



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>July 23, 2013</p>	<p>No. I13-005 (R13-009)</p> <p>Re: Participation of Non-Traditional Teachers in a School's Classroom Site Fund Performance Pay Plan</p>
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To: Candyce B. Pardee, Esq.
Udall Shumway

You have submitted to the Attorney General's Office for review an opinion that you prepared for the Tolleson Union High School District ("District") regarding the eligibility of Marine Junior Reserve Officer Training Instructors and Guidance Advisors to participate in the District's classroom site fund ("CSF") performance pay under Arizona Revised Statutes ("A.R.S.") § 15-977 following the decision in *Reeves v. Barlow*, 227 Ariz. 38, 251 P.3d 417 (App. 2011). The *Reeves* decision modified an earlier Attorney General Opinion (Ariz. Att'y Gen. Op. I01-014) by establishing that, as a threshold matter, a school employee must have a teaching certificate to participate in the CSF performance pay plan.

Pursuant to A.R.S. § 15-253(B), this Opinion revises your opinion as follows. We accept your conclusions and analysis regarding questions A and B presented in your opinion to the District. We further agree with your conclusions regarding whether the Marine Junior Reserve Officer Training Corps teaching certificate and the Arizona Guidance Counselor certificate

would meet the threshold established by *Reeves* for participation in a CSF performance pay plan. However, we revise your Opinion to clarify only that although an employee may possess a qualifying certificate, that employee must be engaged in instructional activities relating to the school's educational mission to participate in the CSF plan.

Question Presented

Is possession of a qualifying teaching certificate sufficient pursuant to *Reeves* to participate in a district's CSF performance pay plan?

Summary Answer

No. Although it is necessary for an individual to possess a qualifying teaching certificate to meet the threshold eligibility for the CSF performance pay plan, such individual should not be included in the plan unless they are also employed to provide instruction to students relating to the school's educational mission.

Background

During the 5th Special Legislative Session of 2000, the Legislature passed S.B. 1007, which created the CSF to provide funding to districts and charter schools. A.R.S. § 15-977. A school district or charter school must spend monies distributed from the CSF "for use at the school site," including spending at least 40% of the funds for "teacher compensation increases based on performance." A.R.S. § 15-77(A). Although the statute allocates CSF monies for teacher compensation increases, it does not define the category of employees who qualify as "teachers."

Your opinion analyzes whether Marine Junior Reserve Officer Training Corps instructors and Guidance Advisors may qualify to participate in the CSF plan as "teachers." The District's

request states that following the *Reeves* decision, the District stopped paying CSF funds to these individuals who were classified as teachers under Ariz. Att’y Gen. Op. I01-014.

Analysis

In 2001, our office issued an opinion concluding that the definition of “teachers” for purposes of the CSF plan is not limited to traditional classroom teachers. Ariz. Att’y Gen. Op. I01-014. Rather, the opinion stated “others employed at public schools to provide instruction to students relating to the school’s educational mission are also ‘teachers’ for the purposes of A.R.S. § 15-977.” *Id.* Further, the opinion concluded that school districts and charter schools should apply these principles to determine in their specific circumstances which employees would qualify for the CSF plan. *Id.*

In *Reeves*, a group of school district employees from the Window Rock school district brought an action against the district seeking a writ of mandamus compelling the district to include them as teachers eligible to participate in the district’s CSF plan. *Reeves*, 227 Ariz. at 39 ¶ 1, 251 P.3d at 418.¹ The district argued that, pursuant to Ariz. Att’y Gen. Op. I01-014, it had exercised its discretion in determining that the employees did not qualify as teachers. The court reviewed the relevant statutes and determined that although “teacher” is not defined, the requirements of A.R.S. § 15-502(B) regarding the employment of certificated teachers made it “clear that a school district may not employ as a teacher anyone who has not received a teaching certificate.” *Id.* at 41 ¶ 13, 251 P.3d at 420. Therefore, the court determined that reading these statutes together, “the class of persons eligible to participate in the compensation system as ‘teachers’ is limited to persons who have the requisite teaching certificate.” *Id.* at 42 ¶ 13, 251

¹ The five employees held positions at the school as a physical therapist, psychologist, speech therapist/pathologist, speech language pathologist, and registered nurse. None of these positions required a teaching certificate, and only one of the employees actually possessed a teaching certificate. *Reeves*, 227 Ariz. at 40 ¶ 4, 251 P.3d at 419.

P.3d at 421. The court thus concluded that “[t]o the extent the Attorney General’s opinion on this issue is contrary . . . we disagree with it.” *Id.* at n.3.

Your opinion correctly observes that a Junior Reserve Officer Training Corps Teaching Certificate is listed as an “Other Teaching Certificate” pursuant to Arizona State Board of Education Rules. Ariz. Admin. Code (“A.A.C.”) R7-2-614(G). We agree with your conclusion that this certificate would meet the *Reeves* qualification as a “teaching certificate” for participation in a CSF plan. Additionally, your opinion is correct in its determination that the Guidance Counselor Certificate issued pursuant to A.A.C. R7-2-617(B) is listed as an “Other Professional Certificate” and would not qualify the employee to participate in the CSF plan.

However, your opinion then concludes that any employee that has a Junior Reserve Officer Training Corps teaching certificate and Guidance Advisors in the District that possess an Arizona teaching certificate in addition to their guidance counselor certificate may be included in the District’s CSF performance plan. We disagree. *Reeves* does not eliminate the requirement from the earlier Attorney General Opinion that an employee must be employed to provide instruction to students to participate in the CSF plan. *See* Ariz. Att’y Gen. Op. I01-014 (concluding that schools may use CSF funds for employees that are “employed to provide instruction to students related to the school’s educational mission”). In fact, the *Reeves* opinion specifically notes that “a school district that permitted a non-teacher to participate in the compensation system would exceed its authority under A.R.S. § 15-977.” *Reeves*, 227 Ariz. at 41 ¶ 11, 251 P.3d at 420. The holding of an appropriate teaching certificate is a necessary condition, but it is not alone sufficient for participation in the District’s CSF plan. As the court discussed in *Reeves*, “a school district retains discretion to determine whether employees who possess a teaching certificate, but are not employed in positions requiring such, are eligible to

participate in the compensation system.” *Id.* at 42 ¶ 14, 251 P.3d at 421. We believe that the earlier Attorney General Opinion provides the framework for schools to make this determination.

Conclusion

We conclude that under A.R.S. § 15-977, a school may include in its CSF plan those individuals who: (1) possess the requisite teaching certificate issued by the Arizona State Board of Education; and (2) are employed to provide instruction to students relating to the school’s educational mission. We therefore revise your opinion to the extent that it is contrary on this limited issue.

Thomas C. Horne
Attorney General