



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>September 30, 2008</p>	<p>No. I08-009 (R08-037)</p> <p>Re: Excluding Passing Time in Calculating Instructional Time for Determining Average Daily Membership</p>
--	---

To: David Schwartz, Esq.
Udall, Shumway & Lyons

This Office revises portions of the opinion you provided to the Glendale Union High School District and submitted under Arizona Revised Statutes ("A.R.S.") § 15-253(B) concerning the calculation of instructional time for purposes of determining average daily membership ("ADM"). Specifically, this Office reached a different conclusion to the first scenario you presented regarding passing time—the time a student spends traveling to or from a course of study—and issues this Opinion because the matter presented is of statewide importance and applies to all public schools. This Office declines to review the remainder of the opinion you submitted.

Question Presented

May the Arizona Department of Education ("ADE") define and exclude portions of passing time in a school's calculation of time spent in an instructional program as that term is used to calculate ADM?

Summary Answer

Yes. ADE may reasonably exclude passing time between an instructional period and a non-instructional period, such as lunch, home room, study hall, or recess or excessive passing time when calculating instructional time.¹

Background

Arizona law has a complex statutory scheme to calculate student count for purposes of receiving state funding. *See* A.R.S. §§ 15-901 to -916. Student count is determined by detailed requirements for calculating average daily membership.² A.R.S. §§ 15-901(A)(2) and 15-902. Each student's ADM is determined by the amount of instructional time provided during the school year.³ *Id.*

ADE issued Guidelines and Procedures GE-19 ("GE-19" or "policy") to provide guidance regarding when and how passing time may be counted toward instructional time for purposes of calculating ADM. In the policy, ADE defines passing time as "the time it takes for a student to physically travel from one Board approved course of study to another Board approved course of study." *See* GE-19.⁴ It appears that ADE had no

¹ This Opinion uses the terms "instructional time," "instructional period," and "instructional hours" interchangeably because those terms are used throughout A.R.S. §§ 15-901 to 15-916, and the Arizona Department of Education uses these terms in its related guidelines. This Opinion does not address a "full-time instructional program," which is defined in Arizona law at 15-901(A)(2)(c).

² A.R.S. § 15-902 calculates the weighted student count through a formula, which results in the adjusted average daily membership.

³ ADM is calculated separately for common school students and high school students, as either fractional or full-time students. A.R.S. § 15-901(A)(2).

⁴ GE-19 also states, in part:

- b. A total of seven (7) minutes or less of passing time can be included in calculating the annual instructional hours. Annual instructional hours are specified in A.R.S. § 15-901(A) (2) (a) (b) or (c).
- c. Passing time not allowed:
 - (i) Passing time in excess of seven (7) minutes shall not be included in calculating the annual instructional hours required in A.R.S. § 15-901(A) (2) (a) (b) or (c).

formal policy or guideline on passing time prior to GE-19. We analyze whether this new guidance is within the parameters of Arizona's school financing statutes, which govern the calculation of ADM.

Analysis

I. ADE's Authority to Interpret the Statutory Scheme

Section 15-239(A)(1) and (B) authorize ADE to monitor school districts to ascertain the proper implementation of applicable laws and to adopt guidelines relative to this purpose. ADE is thus responsible for providing guidance to public schools regarding how to count instructional time in determining ADM. The terms "instructional program," "instructional hours" and "instructional time" are used in Arizona statutes, but they are not specifically defined. *See* A.R.S. §§ 15-901 to -916. For example, under A.R.S. § 15-901(A)(2)(c)(vi), the term "instructional program" is used to define what constitutes a full-time instructional program.⁵ Similarly, the term "instructional hours" is used in defining a part-time student, A.R.S. § 15-901(A)(2)(a)(ii),⁶ and the term "instructional

-
- (ii) Passing time to or from one instructional program to a non-instructional program such as lunch, home room, study hall and recess shall not be included in the calculation of annual instructional hours.

⁵ The statute states that a "full-time 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).

⁶ A.R.S. § 15-901(A)(2)(a)(ii) states

For high schools, a part-time student who is enrolled in less than four subjects that count toward graduation as defined by the state board of education in a recognized high school and who is taught in less than twenty *instructional hours* per week prorated for any week with fewer than five school days. A part-time high school student shall be counted as one-fourth, one-half or three-fourths of a full-time student if the student is enrolled in an instructional program that is at least one-fourth, one-half or three fourths of a full-time instructional program as defined in subdivision (c) of this paragraph.

(Emphasis added.)

time” is employed in defining daily attendance, A.R.S. § 15-901(A)(6)(a) & (b) (using the term “instructional time” to define daily attendance for various grades).

Although the Arizona Legislature has not defined the term “passing time,” the Legislature has addressed concepts related to passing time. For example, state law defines ADM for both fractional and full-time students in common schools to prohibit the inclusion of lunch periods and recess periods as instructional time unless the child’s individualized education program requires instruction during those periods. A.R.S. §§ 15-901(A)(2)(a)(i) & (b)(i).

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); *Barnhart v. Walton*, 535 U.S. 212, 217-18 (2002). In 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.’” *Arizona Water Co. v. Arizona Dep’t of Water Res.*, 208 Ariz. 147, 154, ¶ 30, 91 P.3d 990, 997 (2004) (quoting *Chevron*, 467 U.S. at 844); *Stearns v. Arizona Dep’t of Revenue*, 212 Ariz. 333, 336, ¶ 17, 131 P.3d 1063, 1066 (App. 2006).⁷

⁷ You state in your opinion that ADE’s interpretation is not entitled to deference given “ADE’s inconsistency regarding its interpretation of this law.” 7/31/2008 Letter from D. Schwartz, Udall Shumway & Lyons PLLC, to Superintendent Jennifer Johnson, PhD., Glendale Union High School District, at 3. You cite in support *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In that case, the U.S. Supreme Court held that “[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” *Cardoza-Fonseca*, 480 U.S. at 446 n.30 (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). However, in this case, it does not appear that ADE has previously issued a formal policy with respect to the inclusion or exclusion of passing time in calculating instructional time for purposes of determining ADM. Moreover, even if ADE’s policy is new or inconsistent, it is still entitled to some, albeit less, deference as long as it is a reasonable construction of the governing statutes.

An agency's construction of a statute need not be "the only one it permissibly could have adopted . . . , or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. Moreover, when a legislative body has remained silent on an issue, there is an assumption that the legislative body left a void for an agency to fill. *Chevron*, 467 U.S. at 843-44; see *Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1276 (9th Cir. 1993). In the present situation, the Legislature's silence on the definition of instructional time and the appropriate amount of passing time that could be counted toward instructional time leaves ADE with the responsibility of providing guidance to school districts on how to include or exclude passing time in the calculation of instructional time for the purposes of determining ADM.

II. The Definition of Instructional Time

ADE interprets instructional time to mean a period of the day in which an instructional program or course of study is offered that is included in the State Board of Education's approved minimum course of study based on the definitions contained in Arizona law and the State Board of Education's rules. See GE-19. ADE provided guidance that instructional time should not include lunch, recess, homeroom, study hall, early release, and late start hours because no instruction is offered during these periods. See GE-18 at 2; see also *Ariz. Op. Att'y Gen. I97-002* (stating that late start time is not instructional time because actual physical attendance is required).

ADE's guidance interprets "instructional time," "instructional program" and "instructional hours" in a manner that is consistent with the statutory definitions for "course," "subject" and "course of study." Section 15-101(8) defines a "course" as an

“organized subject matter in which instruction is offered within a given period of time and for which credit toward promotion, graduation or certification is usually given.” “Subject” is defined as “a division or field of organized knowledge, such as English or mathematics, or a selection from an organized body of knowledge for a course or teaching unit, such as the English novel or elementary algebra.” A.R.S. § 15-101(23). “Course of study” is defined as “a list of required and optional subjects to be taught in the schools.” A.R.S. § 15-101(9).

ADE also incorporates the State Board of Education’s rules regarding the minimum course of study in its interpretation of instructional time. *See* Ariz. Admin. Code §§ R7-2-302 through R7-2-302.02. The State Board of Education’s course of study rules require that students complete a specific number of courses and subjects in order to graduate from high school. *Id.*

In addition, ADE’s guidance on this issue complies with Attorney General Opinion I97-002, which discusses the framework by which a school could determine whether off-campus activities, field trips and vocational programs could be counted as instructional time. Ariz. Op. Att’y Gen. I97-002. In that Opinion, the Attorney General advised that periods could count as instructional time if: (1) the time was part of the school’s approved course of study; (2) the time included instruction; (3) the time was distinguishable from lunch and recess, which are statutorily excluded from instructional time for at least common school students; and (4) the school maintained a record of attendance. *Id.* at 4; *see also* A.R.S. § 15-901(A)(2)(a)(i) & (b)(i) (noting that lunch and recess periods may not be counted as instructional time unless instruction is being provided to the child during that time and is specifically documented).

ADE's definition of instructional time conforms to the framework outlined in Arizona statutory law and Attorney General Opinion 197-002. Therefore, the interpretation of instructional time by ADE is reasonable and a permissible construction of the statutory scheme determining the amount of time in the school day that may be counted in the calculation of ADM. The issue then becomes whether ADE's guidance regarding passing time, which further defines the parameters of instructional time, is a reasonable interpretation of Arizona's school funding and instruction statutes.

III. Exclusion of Passing Time When It Is Excessive or Occurs Between an Instructional Period and a Non-Instructional Period

Unlike instructional time, passing time is not mentioned anywhere in Arizona's education statutes. However, as a practical matter, passing time is integral to the educational process as time when students move from one course of study to another. Recognizing that passing time is an essential part of a student's day, GE-19 permits passing time of seven minutes or less to be included in the calculation of annual instructional hours. Under ADE's policy, passing time does not count toward instructional time when it exceeds seven minutes or occurs between an instructional period and a non-instructional period such as lunch, home room, study hall and recess.⁸ In creating this guidance, ADE's definition of passing time relies on the statutory definitions for calculating ADM. Specifically, ADE's policy states, "A total of seven (7) minutes or less of passing time can be included in calculating the annual instructional

⁸ ADE's policy also provides schools with a procedure that outlines how to count passing time toward instructional time. See GE-19.

hours. Annual instructional hours are specified in A.R.S. § 15-901(A)(2)(a), (b), and (c).” GE-19(II)(b).⁹

ADE is not alone in its use of the concept of passing time to regulate funding tied to the instructional day. For example, federal law defines non-instructional time, which is “time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.” 20 U.S.C. § 4072. This definition is consistent with ADE guidance that passing time to or from one instructional program to a non-instructional program such as lunch, home room, study hall and recess is not to be included in the calculation of ADM. *See* GE-19.

In addition, California courts have also contemplated passing time in a manner that conforms to ADE’s definition of passing time. The California Supreme Court in *In re Randy G.*, 28 P.3d 239, 241 n.1 (Cal. 2001), noted that passing time is a term used to describe time between classes when high school students move from one classroom to another. *See also Dawson v. East Side Union High Sch. Dist.*, 34 Cal. Rptr. 2d 108, 129 (Cal. Ct. App.1994); *Swain v. Hillsborough County Sch. Bd.*, 146 F.3d 855, 856 (11th Cir. 1998).

Although statutes and case law from other jurisdictions are not controlling precedent within Arizona, they support the conclusion that ADE’s definition of passing time is a reasonable construction within the framework of the Arizona school finance statutes.

⁹ Section 15-901(A)(2)(a), (b) and (c) refer to fractional students, full-time students and full-time instructional programs respectively, and these concepts are used to calculate ADM.

Conclusion

For the foregoing reasons, ADE's guideline GE-19 excluding portions of passing time in calculating time spent in an instructional program is a permissible exercise of ADE's statutory authority.

**Terry Goddard
Attorney General**