



Ken Wagner, Ph.D.,
Commissioner

State of Rhode Island and Providence Plantations
DEPARTMENT OF EDUCATION
Shepard Building
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August 31, 2016

**By electronic
(vbejma@smrobinsonlaw.com)
and first class mail**

Vicki J. Bejma, Esquire
ROBINSON & CLAPHAM
123 Dyer Street, Suite 135
Providence, Rhode Island 02903

Re: Middle School Recess Requirements

Dear Attorney Bejma:

You wrote on August 18 to request my opinion as to whether a recently-enacted state law mandating “at least twenty (20) consecutive minutes of supervised, safe, and unstructured free play recess each day,” applies to “middle schools that include grades five and six.” I assume your reference to “middle schools that include grades five and six” refers to the Tiverton Middle School, which includes grade five (5) through eight (8). Coincidentally, I also just received a similar request from a parent whose child attends the Wilbur & McMahon School in Little Compton, a public school that serves children in Kindergarten through eighth (8th) grade. You then followed-up with an inquiry concerning my authority to provide a limited waiver of the new law in the event that I concluded that it was applicable.

As to your initial question concerning applicability, the new law provides, in pertinent part, that:

All children attending public schools, or any other schools managed or controlled by the state, that has elementary grades kindergarten through six (6) shall receive in those schools at least twenty (20) consecutive minutes of supervised, safe, and unstructured free play recess each day.

RIGL § 16-22-4.2. (emphasis added). This focus on the child is consistent with the Basic Education Program Regulations (BEP), which note that “students are better able to learn when they are engaged in regular physical activity,” see BEP at G-14-3.4, and which expressly mandates that schools “[p]rovide daily recess opportunities for students in grades Kindergarten through grade 5.” *Id.* Thus, the new law is expanding and providing additional detail to an existing legal requirement.

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The Rhode Island Supreme Court has instructed that laws “that address the same or a related topic, and are thus *in pari materia*, must be construed in a manner that attempts to harmonize them and that is consistent with their general objective scope.” *Horn v. Southern Union Co.*, 927 A.2d 292, 295 (R.I. 2007). When one construes RIGL § 16-22-4.2 “consistent with the general objective and scope” of BEP G-14-3.4, it becomes apparent that the new law was intended to apply to “[a]ll children” in “elementary grades kindergarten through six (6).” I must give meaning to all words in the new statute, including the word “elementary.” In this particular instance, I must presume that the General Assembly was fully aware that some Rhode Island sixth grades are in “elementary schools” and some are not.

Our own certification regulations recognize this. Rhode Island offers both Elementary Teacher Certificates for grades 1 – 6 and Middle Grades Teacher Certificates for Grades 5 – 8. This purposefully designed overlap allows significant flexibility on the part of local education agencies to determine the appropriate certificate based on the organization of the school. As a result of this flexibility, school districts in Rhode Island have chosen to characterize sixth grade as either an “elementary” or “middle” grade. Consequently, we are aware of sixth grades that are the most senior grade in an elementary school, and other districts in which there is a middle school with grades 5 – 8 or 6 – 8. It is my opinion that §16-22-4.2 extends the BEP requirement of recess to sixth grades only in those instances in which the district considers its sixth grade to be “elementary.” In the case of a K-8 school, that organizing principle may not be readily apparent, but it is still within the purview of the district to determine whether its sixth grade is considered to be an elementary or middle grade.

Given my conclusion, I do not see that your follow-up question regarding my waiver authority would be implicated. Finally, please note that this advisory letter is not binding in contested cases under Chapter 39 of Title 16.

Very truly yours,

Ken Wagner, Ph.D
Commissioner of Education

KW/crb