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December 17, 2019

PRIVILEGED AND CONFIDENTIAL

To: Wyoming State Board of Education

From: Randall Lockyear, Assistant Attorney General

Mackenzie Williams, Senior Assistant Attorney General

Re: Computer Science Performance Standards

The State Board of Education recently adopted computer science content standards but removed the accompanying performance standards. While it is appropriate to move forward with the content standards, the Board should promulgate rules containing computer science performance standards so that districts can complete the alignment process. During the Board's last meeting there was some discussion regarding whether including the standards labels ("priority" and "supporting") meant that the Board did not need to have performance standards for the K-5 grade band. This short memo addresses two potential misconceptions regarding the interactions between the standards categories and the standards labels. It also indicates the future steps we advise the Board to undertake.

First, the standards labels should not simply replace the standards categories. Instead, the labels should be used to assist the standards categories in performing their functions. Specifically, the labels of priority and supporting may permissibly function in tandem with the performance standards, but may not simply supplant the performance standards. If the Board desires to follow the advice of the Attorney General's opinion to establish "narrower performance standards that will direct what is required for students to master at the middle/junior high and elementary levels" then the standards labels become

largely superfluous. *The Role of the Standards in Wyoming's Education System*, Op. Wyo. Att'y Gen. p. 10 (Nov. 12, 2019). The Board should establish performance standards for the K-5 grade band as necessary to prepare students for future challenges. The only reason not to have performance standards at the K-5 levels is if the Board genuinely determines that students at these levels do not need to master any of the computer science standards to prepare them for a computer science elective in either middle or high school.

The second important point is that the definition of the label "priority" makes it clear that the label is working in conjunction with, rather than in place of, the performance level descriptors. The definition of "priority" states that, "[a]ll students are expected to be instructed on and demonstrate mastery of the content and **performance expectations** included in these benchmarks." *Proposed Rules Wyo. Dep't of Education*, ch. 10, § 4 (May 2019) (emphasis added). The student's performance expectations are defined by the performance level descriptors. This is clear not only from the role of the performance standards generally, but also from the definition of "Performance Level Descriptors" that is included in the "Computer Science Standards" document. *Id.* That document states that the "Performance Level Descriptors (PLDs) describe the **performance expectations** of students." *Id.*

As was mentioned above, the fact that the adopted computer science standards do not include performance standards is not fatal to the rules. Nevertheless, the Board should determine the benchmarks in the K-5 grade band that students need to master to prepare them for life and to take upper-level electives in computer science. At an appropriate future time, the Board should adopt corresponding performance standards (that is, performance level descriptors) for these identified benchmarks. At the very least, this subset of performance standards should be coextensive with the "priority" standards since that label was meant to work in conjunction with the performance level descriptors.

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November 12, 2019

PRIVILEGED AND CONFIDENTIAL

TO: Wyoming State Board of Education
2300 Capitol Avenue
Cheyenne, WY 82002

FROM: Randall Lockyear
Assistant Attorney General

Mackenzie Williams
Senior Assistant Attorney General

SUBJECT: Process for waiving privilege

The accompanying opinion contains privileged and confidential legal advice to the Wyoming State Board of Education. This legal advice is given to the Board as a whole and, therefore, any decision to waive the privilege must be made by the Board in a public meeting by Board action. No member of the Board should distribute this opinion unless and until the Board has acted to waive its privilege. We will be available at the Board's next meeting to answer any questions.

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PRIVILEGED AND CONFIDENTIAL

November 12, 2019

Walt Wilcox, Chairman
Wyoming State Board of Education
2300 Capitol Avenue
Cheyenne, WY 82002

RE: Opinion Request: The Role of the Standards in Wyoming's Education System

Dear Chairman Wilcox:

You requested an Attorney General opinion to answer the following questions:

1. What determines which uniform student content and performance standards are mandatory for students at the elementary, middle/junior high, and high school levels and which uniform student content and performance standards are elective or optional?

2. What determines which uniform content and performance standards are mandatory for all Wyoming schools to offer at the elementary, middle/junior high, and high school levels?

3. Does the proposed categorization of the computer science standards as "priority" or "supporting" benchmarks infringe upon prohibited curriculum determinations?

4. Does the proposed categorization of the computer science standards as "enhanced" infringe upon uniformity of standards?

5. Does the language in 2018 SEA 48 requiring computer science content and performance standards to be "effective" by the beginning of school year 2022 also require that districts must fully implement the standards, including aligning curriculum to all elements of the content standards, the application of resources/materials, and the application of aligned district assessment systems to the standards, by that same date?

SHORT ANSWERS

1. The Board determines the standards that are mandatory for students at the high school level by establishing graduation requirements that include graduation standards. Since the current graduation requirements do not designate specific graduation standards, there is no way to determine, at a uniform statewide level, the standards that are mandatory or elective at the high school level. Below the high school level the Board should establish performance standards identifying particular benchmarks.[1]

2. Under the current system, all standards must be offered to all students but not necessarily taught to all students. The Board determines the uniform content standards that Wyoming schools must offer by promulgating rules establishing those standards. Setting grade bands or grade-level requirements determines whether the standards are taught at the elementary, middle/junior high, or high school level.

3. It is likely that labeling computer science benchmarks as either "priority" or "supporting" does not impermissibly constitute prescribing curriculum.

4. Depending on how the Board defines "enhanced" for the computer science standards, that categorization could impermissibly introduce variation into the uniform standards. The Board should clarify its intention and either remove the "enhanced" standards or provide an acceptable justification for the variation.

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[1] The term "benchmarks" is used throughout this opinion as defined in the terminology section directly below.

5. The requirement that the computer science content and performance standards be "effective" beginning with the 2022-23 school year compels districts to fully implement the standards by that date.

BACKGROUND

A. Terminology

The state standards terminology is confusing. There are three types of state standards: content, performance, and graduation. Content standards define what students are learning. Content standards are made up of benchmarks (content standard benchmarks) that are discrete items of knowledge and descriptions of skills that students must have the opportunity to learn. Performance standards define the level of proficiency required for students to be considered proficient on any given content standard benchmark. The graduation standards are a selected subset of content standard benchmarks that students must show proficiency in to graduate. The proposed computer science standards use three different labels (priority, supporting, and enhanced). Additionally, often the words referring to various sub-components of the standards are not used consistently. The word "benchmarks" can refer to either the discrete items of knowledge that compose the standards or the grade-level or grade-band targets where those items must be taught. For the purposes of this opinion, a discrete item of knowledge is referred to as a "benchmark." The word "progression-benchmark" refers to the grade-level targets.

B. The Constitutional System

Public education is a fundamental right in Wyoming. *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1245 (Wyo. 1995) (*Campbell I*); *see also Washakie Cty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980). The Wyoming Supreme Court has used many different phrases to describe this right. It can be stated as a student's right to an "equal and adequate education." *State v. Campbell Cty. Sch. Dist.* 2001 WY 19, ¶ 44, 19 P.3d 518, 536 (Wyo. 2001) (*Campbell II*). Or it may be the right to a "proper" education regardless of where the student lives. *Id.* ¶ 10, 19 P.3d at 529. However it is expressed, these definitions convey two distinct aspects—equality and quality. This expansive constitutional guarantee makes Wyoming unique. "Unlike the majority of states, . . . Wyoming views its state constitution as mandating legislative action to provide a thorough and uniform education of a quality that is both visionary and unsurpassed." *Id.* ¶ 51, 19 P.3d at 538.

"The framers intended the education article as a mandate to the state legislature to provide an education system of a character which provides Wyoming students with a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually." *Campbell I*, 907 P.2d at 1259. To carry out this mandate, the framers gave the Legislature a monopoly on determining the structure of the state's educational system. *See* Wyo. Const. art. 7, §§ 1-14. The "legislature has complete control of the state's school system in every respect, including division of the state into school districts and providing for their financing." *Washakie*, 606 P.2d at 320. A few existing constitutional limits on the Legislature are prohibitions regarding discrimination, the prescription of textbooks, and the degree to which this constitutional authority can be delegated. *Id.*; *see also Campbell I*, 907 P.2d at 1272-73; *Powers v. State,* 2014 WY 15, ¶ 34, 318 P.3d 300, 313 (Wyo. 2014) (holding that the Legislature does not have unlimited power to transfer powers from the Superintendent of Public Instruction to a statutorily created office). The framers mandated "that the state, not local boards . . . control the system of education" through the Legislature. *Campbell I*, 907 P.2d at 1272.

The Legislature, therefore, has a "constitutional duty to provide an equal opportunity for a quality education by structuring both school financing and the education system in a manner, and at a level, that maintains 'a complete and uniform system of public instruction.'" *Id.* at 1263 (quoting Wyo. Const. art. 7, § 1). In order to do so, the Legislature must first "state and describe what is a 'proper education' for a Wyoming child." *Id.* at 1279. While certain details in this definition can be delegated to either the Superintendent of Public Instruction or the Board and fleshed out at the state administrative level, delegating these tasks to school districts erodes the constitutional uniformity requirement. *Id.* at 1263.

Nevertheless, the constitutionally required system of education permits a local role. "So long as the constitutional mandates of a complete and uniform public instruction system and a thorough and efficient public school system which delivers proper instruction are met, nothing . . . prohibit[s] the legislature from delegating to local boards the authority of implementing that legislatively created and maintained system." *Id.* at 1272. Indeed, the people of Wyoming highly value local control and, through their elected representatives, have granted school districts significant latitude to implement the state's instructional system. *Campbell II*, ¶ 11, 19 P.3d at 529.

But while local control brings benefits, it also presents challenges. In particular, while local control is a constitutionally permissible avenue for ensuring students obtain their constitutional right to a proper education, there is tension with the constitutional uniformity requirement. Uniformity in educational opportunity is a fundamental right of the student. *Campbell I*, 907 P.2d at 1259. "[L]ocal control is not a constitutionally recognized interest and cannot be the basis for disparity in equal educational opportunity." *Id.* at 1270. Any irreconcilable discrepancies between uniformity and local control are resolved in favor of uniformity. *Id.*

The court identified two causes of "divergent educational opportunity" in school systems related to local control. *Id.* at 1255. The first is the variability in wealth between the districts and the second is the variability in the "effort" or "progressiveness" of the districts. *Id.* As the court stated, "the triggering issue in *Washakie* was wealth-based disparities; however, we now extend that decision beyond a wealth-based disparity to other types of causes of disparities." *Id.* at 1266. The funding model addresses the first source of variability, wealth-based disparity. The standards address the second source of variability by establishing educational uniformity.

C. The Role of the Uniform Standards

To understand the role of the uniform student standards in the current educational system, it is necessary to consider their historical development. In 1993, the Board's rules required students to meet performance standards "at the level set by the school and district" for both the common core of knowledge and the common core of skills. *Rules Wyo. Dep't of Education*, ch. 6, §§ 7-8 (Mar. 1993). Additionally, the rules "permit[ted] graduation upon mastery of the common core of knowledge and skills at the levels set by the district and the schools." *Campbell I*, 907 P.2d at 1263; *see Rules Wyo. Dep't of Education*, ch. 6, § 12 (Mar. 1993).

In *Campbell I*, the court found two problems with allowing districts to set the performance and graduation standards. First, the Board's rules lacked oversight by permitting "the local school districts to establish . . . minimum standards and then evaluate for themselves whether they ha[d] met those standards." *Campbell I*, 907 P.2d at 1262. Second, and more significant, local performance and graduation standards conflicted with the constitutional requirement for a uniform school system. As the court noted, the consequence of this system was to permit "[e]ach school district . . . to separately determine and define an education system for their students, potentially creating forty-nine

autonomous education systems." *Id.* at 1263. The court found that this approach did not satisfy the constitutional requirements for a uniform educational system. *Id.*

In order to address these shortcomings, the Legislature required the Board, rather than local districts, to establish the uniform student performance and graduation standards, and also required the districts to provide educational programs that are "sufficient to meet uniform student performance standards at the level established by the state board of education." 1997 Wyo. Special Sess. Laws 4, 23-25.

While there have been some significant changes to the statutes dealing with the standards since the 1997 special session, the main elements introduced in 1997 remain. First, the uniform standards still contain both "performance" and "graduation" standards. Wyo. Stat. Ann. § 21-2-304(a)(iii). Second, school districts are still required to provide sufficient educational programs to "meet uniform student content and performance standards at the level established by the state board of education." Wyo. Stat. Ann. § 21-9-101(b). And third, the district assessment system is still meant to "determine the various levels of student performance in all content areas of the uniform student content and performance standards relative to the common core of knowledge and skills." Wyo. Stat. Ann. § 21-3-110(a)(xxiv).[2]

At the high school level, these components are intimately related. The graduation standards determine the benchmarks that need to be mastered for graduation. Wyo. Stat. Ann. § 21-2-304(a)(iii). The performance level descriptors (performance standards) then set the level of proficiency required for a student to have mastered those benchmarks. *Id.* The district assessment system, which is meant to "determine the various levels of student performance" on the standards, confirms that students have met the proficiency level on the graduation standards. Wyo. Stat. Ann. § 21-3-110(a)(xxiv); Wyo. Stat. Ann. § 21-2-304(a)(iv).

If the Board determines that certain schools or districts are not adequately implementing or assessing the uniform standards, it has the authority to determine appropriate repercussions "including but not limited to the changing of accreditation status." Wyo. Stat. Ann. § 21-2-304(b)(ii). This process is intended to ensure that schools are helping students achieve the standards. *Campbell Cty. Sch. Dist. v. State*, 2008 WY 2, ¶ 77, 181 P.3d at 67 (Wyo. 2008) (*Campbell IV*).

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[2] The district assessment system role was added in 2002. 2002 Wyo. Sess. Laws 118-19.

Finally, the funding model is based on the premise that the money provided through the Foundation Program is used by districts to meet the standards. In 1997, the Legislature defined "Foundation program" as "the level of funding which is made available to each district under this article so that each district is able to comply with the state uniform educational program standards imposed under W.S. 21-9-101 and 21-9-102 and the uniform state student performance standards prescribed by the state board of education." 1997 Wyo. Special Sess. Laws at 28. This definition remains essentially unchanged. Wyo. Stat. Ann. § 21-13-101(a)(v). Additionally, "in every school finance case, [the Wyoming Supreme] Court has consistently recognized the constitutional directive that it is the legislature's duty and prerogative to determine the appropriate standards for our public schools and to assure sufficient funding is provided to allow the districts to achieve those standards." *Campbell IV*, ¶¶ 75, 79, 181 P.3d at 66, 67; *see also Campbell II*, ¶ 52 n.12, 19 P.3d at 539. This directive can only be achieved when all of the standards' categories (content, performance, and graduation) are functioning appropriately.

D. Superseding a Previous Informal Opinion

Before answering the Board's specific questions we must address a 2017 Attorney General's informal opinion related to the graduation requirements. In December 2017, we issued an opinion stating, "[s]tudents do not have to perform to a certain level in the district assessment system in order to graduate and **the Board does not have to [prescribe] a performance level**." Duties of the State Board of Education Concerning Graduation Requirements, Op. Wyo. Att'y Gen. p. 10 (Dec. 12, 2017) (emphasis added). In further reviewing the statutes and case law to address the current questions, we believe that advice is incorrect and is replaced by this opinion.

First, it is necessary to understand the role of the performance standards within the graduation requirements. Before *Campbell I*, the Board's graduation requirements stated that "student[s] shall master the student performance standards within the common cores of knowledge and skills **at the levels set by the district and the schools**." *Rules Wyo. Dep't of Education*, ch. 6, § 12 (Mar. 1993) (emphasis added). Allowing the districts and schools to set the level of performance on the student performance standards for graduation was explicitly flagged in *Campbell I* as being counter to the constitutional uniformity requirement. *Campbell I*, 907 P.2d at 1263. In response to *Campbell I*, the Legislature made two relevant changes. First, it required the Board to create uniform student performance standards. 1997 Wyo. Special Sess. Laws at 23. Second, it required each school district to provide educational programs sufficient to meet the uniform student performance standards

at the level established by the Board. *Id.* at 25. This basic relationship between the graduation and performance standards remains a statutory requirement. The "[s]tudent content and performance standards . . . shall include standards for graduation from any high school within any school district of this state." Wyo. Stat. Ann. § 21-2-304(a)(iii). This language directs the Board to identify a smaller subset of benchmarks constituting the graduation standards from among the content and performance standards.

The 2017 opinion failed to distinguish between two distinctive parts of the graduation requirements: a course completion component and a standards component. Those two distinctive parts are present in statute and have been since the 1997 special session. 1997 Wyo. Special Sess. Laws at 23. First, the "[s]tudent content and performance standards prescribed under this paragraph shall include standards for graduation from any high school within any school district of this state." Wyo. Stat. Ann. § 21-2-304(a)(iii). And second, "[g]raduation standards imposed under this paragraph shall require the successful completion of [four years of English, and three years each of mathematics, science and social studies], as evidenced by passing grades." *Id.*

Additionally, the Board is required to "establish requirements for students to earn a high school diploma as evidence by course completion [the course completion component] and as measured by each district's district assessment system [the standards component]." Wyo. Stat. Ann. § 21-2-304(a)(iv).

The district assessment system "shall be designed and used to determine the various levels of student performance in all content areas of the uniform student content and performance standards relative to the common core of knowledge and skills prescribed under W.S. 21-9-101(b)." Wyo. Stat. Ann. § 21-3-110(a)(xxiv); *see also* Wyo. Stat. Ann. § 21-2-304(a)(iv). Therefore the district assessment system is intended to measure student performance on the graduation standards that the Board selects from among the content and performance standards.

The Board is responsible for determining the level of performance students must attain on the performance standards. Wyo. Stat. Ann. § 21-9-101(b) ("[e]ach school district within the state shall provide educational programs sufficient to meet uniform student content and performance standards **at the level established by the state board of education**.") (emphasis added).

The 2017 Attorney General's opinion incorrectly stated that "[s]tudents do not have to perform to a certain level in the district assessment system in order to graduate and the

Board does not have to [prescribe] a performance level." Duties of the State Board of Education Concerning Graduation Requirements, Op. Wyo. Att'y Gen. p. 10 (Dec. 12, 2017).

The Board designed its current graduation rules in compliance with the 2017 Attorney General opinion on the graduation requirements. Those rule changes resulted in an inability to determine the content and performance standards that are mandatory for students at the high school level. Therefore, to comply with the *Campbell* cases and relevant statutory provisions, the Board should establish graduation requirements identifying graduation standards from among the content and performance standards.

ANALYSIS

I. What determines which uniform student content and performance standards are mandatory for students at the elementary, middle/junior high, and high school levels and which uniform student content and performance standards are elective or optional?

The Board determines the standards that are mandatory for students by setting graduation and performance standards identifying required benchmarks. Wyo. Stat. Ann. § 21-2-304(a)(iii). The graduation standards should determine the benchmarks that are mandatory at the high school level and the performance standards should determine the benchmarks that are mandatory for students at the lower grade levels. Because the current graduation requirements do not identify particular benchmarks, there is no way to determine, at a uniform statewide level, the benchmarks that are mandatory or elective at the high school level. Similarly, because nearly all content standards in the lower grades currently have corresponding performance level descriptors (i.e., performance standards), there is no way to differentiate mandatory and elective benchmarks at those grade levels.

The Board should designate certain benchmarks that are required for graduation from among the content and performance standards. *Id.* By doing so, the Board will not only comply with the *Campbell* cases and statutory mandates, but will simultaneously establish mandatory benchmarks at the high school level. These identified graduation benchmarks then work in conjunction with the course completion requirement to determine the graduation requirements. *Id.*

The performance standards should determine the benchmarks that are mandatory for all students to master below the high school level. Currently, the performance standards

are not able to adequately perform this function because the Board rules promulgated in response to the 1997 legislation conflated the graduation and content standards. As early as 2000, the rules defined the "Standards for Graduation" as "[t]he content standards contained in the student content and performance standards established for the Common Core of Knowledge and Common Core of Skills. They define what students are expected to know and be able to do by the time they graduate." *Rules Wyo. Dep't of Education*, ch. 31, § 4 (Nov. 2000). This definition remained largely unchanged until it was deleted in the 2018 rules revisions. *Rules Wyo. Dep't of Education*, ch. 31, § 3 (Aug. 2018).

By conflating the graduation and content standards, every content benchmark had a corresponding performance level descriptor (performance standard). Because each content benchmark has a corresponding performance level descriptor, there is no ability for the performance standards to distinguish between what students must actually master in the lower grade levels from what must simply be offered to them. Indiscriminately selecting all benchmarks as requiring a performance standard makes all benchmarks mandatory. In practice, because monitoring and meeting all the performance standards is practically impossible, the districts and schools independently determine the performance standards they will meet.

Below the high school level, the Board should select benchmarks that students must master. Only the content benchmarks that need to be mastered should receive a performance level descriptor. The Board should select the benchmarks containing prerequisite pieces of knowledge or skills that are comprehensively building toward a graduation standard. Additionally, some benchmarks that do not provide a foundation for a corresponding graduation standard may also be important for students to master. By setting narrower performance standards, the Board will simultaneously establish mandatory benchmarks in the lower grade levels.

Currently there is no way of identifying, at either the primary or secondary level, the benchmarks that all students must be taught. By establishing graduation requirements that include the graduation standards, the Board will simultaneously establish mandatory benchmarks at the high school level. Wyo. Stat. Ann. § 21-2-304(a)(iii). This determination will then influence how the Board selects performance standards. New, narrower performance standards will direct what is required for students to master at the middle/junior high and elementary levels.

II. What determines which uniform content and performance standards are mandatory for all Wyoming schools to offer at the elementary, middle/junior high, and high school levels?

The next question is how to determine the uniform content and performance standards that schools must offer. Under the current system, all content benchmarks contained in the uniform content standards must be offered to all students in Wyoming.[3] The Board determines the uniform content standards by including those standards in its rules. Wyo. Stat. Ann. § 21-2-304(a)(iii). Unlike the graduation and performance standards, the content standards do not require levels of proficiency. Instead, they establish the knowledge and types of skills a student must have available as they move through Wyoming's education system.

"The constitution requires the legislature to create and maintain a system providing an equal opportunity to a quality education." *Campbell I*, 907 P.2d at 1274. The content standards are the chief mechanism for providing equality of access. In *Campbell I*, the court included the "[s]etting of meaningful standards for course content," (i.e., content standards) in the list of legislative duties for a "proper education" to which every Wyoming child is entitled. *Id.* at 1279. The Legislature responded by requiring the Board to prescribe "uniform" content standards for the common core of knowledge and the common core of skills. Wyo. Stat. Ann. § 21-2-304(a)(iii).

The second part of this question concerns timing. The progression-benchmarks determine when the benchmarks are taught in elementary, middle/junior high, or high school institutions. The progression-benchmarks vary in the level of flexibility they grant to schools and districts for implementation.

Therefore, the Board determines the uniform content standards (i.e., benchmarks) that are mandatory for Wyoming schools to offer by promulgating rules including those standards. The progression-benchmarks determine the benchmarks that are taught in the elementary, middle/junior high, and high school levels. Schools must offer all of these benchmarks in the appropriate grades to ensure educational equality of access.

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[3] It should be noted that the Board has, in very limited circumstances, permitted schools and districts to choose whether to offer certain benchmarks at all. This is a special circumstance addressed in section IV below.

III. Does the proposed categorization of the computer science standards as "priority" or "supporting" benchmarks infringe upon prohibited curriculum determinations?

It is likely that labeling the standards as "priority" and "supporting" does not constitute prescribing curriculum since the directives conveyed by those labels substantially align with the intended functions of the performance standards.

While the Board is required to establish uniform student standards, it is prohibited from prescribing curriculum. Specifically, the statute requires that the Board shall:

> By rule and regulation and in consultation and coordination with local school districts, prescribe uniform student content and performance standards for the common core of knowledge and the common core of skills specified under W.S. 21-9-101(b) . . . . Student content and performance standards prescribed under this paragraph shall include standards for graduation from any high school within any school district of this state. The ability to prescribe content and performance standards shall not be construed to give the state board of education the authority to prescribe textbooks or curriculum which the state board is hereby forbidden to do.

Wyo. Stat. Ann. § 21-2-304(a)(iii).

In order to determine whether labeling benchmarks constitutes prescribing curriculum, it is first necessary to precisely define all of the terms involved.

The labels of "priority" and "supporting" come from a broader system of academic and practitioner driven instructional reforms. These reforms came in response to the perception that the vast quantity of state benchmarks reduced teacher effectiveness, requiring teachers to cover a significant amount of material, but without any depth. Larry Ainsworth, *Power Standards: Identifying the Standards that Matter the Most* 1, 5 (2003).

In the Professional Learning Communities (PLC) framework, priority standards establish a safety net. In other words, "[p]riority standards represent the assured student competencies that each teacher needs to help every student learn, and demonstrate proficiency in, by the end of the current grade or course." Larry Ainsworth, *Prioritizing the Common Core: Identifying Specific Standards to Emphasize the Most* at xv (2013). The priority standards play a number of different roles in the broader curriculum. They provide a focus for instructional time and intensity, direct the content of formative assessments,

and form the focus of interventions for students who are struggling to master them. Richard DuFour et al., *Learning by Doing* 145, 169 (3d ed. 2016).

Supporting standards "support, connect to, or enhance the Priority Standards . . . but do not receive the same degree of instruction and assessment emphasis." Ainsworth, *Prioritizing the Common Core* at xv.

The Board's definitions for these terms are consistent with this usage. The 2019 draft computer science standards state that "[a]ll students are expected to be instructed on and demonstrate mastery of the content and performance expectations included in [the priority] benchmarks." *Proposed Rules Wyo. Dep't of Education,* ch. 10, § 4 (May 2019).[4] Similarly, the standards state that "[a]ll students are expected to be instructed on these [supporting] standards, taught within the context of the priority standards." *Id.*[5]

The next step is to interpret the definition of curriculum in the statute. The Wyoming Supreme Court has well established rules for statutory construction.

> Our focus, when interpreting statutes, is on determining the legislature's intent. Generally, we look at the "ordinary and obvious meaning" of the statutory language. In ascertaining the meaning of a given law, we consider and construe in harmony all statutes relating to the same subject or having the same purpose.

Vance v. City of Laramie, 2016 WY 106, ¶ 12, 382 P.3d 1104, 1106-07 (Wyo. 2016) (internal citations omitted).

There is no "ordinary and obvious" meaning of curriculum. Dictionary definitions are often too terse to be helpful. For example, *Webster's* defines curriculum as "a specific course of study or, collectively, all the courses of study in a university, college, or school." *Curriculum*, *Webster's New Twentieth Century Dictionary* (2d ed. 1979). On the other hand, definitions of the term can also be overly expansive. The *Glossary of Education Reform* defines curriculum as "the knowledge and skills students are expected to learn . . .

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[4] https://edu.wyoming.gov/downloads/standards/2019/Computer-Science-Standards-2019.pdf

[5] While the definitions of "priority" and "supporting" benchmarks have their origin in the Professional Learning Community context, nothing indicates that the Board intends to require school districts to implement that process in order to comply with them.

includ[ing] the learning standards . . . the units and lessons that teachers teach; the assignments and projects given to students; the books, materials, videos, presentations, and readings used in a course; and the tests, assessments, and other methods used to evaluate student learning." *Curriculum, Glossary of Education Reform* (August 12, 2015).[6] In other words, the term can "be applied to either all or only some of the component parts of a school's academic program or courses." *Id.*

It is clear from the way some texts use the word curriculum that the word's conceptual space overlaps with that of the standards. DuFour et al., *Learning by Doing* at 113. But in considering the legislative intent in prohibiting the Board from prescribing curriculum, it is clear from the statutory context that the two definitions were meant to cover non-overlapping conceptual space. The key to navigating this apparent tension is to recognize that one definition must be read to fit the mold of the other. The three types of standards (content, performance, and graduation) are currently performing constitutional functions by establishing both equality of opportunity and quality. The statutory definition of curriculum must not interfere with these constitutional functions.

One of the ways that the standards achieve these functions is by "guiding" curriculum. The court in *Campbell I* defined a "proper" or "quality" education as one that delivers, at a minimum, five components to all Wyoming students. *Campbell I*, 907 P.2d at 1279. One of those components requires establishing an "[i]ntegrated, substantially uniform substantive curriculum decided by the legislature through the State Superintendent of Public Instruction and the State Board of Education with input from local school boards." *Id.* This definition of a "quality" education remained the standard throughout the *Campbell* line of cases. *Campbell IV*, ¶ 76, 181 P.3d at 66. The court in *Campbell IV* stated that the Legislature had "achieved each of these measures of a quality education" despite the fact that the Legislature had not, in fact, established a uniform curriculum. *Id.* ¶ 77, 181 P.3d at 66. The court reasoned that the performance standards guided curriculum sufficiently to ensure that the school system remained uniform. *Id.* ¶ 77, 181 P.3d at 67.

The constitutional and statutory requirements leave little room to maneuver. On one hand the standards must "guide" curriculum to ensure that the curriculum is "substantially uniform" across the state. On the other hand, the Board is not permitted to simply "prescribe" curriculum. To determine whether the proposed standards labeling qualifies as

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[6] https://www.edglossary.org/curriculum/

guiding curriculum, it is helpful to consider how the performance standards serve that function.

One of the ways that the performance standards guide curriculum is by determining how well a student must understand any given benchmark to be considered proficient. This determination guides the curriculum by dictating instructional emphasis rather than methods. If the performance standards for one benchmark require more in-depth understanding than for another benchmark, the effect on curriculum is that a teacher must dedicate more instructional time toward that benchmark. This mechanism, in other words, is a form of prioritization and helps keep curricula uniform by maintaining a consistent instructional emphasis regardless of the school delivering the instruction.

Labeling the standards as either priority or supporting standards similarly guides curricular decisions by establishing an instructional emphasis, without prescribing instructional materials or methods. Additionally, the priority standards are also performing another intended function of the performance standards by requiring students to show mastery in certain benchmarks. Since these labels are performing the functions of the performance standards, they likely do not implicate the prohibition on prescribing curriculum.

Therefore, the best course of action would be to remove the "priority" and "supporting" labels and use the performance standards to achieve substantially the same effect. While using the performance standards to perform this function is preferred, it is likely permissible to retain the "priority" and "supporting" benchmark labels, since the directives conveyed by those labels substantially align with the functions of the performance standards.

IV. Does the proposed categorization of the computer science standards as "enhanced" infringe upon uniformity of standards?

The rules related to the proposed computer science standards label certain benchmarks as "enhanced." Specifically, the proposed rules state enhanced benchmarks are those that give "[s]tudents . . . an opportunity for enrichment above what all students are expected to know and do as required by the priority benchmarks." *Proposed Rules Wyo. Dep't of Education*, ch. 10, § 4 (May 2019).[7]

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[7] https://edu.wyoming.gov/downloads/standards/2019/Computer-Science-Standards-2019.pdf

There are two possible interpretations of this definition. The first is these benchmarks are available and optional to all students who are advancing beyond their peers and need to be given more challenging work. The second is that these benchmarks are optional for schools to offer.

The legal analysis differs depending on the Board's intended meaning. The first interpretation does not implicate the uniformity of the standards and is permissible. The second possible interpretation implicates the uniformity of the standards and requires additional analysis.

The statutes consistently refer to the standards as the "uniform" standards. Wyo. Stat. Ann. § 21-2-304(a)(ii),(iii), & (iv); Wyo. Stat. Ann. § 21-2-304(b)(ii); Wyo. Stat. Ann. § 21-9-101(b); Wyo. Stat. Ann. § 21-13-101(a)(v). Additionally, the Board is required to "evaluate and review the uniformity and quality" of the standards at least every nine years. Wyo. Stat. Ann. § 21-2-304(c). The emphasis on uniformity can be easily understood given the previously described historical development of the standards. Developing statewide standards was necessary for the Legislature to fulfill its duty to "provide an equal opportunity for a quality education by structuring . . . the education system in a manner, and at a level, that maintains 'a complete and uniform system of public instruction.'" *Campbell I*, 907 P.2d at 1263 (quoting Wyo. Const. art. 7, § 1).

While it may be permissible in some circumstances to allow variability in the state standards across schools or districts, any variability should be accompanied by a persuasive explanation of how the variation does not erode a student's right to an equal educational opportunity. The explanation should address both sources of "divergent educational opportunity" identified by the court. *Id.* at 1255. First, the explanation must address implementation concerns and ensure that optional standards are not only being implemented in more progressive districts. Second, concern about the financial burden different schools will encounter in implementing the standards is an impermissible justification for variation given the constitutional requirement that the financing decision follows, rather than precedes, defining a proper education. *Id.* at 1279.

Therefore, depending on how the Board defines "enhanced" for the computer science standards, that categorization could impermissibly introduce variation into the uniform standards. If by "enhanced" the Board intends to allow schools the option to offer these standards, then it will need to justify that variance with a persuasive reason and

provide a convincing explanation of why the variance will not result in divergent educational opportunity.

V. Does the language in 2018 SEA 48 requiring computer science content and performance standards to be "effective" by the beginning of school year 2022 also require that districts must fully implement the standards, including aligning curriculum to all elements of the content standards, the application of resources/materials, and the application of aligned district assessment systems to the standards, by that same date?

The language requiring that the computer science content and performance standards be "effective" beginning with the 2022-23 school year requires districts to fully implement the standards by that date.

The legislation adding computer science to the common core of knowledge and computational thinking to the common core of skills states that "[b]y January 1, 2022, the state board of education shall promulgate uniform student content and performance standards for computer science to be effective beginning with the 2022-2023 school year." 2018 Wyo. Sess. Laws 262, 264. School districts must engage in the process of alignment (both in terms of resources and curriculum) before the standards can be taught and appropriately assessed in the classroom. Because the alignment process takes time, some have questioned whether "effective" could, therefore, be referring to the beginning of the alignment process.

A plain reading of the law indicates that "effective" refers to the end of that process. In particular, the legislation states that the standards are to be effective "beginning with the 2022-2023 school year." The fact that the effective date is the **beginning** of a school year shows that instruction ought to include the computer science standards starting on that date.

Some have asserted that having the alignment process completed by this time is impracticable. In the usual rule revision process, districts are given three years to fully implement the changes. Wyo. Stat. Ann. § 21-2-304(a)(iv). The argument is then that it makes little sense to have a significantly shorter period to align resources and curriculum to an entirely new set of standards. Nevertheless, it is noteworthy that January 1, 2022 marks the end of an acceptable period for the rules establishing the standards to be promulgated. The rules could be adopted much earlier than January 1, 2022. Indeed, the law, which passed in 2018, gives approximately four years for both the promulgation and

alignment of the computer science standards, which is a sufficient amount of time to promulgate and align to a new set of standards.

Therefore, our reading of the session law is that the language requiring the computer science content and performance standards be "effective" beginning with the 2022-23 school year, also requires districts to have fully aligned to and implemented the standards by that date.

CONCLUSION

The uniform standards play an integral role in establishing "a complete and uniform system of public instruction." Wyo. Const. art. 7, § 1. The different types of standards perform different functions in this system. By promulgating rules containing content standards the Board delineates a student's right to equal access to educational opportunity. Schools must teach all of the benchmarks contained in the content standards and must teach them in the appropriate grade bands. But just because these benchmarks are mandatory for schools to offer does not mean that all students are required to learn all of them.

Since the Board has not established graduation requirements and performance standards specifying particular benchmarks, there is currently no way to determine at a uniform statewide level the benchmarks that must be taught to every student. The Board through its rules should set graduation requirements that include the standards component. The Board should also determine the content benchmarks that need to be mastered at the lower grade levels and only create performance standards for those benchmarks. Additionally, the standards are meant to guide curricula. The Board's proposed categorization of the standards as either "priority" or "supporting" likely guides, but does not prescribe, curricula.

If the Board intends to introduce variability into the standards through the "enhanced" standards, then it has to adequately justify that determination. Uniformity is an important attribute of the standards. If the Board introduces any variation in the uniform standards, it must provide a persuasive reason for doing so and an explanation of how the variation will not erode a student's right to an equal educational opportunity.

Finally, the session law requirement that the computer science standards be "effective" beginning with the 2022-23 school year requires districts to have aligned their instructional materials and assessment systems to the new standards by that date.

If we can be of further assistance, please feel free to contact us.

Sincerely,

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