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ARIZONA COURT OF APPEALS

DIVISION ONE

LEGACY EDUCATION GROUP DBA EAST
VALLEY HIGH SCHOOL, an Arizona
non-profit corporation; and TUCSON
PREPARATORY SCHOOL, an Arizona
non-profit corporation,

Plaintiffs/ Appellants,

v.

ARIZONA STATE BOARD FOR CHARTER
SCHOOLS,

Defendant/ Appellee.

Court of Appeals
Division One
No. 1 CA-CV 17-0023

Maricopa County
Superior Court
No. CV2016-051845

**SUPPLEMENTAL
BRIEF RE S.B. 1055**

Panel: Winthrop,
Campbell, McMurdie
Argument: Apr. 10, 2018,
9:30 a.m.

Senate Bill 1055 confirms that the judgment should be reversed because (1) the Board was required to follow the APA's rulemaking process when promulgating the Frameworks and (2) the new legislation does not retroactively bless the Frameworks.

I. This case is not moot because S.B. 1055 does not excuse the Board's failure to follow the APA when adopting the Frameworks.

S.B. 1055 exempts the Board from certain aspects of the APA. *See* S.B. 1055, § 2 (amending A.R.S. § 41-1005). This new exemption does not apply to the Frameworks (and thus does not moot this appeal) for three reasons.

First, S.B. 1055 does not contain an emergency clause and therefore will not take effect until 90 days after the end of the current legislative session. Ariz. Const. art. 4, pt.1, §1(3).

Second, S.B. 1055 contains no retroactivity clause that would operate to exempt previous actions by the Board, such as promulgating the Frameworks, from the rulemaking requirements of the APA. Statutes do not apply retroactively absent an express retroactivity provision. A.R.S. § 1-244.

Third, S.B. 1055 permits the Board to adopt rules without following the requirements of the APA only if it gives notice, provides two

opportunities for public comment, and considers the fiscal impact of the proposed rule. S.B. 1055 § 2 (new A.R.S. § 41-1055(G)). The Frameworks do not satisfy these requirements. For example, the Board did not formally consider the Frameworks' fiscal impact. *Cf. Bus. Roundtable v. SEC*, 647 F.3d 1144, 1150 (D.C. Cir. 2011) (vacating agency rule because the agency "neglected its statutory obligation to assess the economic consequences of its rule" as required by statute).

Because S.B. 1055 did not exist when the Board adopted the Frameworks, it should be no surprise that the Frameworks do not satisfy the new legislation's specific requirements. But the shortcomings described above demonstrate that even if S.B. 1055 operated retroactively, the Frameworks would still be invalid. Simply put, the new legislation does not retroactively bless the Frameworks.

II. The text and legislative history of S.B. 1055 confirm that the Board was required to follow the APA when it adopted the Frameworks.

The Board contends that when the legislature adopted A.R.S. § 15-183(R) to require that charter school sponsors adopt "performance frameworks," the other charter school sponsors were not subject to the APA's rulemaking requirements. (Ans. Br. at 21-25.) From

this premise about the *other* sponsors, the Board argues that the legislature did not intend for the Board to follow the APA in promulgating the Frameworks. (*Id.* at 21-32.) S.B. 1055 now puts that argument conclusively to rest.

If the other entities' rulemaking exemptions implicitly extended to the Board, then it would have been completely unnecessary for S.B. 1055 to add the Board to the list of exempt entities. By adopting legislation expressly adding an exemption, the legislature has confirmed that such an exemption was necessary, meaning that the Board was previously subject to those requirements, including when it adopted the Frameworks. If the Board was already exempt, then "the legislature (albeit the [2018] legislature, not the [2012] legislature that passed § [15-183(R)]) would not have needed to add subsection (G)." *City of Phoenix v. Glenayre Elecs., Inc.*, 242 Ariz. 139, 145, ¶¶ 20-21 (2017).

The new legislation also shows that the legislature sees nothing wrong with requiring different rulemaking procedures for different sponsors. For example, under new A.R.S. § 41-1005 (as amended by S.B. 1055), the State Board for Charter Schools and the State Board of Education must "consider the fiscal impact" of new frameworks and other proposed

rules,” but the exemption for the Board of Regents has no such requirement. S.B. 1055, § 2. Similarly, the State Board for Charter Schools and the State Board of Education must “provide at least *two* opportunities for public comment” before adopting new frameworks or other rules, but the Board of Regents may provide only one such opportunity. *Id.* (emphasis added). School districts and community college districts, meanwhile, have no obligation to consider either fiscal impact or public comments in connection with any frameworks they might adopt for the charter schools they sponsor. Thus, even under the new legislation, the different sponsors have to follow different procedures when adopting new performance frameworks to satisfy A.R.S. § 15-183(R).

Although that is an unusual result, the inconsistency in procedures is the direct consequence of the legislature’s choice to permit different types of entities to sponsor charter schools. For this reason, there is nothing wrong with requiring the Board to follow the APA for pre-S.B. 1055 rules even though the other sponsors did not have to.

The legislative history likewise confirms that the Board did not previously enjoy an exemption. The chair of the Senate Education Committee, who also sponsored the bill, stated that the purpose of the

legislation was to enable the State Board of Charter Schools to act quickly in response to new legislative mandates, as the other listed entities can already do. Hearing Before the S. Educ. Comm., S.B. 1055 (53d Leg., 2nd Reg. Sess.) (Jan. 11, 2018), http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=20026&meta_id=488361 at 1:34:52-1:36:01. By approving this amendment, the legislature confirmed that the Board was not previously authorized to rely on the express exemptions for other entities to excuse their own failure to follow rulemaking procedures.

III. Conclusion.

This Court should vacate the judgment, reverse the dismissal, and remand for further proceedings.

RESPECTFULLY SUBMITTED this 6th day of April, 2018.

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