policies under A.R.S. § 15-756, it should determine the testing requirements for (B)(1) waivers. Any Guidelines that the Superintendent establishes concerning (B)(1) waivers to fulfill the Department's monitoring responsibilities must be consistent with the testing requirements that the Board establishes.⁷

b. Scores on English Proficiency Tests.

The score required on any test used to determine whether a child qualifies for a (B)(1) waiver because he or she “already know[s] English” must be consistent with the statutory requirement that “the child score[] approximately at or above the state average for his grade level or at or above the 5th grade average, whichever is lower.” A.R.S. § 15-753(B)(1). The statute permits the use of an oral evaluation, as an alternative to a standardized test, but the same scoring requirements apply. That is, the child must score at his grade level average or 5th grade average, whichever is lower.⁸ The score required to obtain a waiver cannot exclude students who meet this statutory standard or include students who fail to meet this requirement.

The Guidelines at issue here focus on scores designated by test publishers rather than the statutory criteria. The Guidelines explain:

For grades K and 1, the scores shown on Exhibit A will be required for the waiver to apply. This is because "standardized tests of English vocabulary comprehension, reading, and writing" are not given in grades K and 1. For grades 2 and higher, the

requirements to determine whether a child qualifies for a (B)(1) waiver is more consistent with the Board's responsibilities to determine English-language proficiency under A.R.S. § 15-756(A) than with the Superintendent's monitoring role under A.R.S. § 15-756(B).

⁷The analysis of English-language proficiency determinations in this Opinion supercedes Ariz. Att'y Gen. Op. I00-027, which analyzed the authority of the Superintendent under statutes that were repealed by Proposition 203.

⁸The statutory language which includes, the phrase "in which the child scores approximately at or above the state average for his grade level or at or above the 5th grade average, whichever is lower" appears to apply to both "standardized tests of English vocabulary, comprehension, reading, and writing" and to oral evaluations.

waiver can be given if (1) the grades shown [in] Exhibit A are received, or alternatively, (2) if the child scores at or above the state average for his or her grade level in standardized tests of English vocabulary comprehension, reading, and writing. Performance at the 5th grade level is also sufficient.

Guidelines at 2.

The portion of the Guidelines that acknowledge that a child scoring at or above the state average for his or her grade level or at the 5th grade average is consistent with the Department's authority to monitor for compliance with the statute. The specifications of the test publishers, however, do not ensure compliance with the statutory parameters, which rely on test results in Arizona. Any policy determinations that may be necessary regarding the scores required for (B)(1) waivers should be made by the Board; the Department's monitoring guidelines should be consistent with those policies. *Cf.* A.R.S. §§ 15-203, -231 (describing powers and duties of the board and the department).

In sum, the Guidelines are within the Superintendent's statutory authority, except for the selection of specific tests to determine English proficiency. The Board must determine which standardized tests or other procedures are used to determine English proficiency. A.R.S. § 15-756(A). In addition, the minimum test scores for a (B)(1) waiver, although an appropriate subject for monitoring guidelines, must be supported by facts that establish that the scores are the average for students at the appropriate grade level, as required by statute.

Conclusion

Guidelines concerning waivers under A.R.S. § 15-753(B)(2) and (3) are consistent with the Superintendent's authority to monitor schools for compliance with the state and federal laws regarding the education of ELLS. The Board, however, has the authority to establish the tests to determine whether a child has “good English language skills” necessary for a waiver under A.R.S. § 15-753(B)(1). The Superintendent may establish monitoring guidelines consistent with the statutory requirements and with Board determinations concerning tests to determine English proficiency.

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