STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By MARK BRNOVICH ATTORNEY GENERAL June 24, 2015	No. I15-005 (R15-011) Re: Small School Weight for Charter Schools

To: Diane M. Douglas
Arizona Superintendent of Public Instruction

Questions Presented

You have asked the following questions about Senate Bill 1476, 2015 Ariz. Sess. Laws, 52d Leg., 1st Reg. Sess., ch. 15 (SB 1476), as amended by Senate Bill 1193, 2015 Ariz. Sess. Laws, 52d Leg., 1st Reg. Sess., ch. 299 (SB 1193), legislation that affects the eligibility of certain charter schools for the Small School Weight:

1. Which charter holders are eligible for Small School Weight and which charter holders are eligible for a phase down of the Small School Weight, given the above-described changes.

2. Whether the changes in the calculation of the Small School Weight as a result of SB 1476 will affect the calculation and distribution of Classroom Site Fund monies.

3. Whether the changes in the calculation of the Small School Weight as a result of SB 1476 will affect the distribution of the inflationary increase set forth in Senate Bill 1469, 2015 Ariz. Sess. Laws, 52d Leg., 1st Reg. Sess., ch. 8, § 34 (SB 1469).

4. How should the Small School Weight be calculated for charter holders that serve grades K-12, given that A.R.S. § 15-943(1) provides for separate Small School Weights for schools serving grades K-8 and schools serving grades 9-12.

Summary Answers

1. A charter holder is eligible for application of the Small School Weight if that charter holder meets the definition of charter holder in A.R.S. § 15-101(3) and the student count of all charter schools held by that charter holder is less than 600. In other words, the controlling factor for eligibility as to this adjustment is the aggregate average daily membership and not the number of charters held.

2. Yes, the changes in the calculation of the Small School Weight will affect the amount of Classroom Site Fund monies that some charter schools receive.

3. Yes, the changes in the calculation of the Small School Weight will affect the distribution of the inflationary increase set forth in SB 1469.

4. For charter schools that serve students in grades K-12, the Department should separately determine the number of students in grades K-8 and 9-12, and apply the appropriate weighting factors set out in A.R.S. § 15-943(1)(a) and (b) to the K-8 students and the 9-12 students.

Background

Charter schools are "established by contract with a district governing board,[1] the state board of education, the state board for charter schools, a university under the jurisdiction of the Arizona board of regents, a community college district . . . or a group of community college districts . . ." A.R.S. § 15-101(4). The contract that establishes a charter school is commonly known as a charter. The entities that may establish a charter school are referred to as "sponsors." *See, e.g.,* A.R.S. § 15-183(C). Also defined by statute is the term "charter holder" which "means that person that enters into a charter with the state board for charter schools." A.R.S. § 15-101(3). Notably, the definition of "charter holder" does not include all of the entities permitted to sponsor charter schools.

A charter holder may operate a single school. Or a charter holder might operate a number of charter schools. In such a case, the charter holder might hold one charter and operate one or more schools under that charter. Alternatively, a charter holder could hold one or more charters and operate one school for each of those charters. A charter school can serve just a few grades or it can serve grades K-8, 9-12 or K-12.

The questions at issue here relate to base support level funding, which is made available to charter schools by A.R.S. § 15-185(B)(1). A.R.S. § 15-943 describes how base support level is determined: it is calculated by multiplying a school's weighted student count by a statutorily-set base level.[2] Weighted student count is determined by applying specific weights to student count, as set out in A.R.S. § 15-943. Application of the weights increases funding.

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[1] In 2014, the legislature imposed a moratorium on district-sponsored charter schools through that year's budget. 2014 Ariz. Sess. Laws, 51st Leg., 2d Reg. Sess., ch. 17, §2 (SB 1488).
[2] For example, the base level for the fiscal year 2014-15 is $3,373.11. A.R.S. § 15-901(B)(2)(e).

Paragraph (1) of A.R.S. § 15-943 addresses the Small School Weight. A Small School Weight is a statutorily-set weight (or adjustment) to a school district's student count for school districts with fewer than 600 students. The amount of the weight varies, depending on whether the school district serves students in grades K-8 or 9-12 and depending on the number of students.[3] A.R.S. § 15-943(1). Student count is also weighted to account for other factors, as set out in A.R.S. § 15-943(2), but those weighting factors are not relevant to this issue. While A.R.S. § 15-943 refers only to a school district's eligibility for Small School Weight, A.R.S. § 15-185(B)(1) established that charter schools would also be funded on the basis of a base support level as prescribed in A.R.S. § 15-943.[4]

For purposes of school finance, the Arizona Department of Education historically treated each separate charter school operated pursuant to an individual charter as a school district. By way of example, if a charter holder had three separate charters for three separate school sites, the Department treated each separately chartered site as a school district, even if the same charter holder held all three charters and operated the three schools as a system or set of related schools. Thus, the Department determined the student count of each individually-chartered school for purposes of determining eligibility for the Small School Weight. (E.g., if each separately chartered school had 500 students, then each would be eligible for the Small School Weight.) If, however, the charter holder had one charter and operated three school sites under that charter, the Department aggregated the student count of all three schools for purposes of determining eligibility for the Small School Weight. (E.g., if each school operated under the same charter had 250 students, none would receive the Small School Weight.)

In the 2015 legislative session, the Legislature enacted SB 1476, as amended by SB 1193, with changes effective in the 2015-16 school year. It provides as follows:

> (b) The small school weights prescribed in section 15–943, paragraph 1 apply if a charter holder, as defined in section 15–101, holds one charter for one or more school sites and the average daily membership for the school sites are combined for the calculation of the small school weight. The small school weight shall not be applied individually to a charter holder if one or more of the following conditions exists and the combined average daily membership derived from the following conditions is greater than six hundred:
>
> > (i) The organizational structure or management agreement of the charter holder requires the charter holder or charter school to contract with a specific management company.
> >
> > (ii) The governing body of the charter holder has identical membership to another charter holder in this state.

[3] There are different Small School Weights for schools with 1-99 students, 100-499 students, or 500-599 students. A.R.S. § 15-943(1).

[4] The only difference between district and charter schools, in terms of determining base support level, is the calculation of the Teacher Experience Index, as required by A.R.S. § 15-941; no Teacher Experience Index is determined for charter schools. A.R.S. § 15-185(B)(1)(a).

(iii) The charter holder is a subsidiary of a corporation that has other subsidiaries that are charter holders in this state.

(iv) The charter holder holds more than one charter in this state.[5]

(c) Notwithstanding subdivision (b) of this paragraph, for fiscal year 2015–2016 the department of education shall reduce by thirty-three percent the amount provided by the small school weight for charter schools prescribed in subdivision (b) of this paragraph.

(d) Notwithstanding subdivision (b) of this paragraph, for fiscal year 2016–2017 the department of education shall reduce by sixty-seven percent the amount provided by the small school weight for affiliated charter schools prescribed in subdivision (b) of this paragraph.

SB 1476 changes the way that Small School Weights are calculated for charter schools. The first sentence defines charter schools that are eligible for consideration for the Small School Weight: they must be schools where a "charter holder, as defined in section 15–101, holds one charter for one or more school sites and the average daily membership for the school sites are combined for the calculation of the small school weight." SB 1476, 2:34-37. The next sentence describes a set of charter holders that will no longer be eligible for Small School Weight. It states "the small school weight shall not be applied individually to a charter holder if one or more of the following conditions exists and the combined average daily membership derived from those conditions is greater than 600." SB 1476, 2:37-40. Taken together, the conditions, which are listed in subsections (i) through (iv), describe ways of organizing charter schools as a system or a set of affiliated schools. They include an organizational structure or management agreement that requires the charter holder or charter school to contract with a specific management company, identical governing bodies for charter holders, the charter holder being the subsidiary of a corporation with other charter holders as subsidiaries, or the charter holder holds more than one charter in the state. *Id.,* 2:41-3:3. Finally, subsections (c) and (d) phase in the elimination of the Small School Weight for those schools no longer eligible, providing that it will be reduced by thirds over the next two years.

Analysis

The intent of the new legislation appears to be to limit the application of the Small School Weight, and in particular, to eliminate eligibility for the Small School Weight for affiliated charter schools where the total student count for all affiliated schools exceeds 600. However, the language of the first sentence introduces two potential difficulties into the process of identifying the charter schools that are eligible for the Small School Weight. In addition, questions have arisen regarding the calculation of Classroom Site Funds, pursuant to A.R.S. § 15-977, and the amount of the inflationary increase provided by Senate Bill 1469. Finally, the Department has asked how it should determine eligibility for Small School Weight for charter schools that serve

[5] SB 1476 originally provided "(iv) The charter holder holds one or more charters in this state." SB 1193 amended the provision to read, "(iv) The charter holder holds more than one charter in this state."

grades K-12, because the Small School Weight varies, depending on whether a charter school serves grades K-8 or 9-12.

I. Identification of Charters Eligible for Small School Weight

The new legislation begins by defining a charter holder who is eligible for consideration of the Small School Weight as "a charter holder . . . [who] holds one charter for one or more school sites and the average daily membership is combined for the calculation of the small school weight." SB 1476, at 2:34-37. The statute does not specifically address charter holders who hold more than one charter but have an aggregate student count less than 600. The statute could be read to eliminate their eligibility for Small School Weight, except that Arizona courts have made it clear that a statute's silence cannot be conclusive as to legislative intent. *Sell v. Gama*, 231 Ariz. 323, 328, ¶ 21 (2013) ("we find it not plausible to interpret the statutory silence as tantamount to an implicit [legislative] intent.") (internal quotation marks omitted, alterations in original); *see also Sw. Paint & Varnish Co. v. Arizona Dep't of Envtl. Quality*, 194 Ariz. 22, 26, ¶ 21 (1999) ("We have squarely rejected the idea that silence is an expression of legislative intent.")

The silence in this case can be resolved by looking to "the context of the [legislation], the language used, the subject matter, the historical background, the effects and consequences, and the spirit and purpose of the law." *Martin v. Martin*, 156 Ariz. 452, 457 (1988). By looking to the broader language and context of the legislation, it becomes clear that this legislation sought to ensure that affiliated charter schools whose aggregated student count exceeds 600 will no longer receive the Small School Weight adjustment. Thus, interpreting the silence as to charter affiliates with multiple charters and small enrollment such that these schools no longer receive this adjustment would be inconsistent with the purpose of SB 1476.

This conclusion is bolstered by "phase out" language in subsections (c) and (d) of the relevant provision. It would be illogical for the legislature to slowly phase out this funding mechanism for affiliated schools with aggregate student counts elevating them out of the "small school" category, while immediately eliminating eligibility for a class of affiliated schools that remain "small" even in the aggregate. In other words, the legislature made an effort to minimize the difficulty posed by this reduction in financing by phasing it out over time for the explicitly affected schools. To interpret the statute so as to maximize the burden on schools that remain "small" even in the aggregate runs contrary to that effort.

A more difficult situation is created by SB 1476's statement that the Small School Weight applies if a "charter holder, *as defined in section 15-101*, holds one charter for one or more school sites." (Emphasis supplied.) The reference to the definition of charter holder in A.R.S. § 15-101 introduces a limitation on the universe of affected entities. That statute defines a charter holder as "a person that enters into a charter with the state board for charter schools." A.R.S. § 15-101(3). Notably, this definition does not include other entities that may grant charters, including the State Board of Education, a university under the Arizona Board of Regents, or a community college (or group of community colleges). Nor is it consistent with the definition of a charter school, found immediately adjacent, in A.R.S. § 15-101(4). That definition describes a charter school as

> a public school established by contract with a district governing board, the state board of education, the state board for charter schools, a university under the jurisdiction of the Arizona board of regents, a community college district with enrollment of more than fifteen thousand full-time equivalent students or a group of community college districts with a combined enrollment of more than fifteen thousand full-time equivalent students pursuant to article 8 of this chapter to provide learning that will improve pupil achievement.

As a result of SB 1476's reference to the statutory definition of charter holder, the new law excludes from eligibility those charter schools that are chartered by entities other than the State Board for Charter Schools. There is no ambiguity in this reference; the legislature explicitly included a limiting provision by reference to a particular definition and there is no second, plausible interpretation of the language. *See CNL Hotels & Resorts, Inc. v. Maricopa County*, 230 Ariz. 21, 23, ¶ 9 (2012). To include charter schools sponsored by such other entities would effectively amend either SB 1476's reference to A.R.S. § 15-101 or the definition of charter holder in A.R.S. § 15-101(3),[6] to include sponsors that the legislature did not reference. Because there is no ambiguity, there is no need to consider legislative history. *Farris v. Advantage Capital Corp.*, 217 Ariz. 1, 2, ¶ 5 (2007). Even if it were appropriate to consider, however, the legislative history of SB 1476 does not explain why lawmakers excluded charter schools sponsored by entities not listed in A.R.S. § 15-101; it also does not provide any basis for including in SB 1476 charter sponsors not specifically listed there.

II. Calculation of Classroom Site Fund Monies

You have also asked how the changes in SB 1476 will affect the calculation of Classroom Site Fund (CSF) monies. The CSF was established pursuant to Proposition 301, and the rules governing the CSF are set forth at A.R.S. § 15-977. Subsection G describes how the funds are distributed:

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[6] The inconsistency between the definitions of "charter school" and "charter holder" has existed since the legislature first defined "charter holder" in 2009. Nothing in the legislative history explains why the two definitions are not consistent with each other. The definition of charter school was added in 1994; it included all entities that could sponsor charter schools at that time. House Bill 2002, 1994 Ariz. Sess. Laws, 41st Leg., 9th Spec. Sess., ch. 2. The legislature added the definition of charter holder in 2009; it has always been limited to charters given by the State Board for Charter Schools and has never included all the entities that are able to sponsor charter schools. Senate Bill 1196, 2009 Ariz. Sess. Laws, 49th Leg., 1st Reg. Sess., ch. 95. Its legislative history gives no indication as to the purpose of defining charter holder. *See* Fact Sheet for Senate Bill 1196 as enacted, 49th Leg., 1st Reg. Sess., at p. 3. While the definition of charter school has been updated as the entities that can sponsor charter schools has changed, the definition of charter holder has remained the same. *See* Senate Bill 1263, 2011 Ariz. Sess. Laws, 50th Leg., 1st Reg. Sess., ch. 344 (amending definition of charter school to include entities given the ability to sponsor charter schools during the 2010 session). The change that increased the entities that could sponsor charter schools was made in House Bill 2725, 2010 Ariz. Sess. Laws, 49th Leg., 2d Reg. Sess., ch. 332.

G. Monies in the [Classroom Site F]und are continuously appropriated, are exempt from the provisions of section 35-190 relating to lapsing of appropriations and shall be distributed as follows:

1. By March 30 of each year, the staff of the joint legislative budget committee shall determine a per pupil amount from the fund for the budget year using the estimated statewide weighted count for the current year pursuant to section 15-943, paragraph 2, subdivision (a) and based on estimated available resources in the classroom site fund for the budget year adjusted for any prior year carryforward or shortfall.

2. The allocation to each charter school and school district for a fiscal year shall equal the per pupil amount established in paragraph 1 of this subsection for the fiscal year multiplied by the weighted student count for the school district or charter school for the fiscal year pursuant to section 15-943, paragraph 2, subdivision (a). For the purposes of this paragraph, the weighted student count for a school district that serves as the district of attendance for nonresident pupils shall be increased to include nonresident pupils who attend school in the school district.

A.R.S. § 15-977(G). In short, monies in the Classroom Site Fund are distributed based on a school district or charter school's weighted student count, calculated pursuant to A.R.S. § 15-943(2)(a), and multiplied by a per pupil amount determined by the Joint Legislative Budget Committee each year. Arizona Revised Statutes § 15-943(2)(a) specifically incorporates the Small School Weight when it states "subject to paragraph 1 of this section;" paragraph (1) of A.R.S. § 15-943 addresses the Small School Weight, and paragraph (2) describes other weights, related to factors such as ELL status, disability or homelessness. In other words, CSF monies are distributed based on weighted student count.

A.R.S. § 15-185(B)(1) provides, "the charter school shall calculate a base support level as prescribed in section 15-943, except [for the conditions described in (a)[7] and (b)]." SB 1476, which adds subsections (b) through (d), then explains how weighted student count is calculated, depending on whether a school's student count is more or less than 600 and on whether certain factors demonstrating affiliation are present. Because SB 1476 affects the calculation of weighted student count, and weighted student count is one factor in the equation for determining the allocation of CSF monies, the allocation of CSF monies is necessarily affected by SB 1476.

III. Distribution of SB 1469's Inflationary Increase

You have also asked how SB 1476's reduction in the Small School Weight should affect distribution of the inflationary increase set forth in Senate Bill 1469. 2015 Ariz. Sess. Laws, 52d Lg. 1st Reg. Sess., ch. 8, § 34 (SB 1469). Senate Bill 1469 provides that the Department shall

[7] Subsection (a) prevents charter schools from having access to the Teacher Experience Index funding, as provided by A.R.S. § 15-941. This provision is not new. Previously, it was found in subsection (B)(1); with the change, it is now separately enumerated as subsection (a).

allocate $74,394,000 as though it were "an additional increase of $54.31 in the base level defined for fiscal year 2015-2016 in section 15-901, subsection B, paragraph 2," but specifies that the "additional inflation amount is not an increase in the base level" as defined by A.R.S. § 15-901. SB 1469 at 25:12-24. This language clearly indicates that the inflationary increase is to be treated as though it is part of the base level. A.R.S. § 15-943(3) states that a "base support level" is calculated by multiplying the weighted student count (as determined pursuant to subsections (1) and (2)) "by the base level." A.R.S. § 15-943(3). Because the inflationary amount is to be allocated as "if the monies were for an additional increase . . . in the base level," the inflationary increase amount should be added to the base level, and then the base support level should be calculated by multiplying that number by the weighted student count, determined pursuant to A.R.S. § 15-943, as affected by SB 1476, if appropriate.

IV. Calculation of the Small School Weight for K-12 Charter Schools

Finally, you have asked how the Department should apply SB 1476 to charter schools that serve grades K-12. This question arises because A.R.S. § 15-943(1) establishes different Small School Weights for K-8 schools and for 9-12 schools. *Compare* A.R.S. § 15-943(1)(a) *with* -943(1)(b). While neither SB 1476 nor A.R.S. § 15-943 address this question, the Department has developed its own interpretation, which arises independently of the change effected by SB 1476. For charter holders that serve both K-8 and 9-12 in one school, the Department determines the number of K-8 students and the number of 9-12 students separately. If the number of K-8 students is less than 600, it applies the K-8 Small School Weight, with a similar result if the number of 9-12 students is less than 600. The Department's practice is reasonable; under this practice, students in grade K-8 are aggregated for purposes of determining their eligibility for the weight assigned to them, while 9-12 students are considered as a separate group for the weight assigned to them. With SB 1476, the Department should now aggregate all students in grades K-8 in schools held by a single charter holder to determine whether to apply the Small School Weight, and should make similar calculation as to all students in grades 9-12.

Conclusion

The legislative change to eligibility for the Small School Weight will not change eligibility for those affiliated charter schools with aggregated student counts below 600, regardless of the number of charters held. It will, however, affect both the Classroom Site Fund and inflationary increase monies that some charter schools receive. Finally, the Department of Education should separately determine the number of students in grades K-8 and 9-12 for purposes of applying the relevant weighting factors.

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