

To: The Honorable Lisa Graham Keegan

October 31, 2000

Superintendent of Public Instruction

Re: Testing for English Language Proficiency

I00-027

(R00-049)

Issue Presented

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

Summary Answer

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

Background

In 1999, the Legislature amended the statutes that address bilingual and English as a second language programs to require the Superintendent to develop criteria for determining whether a student is limited English proficient, including a list of tests for school districts to use. A.R.S. § 15-756(7), added by 1999 Ariz. Sess. Laws, Ch. 249 § 3. ⁽¹⁾ School districts are to adopt the Superintendent's assessment criteria and procedures. A.R.S. § 15-753(C).

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

Analysis

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

The Legislature has now specifically directed the Superintendent to develop English proficiency criteria for purposes of English acquisition education. That statute now supplants any general authority of the State Board regarding English proficiency criteria. See *Mercy Healthcare Ariz., Inc. v. Arizona Health Care Cost Containment Sys.*, 181 Ariz. 95, 100, 887 P.2d 625, 630 (App. 1994) ("A basic principle of statutory interpretation instructs that specific statutes control over general statutes."). The Superintendent's new responsibilities include identifying a list of tests for school districts to use to assess students' oral, reading and writing skills, and determining the score on each test that denotes English proficiency. A.R.S. § 15-756(7). Nowhere does the statute require that the tests chosen by the Superintendent be submitted to the State Board. See A.R.S. § 15-756. Similarly, the statute requires school districts to adopt language assessment criteria "as prescribed by the superintendent of public instruction," without requiring or even mentioning State Board approval. A.R.S. § 15-753(C) (emphasis added).⁽³⁾

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

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

Conclusion

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

Janet Napolitano
Attorney General

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

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

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

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

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