

Opinion No. 2013-075

October 11, 2013

The Honorable John W. Walker
State Representative
1723 Broadway Street
Little Rock, Arkansas 72206-1220

Dear Representative Walker:

I am writing in response to your request for my opinion on three questions I will paraphrase as follows:

1. Are school districts authorized by law to collect from public school children fees or fines for late fees, student discipline and tuition?
2. If so, may payment of such fees or fines be a condition for continued enrollment?
3. Must a school district account to the public for such fees or fines collected?

RESPONSE

With respect to your first question, in my opinion, school districts are generally prohibited from charging any fees that might compromise students' equal access to "a general, suitable and efficient system of free public schools" as guaranteed by Article 14, § 1 of the Arkansas Constitution. The Arkansas Supreme Court has generally interpreted this guarantee as foreclosing the state from conditioning public-school attendance upon the payment of tuition or registration fees. The Arkansas legislature, however, in legislation that is presumed constitutional, has approved charging tuition to non-indigent students for "optional" summer-school courses – a category that may well include make-up course work offered during

the summer term. No court has yet addressed the constitutional propriety of charging “late fees” for untimely summer-school registration. In my opinion, however, reasonable late fees of this sort might pass constitutional muster. The same conclusion applies to other traditional varieties of “late fees” such as library fines, which might also be deemed acceptable so long as they do not foreclose equal access to a free public education. In the absence of judicial guidance, however, I am not situated to opine definitively on this question. In my opinion, the answer to your second question, which appears to be concerned with the propriety of indefinite suspension pending the payment of a fine, is “no.” In my opinion, the answer to your third question is “yes.”

Question 1: Are school districts authorized by law to collect from public school children fees or fines for late fees, student discipline and tuition?

I must note initially that the term “late fees” in your question is ambiguous, inasmuch as it might denote a variety of expenses, ranging from a surcharge for late registration for summer courses to penalties for such infractions as tardiness or the untimely return of library materials. Whatever has prompted your concern in this regard, the ensuing discussion should provide guidance regarding the permissibility of such fees under any circumstances.

My consideration of whether a school district may impose any of the three categories of charges you have listed begins with and must at all times be bounded by the principle that “the State shall ever maintain a general, suitable and efficient system of free public schools.”¹ The application of this directive regularly arises within the context of school financing, and it has prompted the Arkansas Supreme Court to offer the following explanatory credo:

[W]e believe the right to equal educational opportunity is basic to our society. “It is the very essence and foundation of a civilized culture; it is the cohesive element that binds the fabric of our society together.” *Horton*. . . .^[2] Education becomes the essential

¹ Ark. Const. art. 14, § 1. This provision closely resembles constitutional guarantees of free public education applicable in other states. See Note, *The Constitutional Mandate for Free Schools*, 1971 Wis. L.Rev. 971 (1971).

² *Horton v. Meskill*, 376 A.2d 359, 377 (Conn. 1976), Bogdanski, J., concurring.

prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights.³

In accordance with this principle, the court has previously deemed it unconstitutional to condition attendance at a public school upon the payment of tuition or a “registration fee.”⁴ As one of my predecessors noted:

Our constitution and statutes require that the public schools be free. Ark. Const. art. 14, § 1; A.C.A. § 6-18-202(a) (Repl. 1993).⁵ As a result, school districts cannot impose direct tuition fees or other charges that indirectly violate the legal requirement that instruction be gratuitous, even if such fees are authorized by statute. Prior opinions of this office, which are consistent with judicial opinions from other jurisdictions addressing the issue, might fairly be characterized as stating that these constitutional and statutory provisions mean that a fee may not be charged for goods or services that are necessary and integral parts of the required system of free public schools, and that, conversely, fees for other goods or services may be imposed without violating the requirement that the schools be free.⁶

This office has interpreted this mandate as in all likelihood foreclosing charging any tuition or registration fee even for elective courses, at least to the extent that

³ *Dupree v. Alma School District No. 30*, 279 Ark. 340, 346, 651 S.W.2d 90 (1983).

⁴ *Special School District No. 65 v. Bangs*, 144 Ark. 34, 221 S.W.2d 1060 (1920); *Dowell v. School District No. 1*, 220 Ark. 828, 250 S.W.2d 127 (1952).

⁵ Subsection 6-18-202(b)(1) of the Code (Supp. 2011) currently provides in pertinent part:

The public schools of any school district in this state shall be open and free through completion of the secondary program to all persons in this state between the ages of five (5) and twenty-one (21)

⁶ Op. Att’y Gen. 96-072 (footnote omitted), citing Ops. Att’y Gen. 93-393, 91-219, 90-227, 83-154, 73-137. In Op. Att’y Gen. No. 2000-230, one of my predecessors addressed generally what the constitutional mandate of “free” public schools means. As reflected in that discussion, determining whether particular charges runs afoul of that mandate will often be inherently factual in nature and hence beyond the scope of an Attorney General opinion.

the completion of elective courses is a requirement to graduate from high school.⁷ As one of my predecessors noted in the regard:

[T]he Constitution prohibits Arkansas public schools from requiring the payment of any fee as a prerequisite to any student being permitted to receive instruction for credit in a course offered for credit towards graduation from such school.⁸

This conclusion is consistent with the generally accepted premise that a guarantee of free public education forecloses charging fees for courses offered in the standard curriculum.⁹

It does not follow from the foregoing that the public schools are foreclosed from charging tuition under any and all circumstances. As one of my predecessors has observed:

Historically, neither school administrators nor any legislature in the country, including those with a constitutional mandate for “free public schools,” has ever interpreted this term to mean that citizens must be spared any and all expenses incidental to public school attendance.¹⁰

Among the charges the legislature has deemed it permissible to impose upon non-indigent students is tuition for “optional” summer-school courses designed to supplement the core public school curriculum.¹¹ Various other jurisdictions

⁷ See, e.g., Ops. Att’y Gen. 93-393; 91-219 (“[F]ees for elective courses are problematic if the courses are part of a given number which must be taken in order to meet the total education requirements for graduation.”); 73-137 (noting that “[e]lective courses are an integral part of Arkansas education” and that a specified number must be completed in order to graduate).

⁸ Opinion 73-137.

⁹ See discussion in 1985 Ga. Op. Att’y Gen. 81, citing *Cardiff v. Bismark Public School District*, 263 N.W.2d 105, 113 (N.D. 1978) and Note, *Student Fees in Public Schools: New Statutory Authority*, 16 Washburn L.J. 429, 442 (1977).

¹⁰ Op. Att’y Gen. 2000-230, citing Jeffrey F. Ghent, Annotation, *Validity of Exaction of Fees from Children Attending Elementary or Secondary Public Schools*, 41 A.L.R.3d 752 (1972 & currently, Supp. 2013); accord Ops. Att’y Gen. 99-224.

¹¹ See subchapter 7 of title 6, chapter 16 of the Arkansas Code (Repl. 2007), which authorizes charging tuition for optional summer-school courses. The tuition obligation does not apply to students who qualify

subject to a constitutional guarantee of a “free” public school education have likewise concluded that charging tuition for summer-school classes does not offend this guarantee.¹²

As noted by one of my predecessors, perhaps the most that can be declared regarding the scope of the constitutional guarantee of a “free” public education is that no fees can be imposed that would deny children equal access to education.¹³ Courts in other jurisdictions have further concluded that so long as school policy provides for tuition waivers in the event of indigency – as does the legislation at issue in this instance – the constitutional principle of equal protection is not implicated.¹⁴ The Arkansas legislation authorizing charging tuition for “optional” course-work is deemed constitutional.¹⁵

The foregoing sets the framework for assessing the constitutionality of charging what you term “late fees” – a general designation that may in this instance refer to fees charged for untimely summer-school registration.¹⁶ In gauging the propriety

for free or reduced-price meals. A.C.A. § 6-16-702(b). Tuition may be charged even for summer courses taken as make-up work for courses unsuccessfully completed in the core curriculum offered in the regular academic session. *Id.* The premise underlying this provision is apparently that the state’s constitutional obligation to offer a “free” education is fulfilled by making the course-work available in the regular school session at no charge. *Compare Granger v. Cascade County School District No. 1*, 499 P.2d 780, 786 (Mont. 1972) (stating that the Montana Constitution’s guarantee of a “free” public education generally bars tuition if “a given course or activity [is] reasonably related to a recognized academic and educational goal of the particular school system,” but that this bar does not apply to summer-school courses).

¹² See, e.g., *Washington v. Salisbury*, 306 S.E.2d 600 (S.C. 1983); *Crim v. McWhorter*, 252 SE.2d 421 (Ga. 1979); *Granger*, *supra* note 11; 1979-1980 Mich. Op. Att’y Gen. 628, 1979-1980 Mich. OAG No. 5656, 1980 WL 114025 (Mich. A.G.) (citing *Crim* and *Granger*, opining under a similar constitutional provision that “school districts may impose a charge for persons voluntarily attending summer school”); *compare* 1982 Iowa Op. Att’y Gen. 227, 1981 WL 37133 (Iowa A.G.) (opining that the Iowa legislature’s enactment of a statute permitting charging tuition for summer-school courses did not violate the constitutional guarantee of a free public education but that charging tuition for any regular-term courses was impermissible).

¹³ Op. Att’y Gen. 2000-230.

¹⁴ See, e.g., *Crim*, *supra* note 11, at 424-25.

¹⁵ See, e.g., *Paschal v. State*, 2012 Ark. 127, 8 (“Statutes are presumed constitutional, and the burden of proving otherwise is on the challenger of the statute.”).

¹⁶ I have been provided what may be a representative flyer captioned “Little Rock School District 2013 Middle School Summer School Announcement: Grades 6—8,” which sets forth late registration fees and

of assessing such fees, I am again guided by the legislature's apparent determination that charging for optional summer course-work does not offend the guarantee of a "free" education set forth in Article 14, § 1. Although the Code contains no express provision authorizing the imposition of "late fees" for untimely summer-school registration, I must note that the legislature has afforded school districts considerable autonomy in the setting of policy.¹⁷ I do not consider the legislature's silence on the specific issue of late fees as in itself amounting to a prohibition against their imposition. Moreover, the propriety of imposing such fees might be supported if they applied only to non-indigent students, as the legislature has mandated with respect to summer-school tuition. Having offered these observations, however, I must further note that no court has yet found occasion to address the propriety of imposing such fees.

I am unaware either of current practice regarding or of any Arkansas authority addressing the propriety of other varieties of "late fees" such as library fines for late returns. Late fees for such infractions as the tardy return of library books are, in my estimation, at least potentially subject to challenge inasmuch as such infractions might well be characterized as inevitable in the course of providing a "general, suitable and efficient system of free public schools." On the other hand, the charging of fines for untimely return of library books appears to be accepted practice in at least certain jurisdictions. To the extent that your question embraces such "late fees," I can only note that I have found no precedent directly addressing their propriety. A reviewing court might conclude that imposing nominal late fees of this sort does not run afoul of constitutional proscriptions and falls within the range of school district discretion. Without judicial guidance, I cannot opine definitively on this issue.

The legislature has devoted an entire subchapter of the Code to the question of discipline policy in public schools.¹⁸ Although no provision in this subchapter expressly addresses the issue of imposing fines or fees as disciplinary measures,

various tuition fees for attendance at the Mann Magnet Middle School. Not being a finder of fact, I am unaware of how common the practice announced in this flyer is.

¹⁷ See A.C.A. § 6-13-620(11) (Supp. 2011) (investing a school district board with discretion to "[d]o all . . . things necessary and lawful for the conduct of efficient free public schools in the school district") and *Saffirstone v. Tucker*, 235 Ark. 70, 72, 357 S.W.2d 3 (1962) (barring interference with a school board's exercise of this discretion absent "a clear abuse" thereof established "by clear and convincing evidence").

¹⁸ A.C.A. §§ 6-18-501 through -515 (Repl. 2007 & Supp. 2011), as amended by Acts 2013, Nos. 71; 1138, § 48; and 1329.

this silence in itself is not necessarily tantamount to a prohibition of such charges. The Code expressly invests school districts with considerable discretion in the setting of disciplinary policy.¹⁹ In my opinion, however, this discretion is bounded both by (1) the constitutional directive that public education – an enterprise that will necessarily entail imposing discipline in various forms – be provided free of charge; and (2) the Code’s failure at any point even to mention monetary fees or fines as acceptable disciplinary measures.

With respect to the former of these factors, one of my predecessors, after noting the legislature’s acknowledgement “that the only place that many individuals are likely to learn self-control and good behavior is in the public schools,”²⁰ offered the following pertinent remarks:

I am reluctant to conclude, in light of this statement, that the general authority and responsibility of school districts to develop student discipline policies (see A.C.A. §§ 6-18-502 and -503) includes the authority to extract payments from students for time spent in detention in order to fund the districts’ expenses in this regard. If discipline is deemed a necessary or essential element of the educational process, can it reasonably be contended that the legislature intended for school districts to be authorized to impose a charge or fee for programs that are developed in the interest of discipline? Would such a fee be constitutional, in any event, if the discipline program is a necessary part of the “general, suitable and efficient system of free public schools . . . [?]” I believe this latter question would be the focus of the inquiry in the event of a constitutional challenge.²¹

I fully concur in this analysis.

¹⁹ Subsection 6-18-502(a) of the Code (Repl. 2007), as amended by Acts 2013, No. 1329, § 4, directs the Department of Education to “establish guidelines for the development of school district student discipline policies.” Subsection (b) of this statute charges the school district to develop policies in compliance with these guidelines.

²⁰ Acts 1994 (2nd Ex. Sess.), No. 51, § 9 (emergency clause).

²¹ Op. Att’y Gen. 96-104 (footnotes omitted).

With respect to the latter of the two factors listed above – namely, the statutory silence regarding discipline-related fees or fines – I note that the Code as recently amended provides the following catalog of permissible “disciplinary measures”:

“Discipline measure” means:

- (A) In-school suspension;
- (B) Out-of-school suspension;
- (C) Expulsion;
- (D) Corporal punishment; and
- (E) Referrals to law enforcement authorities[.]²²

Conspicuously absent from this list is any reference to monetary fees or fines. In my opinion, imposing monetary sanctions as a form of discipline, particularly if done without regard to a student’s possible indigency, would at the very least invite extremely close judicial review.

Question 2: If so, may payment of such fees or fines be a condition for continued enrollment?

No.

Given the state’s paramount concern with educating its children, even in those instances in which it might be permissible to charge tuition or a late fee, I do not believe that it would be permissible to “condition . . . continued enrollment” upon the payment of such a fee. Simply stated, I do not believe barring a student from public education for failure to pay a debt owed a school district is consistent with the mandate of Article 14, § 1. Moreover, as noted above, I question that fines are even a permissible disciplinary option. If they are, however, for the reasons stated, I do not believe a school could condition continued enrollment upon their payment.²³

²² A.C.A. § 6-18-515(a)(2). The statute identifies these measures as pertinent in determining “disciplinary disparities” among subgroups.

²³ This conclusion seems in all respects in accord with the following legislative finding expressed in Acts 2013, No. 1329, § 1(3): “Discipline that keeps students engaged in the learning process and in the school community is more effective than discipline that interrupts the learning process and separates the student from the school community.”

Question 3: Must a school district account to the public for such fees or fines collected?

Yes.

The treasurer of a school district is statutorily charged “[t]o keep a record of all financial transactions of the school district on forms approved by the Department of Education and the Division of Legislative Audit.”²⁴ These transactions are subject to the following audit procedure:

An audit of a publicly funded educational institution shall be performed by the Division of Legislative Audit or other independent person licensed to practice accounting by the Arkansas State Board of Public Accountancy selected by the governing body of the educational institution.²⁵

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

²⁴ A.C.A. § 6-13-701(2) (Supp. 2011).

²⁵ A.C.A. § 6-1-101(a)(1) (Supp. 2011), as amended by Acts 2013, No. 1155, § 1.