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State of Arizona

July 24, 2023

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Dear Colleagues,

On July 17, 2023, pursuant to A.R.S. § 41-193(A)(7), I issued Attorney General Opinion I23-005. That Opinion, which I have enclosed with this letter, concerns the Dual Language Model of structured English immersion approved by the State Board of Education pursuant to A.R.S. § 15-

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756.01(A) and used by some Arizona schools to teach English language learners. Pursuant to A.R.S. § 15-253(A), Attorney General Opinions related to school matters shall be distributed to all county attorneys and county school superintendents. I would appreciate it if you would distribute this Opinion and this letter to your respective county school superintendents and ask that they convey them to the school districts in your county.

Following the release of the Opinion, another public official made inaccurate statements to the media claiming that school officials who implement the Dual Language Model could face personal liability under A.R.S. § 15-754. Liability under A.R.S. § 15-754 is limited to situations in which school officials “refuse to implement the terms of” A.R.S. 15-751 to -757. Implementing the Dual Language Model, which has been duly approved by the State Board of Education, is not a “refusal” to implement the applicable statutes. Further, pursuant to A.R.S. § 38-446, “[n]otwithstanding any provision of law to the contrary, no public officer or employee is personally liable for acts done in his official capacity in good faith reliance on written opinions of the attorney general issued pursuant to section 41-193.” Thus, a school official who implements the Dual Language Model in good faith reliance on the State Board’s approval of that model and Attorney General Opinion I23-005 cannot be held personally liable under A.R.S. § 15-754.

I hope that this information is helpful to you and the school officials in your county. If you have any questions or would like to discuss these matters, please do not hesitate to contact me.

Sincerely,



KRIS MAYES
Arizona Attorney General

Attachment

Attachment



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>KRIS MAYES ATTORNEY GENERAL</p> <p>July 17, 2023</p>	<p>No. I23-005 (R23-013)</p> <p>Re: Which state entity has statutory authority to eliminate a model of structured English immersion approved by the State Board of Education</p>
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To: Representative Jennifer Pawlik, Leg. Dist. 13
Representative Laura Terech, Leg. Dist. 4
Representative Nancy Gutierrez, Leg. Dist. 18
Representative Judy Schwiebert, Leg. Dist. 2

Questions Presented

You have raised questions regarding how structured English immersion (“SEI”) instructional models approved by the State Board of Education (the “Board”) may be modified or rescinded and the procedures for addressing public schools that are not in compliance with laws applicable to English language learners (“ELL”s). You have also asked whether the Dual Language Immersion SEI Model (“Dual Language Model”) approved by the Board is consistent with Arizona law.

Summary Answer

Arizona law is clear that the Board has the sole authority to eliminate or modify an approved SEI model. The Board also has the sole authority to determine whether a school district or charter school has failed to comply with Arizona law governing English language learners. Only those school districts and charter schools found by the Board to be noncompliant are barred

from receiving monies from the English language learner fund. For the reasons explained below, we respectfully decline to address your question regarding the Dual Language Model.

Background

In 2000, Arizona voters passed Proposition 203 in an effort to ensure that students considered to be ELLs in Arizona are taught the English language “as rapidly and effectively as possible.”¹ To effectuate this intent, Prop. 203 repealed and replaced Title 15, Chapter 7, section 3.1 of the Arizona Revised Statutes (“ELL Statutes”). The language added by Prop. 203 provides, in relevant part, 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. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year.

A.R.S. § 15-752.

Section 15-753, also added by Prop. 203, provides that the “requirements of section 15-752 may be waived” by parental consent, allowing an ELL to be taught “English and other subjects through bilingual education techniques or other generally recognized educational methodologies permitted by law.” Prop. 203 defines “sheltered English immersion” as

an English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language. Books and instructional materials are in English and all reading, writing, and subject matter are taught in English. Although teachers may use a minimal amount of the child’s native language when necessary, no subject matter shall be taught in any language other than English, and children in this program learn to read and write solely in English.

A.R.S. § 15-751(5).

¹ Proposition 203, (2000), <https://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop203.htm#:~:text=Proposition%20203%20allows%20parents%20to,their%20child%20has%20special%20needs>.

In 2006, the legislature passed H.B. 2064, which added sections 15-756 through -756.13 to the ELL Statutes.² The bill appropriated funds to support ELL programs and established the Arizona English Language Learners Task Force, which was directed to create and approve models for SEI instruction.³ The bill required that the SEI models include a minimum of four hours of English language development.⁴ Further, the bill created the Office of English Language Acquisition Services within the Arizona Department of Education (the “Department”) and tasked it with monitoring schools’ progress as they implemented their ELL programs.⁵

In 2013, the legislature amended the ELL Statutes, in part to dissolve the ELL Task Force and transfer its authority, powers, and duties to the Board.⁶ In 2019, the legislature again amended the ELL Statutes. Senate Bill 1014 passed unanimously and changed the required minimum amount of English language development contained in SEI models from four hours to 120 minutes per day for students in Kindergarten through fifth grade, and 100 minutes per day for students in grades six through twelve.⁷ Further, the bill directed the Board to establish a framework for evaluating research-based models and required that the framework meet certain criteria.⁸ The bill also made changes to the evaluation process carried out by the Department.⁹

² H.B. 2064, 47th Leg., 2nd Reg. Sess. (Ariz. 2013), <https://www.azleg.gov/legtext/47leg/2R/laws/0004.pdf>.

³ *Id.* § 15-756.01.

⁴ *Id.*

⁵ *Id.* § 15-756.07, -756.08.

⁶ Ariz. State Senate Fact Sheet for H.B. 2425, 51st Leg., 1st Reg. Sess. (March 25, 2013), https://www.azleg.gov/legtext/51leg/1r/summary/s.2425ed_adopted.pdf.

⁷ Ariz. State Senate Fact Sheet for S.B. 1014, 54th Leg., 1st Reg. Sess. (Feb. 28, 2019), https://www.azleg.gov/legtext/54leg/1R/summary/S.1014ED_ASENACTED.DOCX.htm.

⁸ *Id.*

⁹ *Id.*

In January 2020, exercising its authority under A.R.S. § 15-576.01, the Board approved the Dual Language Model. This Model allows schools to teach ELL students in English for half of the school day and in a partner language for the other half of the day.¹⁰

On June 19, 2023, the Superintendent for Public Instruction issued a statement purporting to declare that the Dual Language Model violates Prop. 203.¹¹ The statement warned schools that “[a]ny district or school that continues placing English Language learners into dual language classes, without the requisite parental waivers, should be aware of the legal consequences.”¹² The statement cited a three-page memo from the General Counsel of the Legislative Council that was prepared for State Senator Sonny Borrelli.¹³ The memo states that the Dual Language Model “likely violates Proposition 203.”¹⁴

The Department’s Office of English Language Acquisition Services then sent a letter to Arizona school districts on June 20, 2023, stating that it had been “advised from the Arizona Legislative Council ... that the 50-50 Dual Language Immersion SEI Model of the Structured English Immersion Models approved by the State Board of Education in January 2020 is in

¹⁰ Arizona Board of Education Board Notice of Public Meeting (January 27, 2020), Item 4A, “Approval of Research-Based Structured English Immersion and Alternative Models of English Instruction,” https://simbli.eboardsolutions.com/SB_Meetings/ViewMeeting.aspx?S=112020&MID=1128; Arizona Department of Education, “50-50 DLI Model,” <https://www.azed.gov/sites/default/files/2020/01/50-50%20Dual%20Language%20Immersion%20Model%2003.27.2020.pdf?id=5e348a0503>.

¹¹ Superintendent Tom Horne, Letter, “Re: English Language Learner,” June 19, 2023, <https://www.azed.gov/sites/default/files/2023/06/English%20Language%20Learners%20DRAFT%204%20%20FINAL.pdf>.

¹² *Id.*

¹³ Arizona Legislative Council Memo (May 31, 2023), <https://www.azed.gov/sites/default/files/2023/06/36%20Proposition%20203%3B%2050-50%20dual%20lagueage%20immersion%20model.pdf>

¹⁴ *Id.* at 3.

violation of Proposition 203.”¹⁵ The letter informed schools that, “[e]ffective immediately, the 50-50 Dual Language Immersion Model is hereby eliminated as a model of Structured English Immersion.”¹⁶ The letter further stated that, in order to continue placing ELL students in a dual language immersion program, a school must “comport with the use of the bilingual parental waiver for English Language Learners as codified in law within Proposition 203 and ARS 15-753.”¹⁷

On June 30, 2023, four legislators on the House Education Committee submitted a joint request for an Opinion from this Office seeking guidance regarding whether the Dual Language Model remains an approved SEI model and whether schools that implement the Dual Language Model may lose access to ELL funds.

Analysis

I. Only the Board has statutory authority to eliminate an SEI model or determine that a school is noncompliant with ELL requirements.

The powers and duties of the Board and the Superintendent of Public Instruction are prescribed by the legislature. Ariz. Const. art. V, § 9 (“The powers and duties of ... [the] superintendent of public instruction shall be as prescribed by law.”); Ariz. Const. art. XI, § 3 (stating the powers and duties of the Board shall be as “prescribed by law”). The legislature has prescribed that the Board “shall . . . [e]xercise general supervision over and regulate the conduct of the public school system and adopt any rules and policies it deems necessary to accomplish this purpose.” A.R.S. § 15-203(A)(1). The Superintendent is directed to “[e]xecute, under the

¹⁵ Arizona Department of Education, Letter (June 20, 2023), https://www.azed.gov/sites/default/files/2023/06/Emailed%20Communication-50-50%20Dual%20Language%20Immersion%20Letter%20to%20LEAs%20_6.20.23.pdf.

¹⁶ *Id.*

¹⁷ *Id.*

direction of the state board of education, the policies that have been decided on by the state board.”
A.R.S. § 15-251(4).

The ELL Statutes grant the Board the statutory authority to “adopt and approve research-based models of structured English immersion for school districts and charter schools to use.”
A.R.S. § 15-756.01(A). Further, the ELL Statutes grant the Board the authority to “delete from, add to or modify” existing SEI models. *Id.* (G).

The Superintendent is empowered by § 15-756.08 to “direct the office of English language acquisition services” within the Department to monitor schools’ implementation of ELL programs in accordance with the guidelines provided in § 15-756.08. The purpose of this monitoring is to assess “programmatically effectiveness” and to ensure that schools are providing legally adequate ELL services to facilitate English proficiency. A.R.S. § 15-756.08(B).

If the Department determines that a school district or charter school is not complying with the legal requirements for ELLs, the Department must issue a report and follow prescribed procedures to assist schools in creating and implementing a corrective action plan. A.R.S. § 15-756.08(C), (E)–(J). If, after following these procedures, the Department believes a school to be out of compliance with the law, the Department “shall refer the school district or charter school to the state board of education for a finding of noncompliance.” *Id.* (J). A school district or charter school that “is found by the state board to be noncompliant shall not continue to receive any monies from the Arizona English language learner fund established by section 15-756.04 for English language learners.” *Id.*

The ELL Statutes do not authorize either the Superintendent or the Department to eliminate or modify an existing SEI model approved by the Board. *See* A.R.S. § 15-756.01(G). Additionally, the ELL Statutes do not authorize the Superintendent or the Department to determine

that a school district or charter school is not in compliance with the ELL Statutes. *See* A.R.S. § 15-756.08(J). Rather, the Superintendent’s and the Department’s role in implementing the ELL Statutes is limited to monitoring and referring school districts and charter schools to the Board for a finding of noncompliance, as explained above. *Id.* (C), (E)–(J). Finally, the ELL Statutes do not authorize the Superintendent or the Department to withhold ELL funding from a school district or charter school absent a finding of noncompliance by the Board. *Id.* (J).

Contrary to the June 20, 2023 letter from the Department’s Office of English Language Acquisition Services, the Board has not modified the Dual Language Model or otherwise deleted the Dual Language Model from the approved list of SEI models. The Dual Language Model thus remains an approved SEI model. School districts and charter schools may implement any SEI model approved by the Board, including the Dual Language Model, and only the Board has the authority to determine whether school districts and charter schools are in compliance with the ELL Statutes. A.R.S. § 15-756.01(G); § 15-756.08(J).

Additionally, just as the Superintendent lacks authority to make final determinations regarding whether schools are in compliance, the Superintendent also lacks authority to issue formal legal opinions on school matters. The legislature has assigned the task of writing legal opinions (and approving opinions issued by county attorneys) relating to school matters to the Attorney General. A.R.S. § 15-253(B). This section further instructs the Superintendent to distribute copies of “attorney general opinions . . . relating to school matters to all county attorneys [and] county school superintendents.” *Id.* (A)(1). The Superintendent also must “[r]equire each county school superintendent to furnish copies of all attorney general opinions relating to school matters to all school districts in his county.” *Id.* (A)(2). Any legal opinion issued by the Superintendent—like the Superintendent’s June 19 statement—lack legal force.

In sum, the Board has sole statutory authority to delete or modify an SEI model. Further, the Board holds the authority to make the final determination as to whether a school district or charter school is noncompliant and ineligible for ELL funding. Neither the Department nor the Superintendent has statutory authority to reject an SEI model approved by the Board, or to declare its illegality. Nor does the Superintendent or the Department have authority to withhold monies from school districts or otherwise impose consequences on schools for utilizing the Dual Language Model.

II. We decline to opine on whether the Dual Language Model satisfies the SEI requirements of Prop. 203.

In 2019, the legislature made substantial amendments to the ELL statutory scheme.¹⁸ The amendment reduced the required amount of English language development time for SEI models. A.R.S. § 15-756.01(A). That statute also requires that SEI models must be “research-based” and must be “the most cost-efficient models that meet all state and federal laws.” *Id.* (D). Prior to approval, the Board is also required to submit SEI and alternative models to the joint legislative budget committee for review; the Board must also submit the models to the president of the senate, the speaker of the house, and the governor. § 15-765.01(F). And whenever “adopting, approving or modifying” ELL programs, the Board must “review and consider the information and data obtained” by the Department in its monitoring of ELL programs under § 15-756.08. *Id.* (G).

The new provisions also required that the Board create a framework for evaluating potential SEI models. *Id.* (I). The framework must ensure that all approved models include the following: “coherent instruction aligned with this state’s English language proficiency standards”; “oral and written language instruction, including structured opportunities to develop verbal and written skills

¹⁸ See Ariz. State Senate Fact Sheet for S.B. 1014, *supra* note 7.

and comprehension strategies”; “access to complex language content through grade-level textbooks with appropriate supports”; and “parental engagement.” *Id.* In sum, the Board’s approval of the Dual Language Model (and other ELL models) is subject to a detailed and complex process involving technical expertise.

The Attorney General does not issue all opinions that are requested. For example, the Attorney General will typically decline to issue opinions that: (1) address matters pending before a court, Ariz. Att’y Gen. Op. I81-137; *but see* Ariz. Att’y Gen. Op. I91-002; or (2) respond to legal questions from constituents or third parties, Ariz. Att’y Gen. Ops. I78-81, -83. When called upon to address the constitutionality of a statute, the Attorney General presumes a statute is constitutional and will find otherwise only when the statute is clearly or patently unconstitutional. *See* Ariz. Att’y Gen. Op. I83-069 (“Because the Attorney General has the duty to uphold and defend state laws, we will not opine that a statute is unconstitutional unless it is patently so.”).

By the same token, this Office should generally be reluctant to issue an official Opinion stating that a particular official action by a state agency is contrary to law. That is especially true when the agency action requires subject matter expertise and a detailed administrative decision-making process that the legislature has directed the agency, rather than this Office, to undertake. *See* A.R.S. § 41-193(A)(7) (providing that upon request from certain elected or appointed officials, the Attorney General shall “render a written opinion on any *question of law* relating to” the office of the requesting party) (emphasis added); Ariz. Att’y Gen. Op. I13-009 (“We decline to answer questions of fact.”) (citing A.R.S. § 41-193(A)(7)); Ariz. Att’y Gen. Op. I90-007 (declining to offer opinion where question would depend on “particular facts or circumstances”); Ariz. Att’y Gen. Op. I80-236 (expressing no opinion where doing so would require “an analysis of individual fact situations”); *cf. Moulton v. Napolitano*, 205 Ariz. 506, 511 ¶ 9 (App. 2003) (the doctrine of

administrative exhaustion “allow[s] an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies”); *Sharpe v. Ariz. Health Care Cost Containment Sys.*, 220 Ariz. 488, 492 ¶ 9 (App. 2009) (stating courts evaluate agency action by considering whether the action “was supported by the law *and substantial evidence*”) (emphasis added).

In this case, the legislature has assigned to the Board the authority to adopt SEI models. The Board has adopted several such models, including the Dual Language Model. Second-guessing that determination would require a fact-intensive inquiry into the Board’s processes, the contents of the Dual Language model, and a comparison of those contents to the ELL Statutes. The complex nature of this inquiry is acknowledged in the Legislative Council memo cited by the Superintendent in his statement.¹⁹ The memo’s author states they were “able to identify only one document that discusses the 50-50 dual language immersion model,” indicating that the document was found in an online search, without any context or verification from the Board.²⁰ The memo further states that the document “is technical in nature” and that the memo’s author was “unable to deduce from the document how exactly the model is to be implemented.”²¹

This is not the type of record on which an official legal determination should be made, and this Office declines to attempt such a fact-dependent analysis in the context of an official request for an Opinion, which does not involve public hearings or other taking of evidence. The Board has approved the Dual Language Model as a model of SEI instruction, and school districts and charter schools remain entitled to rely on that approval.

¹⁹ See Arizona Legislative Council Memo, *supra* note 13 at 2.

²⁰ *Id.*

²¹ *Id.*

Conclusion

Only the Board has the statutory authority to exclude the Dual Language Model from the list of approved SEI models and to declare a school noncompliant and ineligible for ELL funds. The Superintendent does not have authority to impose any consequences on, or withhold any monies from, a school district or charter school that utilizes a Board-approved SEI Model absent a finding of noncompliance by the Board.²²

Kris Mayes
Attorney General

²² Because the Dual Language Model is a Board-approved SEI model, no waiver is required for schools that utilize the Dual Language Model to serve ELLs. *See* §§ 15-752, -753, -756.01(A).