



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>July 25, 2018</p>	<p>No. I18-007 (R17-015)</p> <p>Re: Whether Arizona's A through F School Accountability Plan may implement a floating weight or impact indicator system</p>
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To: Paul Boyer
Arizona House of Representatives

Question Presented

Can the Arizona State Board of Education include "floating weights" within its A through F School Accountability Plan?

Summary Answer

Yes. Under previous federal regulations, floating weights were not permitted to be used in States' school accountability plans. Congress, however, subsequently disapproved those regulations pursuant to the Congressional Review Act. Presently, no federal regulation governs the question and the relevant federal and state statutes do not bar floating weights. Thus, the State Board of Education may choose to include floating weights within its A through F School Accountability Plan.

Background

In 2016, the Arizona Legislature substantially amended Arizona Revised Statutes (“A.R.S.”) § 15-241 governing public school and local education agency (“LEA”) accountability. Section 15-241 requires the Arizona Department of Education (the “Department”) to “compile an annual achievement profile for each public school” and LEA that “shall be used to determine a standard measurement of acceptable academic progress.” A.R.S. § 15-241(A), (C).

The annual achievement profile is used to give each school and LEA an A through F letter grade. A.R.S. § 15-241(F). The Department determines the criteria used to compile the annual achievement profile, subject to final adoption by the State Board of Education (the “State Board”), using a “researched-based methodology.” A.R.S. § 15-241(E). The statute directs the Department to develop the methodology “in collaboration with a coalition of qualified technical and policy stakeholders” and to “include the performance of pupils at all achievement levels, account for pupil mobility, account for the distribution of pupil achievement at each school and [LEA] and include longitudinal indicators of academic performance.” *Id.*

The A through F letter grade system takes into account both the academic proficiency of students in a school or LEA and their growth or improvement. These factors may be weighted equally across all schools or differently at each school, based on the characteristics of a school’s student body. The latter system is referred to as a “floating weight” system. In a floating weight system, growth may be weighted more heavily if most of a school’s students are behind and need to reach proficiency. For another school, proficiency may be weighted more heavily if most of

that school’s students are proficient at the beginning of the measurement period. Thus, the weight “floats” between growth and proficiency based on the characteristics of a school.¹

When the State Board was considering the criteria for the A through F School Accountability Plan in early 2017, a recently adopted federal regulation required that States, “[w]ithin each grade span, afford the same relative weight to each indicator among all schools” Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act—Accountability and State Plans, 81 Fed. Reg. 86076-01, 86227 (Nov. 29, 2016) (Notice of Final Rulemaking re *inter alia* 34 C.F.R. § 200.18(b)(3)) (the “2016 Version of § 200.18”). Under this regulation, States could not incorporate a floating weight system into their school accountability plans. Congress, however, disapproved that regulation on March 27, 2017, pursuant to the Congressional Review Act and it did not take effect. Elementary and Secondary Education Act of 1965, Pub. L. No. 115-13, 131 Stat 77 (2017); *see also* 5 U.S.C. § 801(b)(1). The United States Department of Education has since promulgated rules that reinstate the version of the rule in existence before the Congressional disapproval of the 2016 Version of § 200.18. *See* 82 Fed. Reg. 31690-01, 31692 (July 7, 2017).

Analysis

I. ARIZONA LAW REGARDING THE A THROUGH F SCHOOL ACCOUNTABILITY PLAN DOES NOT ADDRESS USE OF FLOATING WEIGHTS.

Arizona Revised Statutes § 15-241 governs the components of each school or LEA’s annual achievement profile, which is used to assign A through F letter grades. A.R.S. § 15-241(F) (“The annual achievement profile shall be used to determine a school and [LEA] classification based on an A through F letter grade system adopted by the state board of

¹ “Academic progress” means “measures of both proficiency and academic gain.” A.R.S. § 15-241(K). For purposes of this Opinion, “growth” has the same meaning as academic gain.

education.”).² The annual achievement profile must include the following academic performance indicators: “[m]ultiple measures of academic performance . . . as determined by the state board of education,” “[a]cademic progress on statewide assessments . . . in English language arts and mathematics,” “[a]cademic progress on . . . English language learner assessments,” and “[p]rogress toward college and career readiness for all schools and [LEAs] that offer instruction in any of grades nine through twelve.” A.R.S. § 15-241(D). Subject to adoption by the State Board, the Department is responsible for “determin[ing] the criteria for each school and [LEA] classification label using a researched-based methodology.” A.R.S. § 15-241(E). “The methodology developed . . . shall include the performance of pupils at all achievement levels, account for pupil mobility, account for the distribution of pupil achievement at each school and [LEA] and include longitudinal indicators of academic performance.” *Id.*

Nothing in A.R.S. § 15-241, however, addresses the weight to be assigned to any of the academic performance or progress indicators included in the annual achievement profile. Nor does the statute address whether the weights assigned must be the same from school to school. In short, if “systematic and objective application of statistical and quantitative research principles” support the use of floating weights, the State Board may incorporate them into the A through F School Accountability Plan. *Id.* (defining “researched-based methodology”).

II. CURRENT FEDERAL REGULATIONS DO NOT BAR USE OF FLOATING WEIGHTS IN THE A THROUGH F SCHOOL ACCOUNTABILITY PLAN.

The Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act, provides federal funding to state educational agencies. One of the requirements for this funding is submission of a state plan that meets the requirements of 20 U.S.C. § 6311.

² In 2018, the Legislature further amended A.R.S. § 15-241. *See* 2018 Ariz. Sess. Laws ch. 275, § 1. Those changes, which will become effective on or about August 3, 2018, do not affect the analysis in this Opinion.

The state plan “shall demonstrate that the State educational agency, in consultation with local educational agencies, has implemented a set of high-quality student academic assessments in mathematics, reading or language arts, and science.” 20 U.S.C. § 6311(b)(2)(A). 20 U.S.C. § 6311(b)(2) sets forth detailed requirements for these academic assessments. It does not, however, address the issue of floating weights.

In 2016, the U.S. Department of Education proposed a revised regulation, 34 C.F.R. § 200.18, to implement 20 U.S.C. § 6311(b)(2). The regulation would have barred floating weights,³ but Congress rejected the agency’s proposal. Under the Congressional Review Act, an agency promulgating a rule must submit to Congress: (1) “a copy of the rule,” (2) a concise general statement relating to the rule,” and (3) “the proposed effective date of the rule.” 5 U.S.C. § 801(a)(1)(A)(i)–(iii). Within 60 days of submission to Congress, a majority of both Houses may enact a “joint resolution of disapproval” of the proposed regulation. 5 U.S.C. § 801(b)(1). The effect of such disapproval is that the regulation “shall have no force or effect.” 5 U.S.C. § 802(a). That is exactly what happened with the 2016 Version of § 200.18. Pub. L. No. 115-13, 131 Stat 77 (2017). As a result, the prior version of the regulation is again in effect and the U.S. Department of Education is barred from reissuing its revised regulation “in substantially the same form.” 5 U.S.C. § 801(b)(2).

The Congressional Review Act’s effect on the Department of Education’s proposed 2016 regulation resolves the question presented in this Opinion. Because Congress rejected the

³ As previously mentioned, the 2016 Version of § 200.18(b)(3) provided that States must “[w]ithin each grade span, afford the same relative weight to each indicator among all schools.” 81 Fed. Reg. 86076-01, 86227 (Nov. 29, 2016). In its response to comments on the 2016 Version of § 200.18, the Department of Education stated that the regulation required uniform weighting of indicators within each grade span because without it, “the methodology for differentiating schools and identifying them for support and improvement could be unreliable from district to district, or worse, biased against particular schools or set lower expectations for certain schools, based on the population of students they serve.” *Id.* at 86130.

Department of Education's only proposed prohibition on floating weights, neither the current version of 34 C.F.R. § 200.18 nor the statute that it implements, 20 U.S.C. § 6311(b)(2), presents any barrier to the use of floating weights.

Conclusion

In sum, the State Board, with the assistance of the Department, has discretion and authority to adopt an A through F School Accountability Plan that meets the requirements of A.R.S. § 15-241. Neither that statute nor federal law governing such plans bars the use of floating weights as a component of the plan. As such, if floating weights are supported by a researched-based methodology, the State Board has discretion to incorporate them into its A through F School Accountability Plan.

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