



**STATE OF ARKANSAS**  
**THE ATTORNEY GENERAL**  
**DUSTIN MCDANIEL**

Opinion No. 2014-041

June 27, 2014

Dr. Tom W. Kimbrell, Commissioner  
Arkansas Department of Education  
Four Capitol Mall  
Little Rock, Arkansas 72201-1019

Dear Commissioner Kimbrell:

I am writing in response to your request for my opinion on various issues relating to public-school transfers under the Public School Choice Act of 2013 (the "Act").<sup>1</sup> You have posed the following questions:

1. Once a school district notifies the Arkansas Department of Education (the "ADE") of its intent to declare an exemption from participation in [the Act], pursuant to A.C.A. 6-18-1906, must that school district annually notify the DOE of its intent to declare the exemption in order for the exemption to continue during subsequent school years?
2. Once declared by the school district, does the exemption automatically continue until such time that the school district notifies the ADE of its intent to resume participation in the Act?
3. If a school district notifies the ADE of its intent to declare an exemption but, in a subsequent year, does not affirmatively notify the ADE of its intent to resume participation in the Act, does the school district remain exempt from participation in the Act?

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<sup>1</sup> A.C.A. §§ 6-18-1901 to -1908 (Repl. 2013). The Act was enacted pursuant to Acts 2013, No. 1227, § 6.

My inquiries reveal that 23 districts declared exemptions for the 2013-14 school year, but only 21 have timely declared an intent to claim an exemption for the 2014-15 school year. Some but not all of the districts declaring an exemption for the upcoming year had also declared an exemption for the 2013-14 school year. Various districts, then, that declared an exemption for the 2013-14 school year have failed to declare, in accordance with the statute, an intention either to renew the exemption or to participate in the school choice program.

## **RESPONSE**

With respect to all three of your questions, A.C.A. § 6-18-1906 expressly provides that an exempt school district must provide notice of its intent to exempt itself from participation in a school choice program for the subsequent year. The statute likewise provides, however, that an exempt school district must declare its intent to reenter the school choice program for the subsequent year. The statute is silent regarding the effect if an exempt school district makes neither declaration in timely fashion. I can only opine that, to the extent participation in a school choice program would contravene a judicial decree or court order designed to remedy the effects of past racial segregation, such participation would be barred regardless of whether the district gave notice of either intent referenced above. Legislative clarification is warranted regarding the effect of a failure to give timely notice if the contingency just described does not apply.

### ***The scope of the Act and exemption***

As a preface to my discussion of your particular questions, which all relate to the Act's notice provisions, I will briefly summarize the Act and the exemption to its application. The Act sets forth a public school-choice program that is obligatory for each district unless the statutory restrictions referenced in your request apply. Specifically, the Act provides that "[e]ach school district shall participate in a public school choice program consistent with this chapter."<sup>2</sup> Any student is entitled to apply for transfer to another district "provided that the transfer . . . does not conflict with an enforceable judicial decree or court order remedying the effects of past racial segregation in the school district."<sup>3</sup> To realize this entitlement, the Act declares: "A public school choice program is established to

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<sup>2</sup> A.C.A. § 6-18-1903(b).

<sup>3</sup> A.C.A. § 6-18-1901.

enable a student to attend a school in a nonresident district, subject to the limitations under § 6-18-1906.” At issue in your request are the scope of those limitations and the procedural requirements attending the exemption.

Your immediate question concerns the notice provisions of the statute just referenced, which provides in pertinent part:

***a) If the provisions of this subchapter conflict with a provision of an enforceable desegregation court order or a district's court-approved desegregation plan regarding the effects of past racial segregation in student assignment, the provisions of the order or plan shall govern.<sup>[4]</sup>***

***(b)(1) A school district annually may declare an exemption under this section if the school district is subject to the desegregation order or mandate of a federal court or agency remedying the effects of past racial segregation.<sup>[5]</sup>***

***(2)(A) An exemption declared by a board of directors under this subsection is irrevocable for one (1) year from the date the school district notifies the Department of Education of the declaration of exemption.***

***(B) After each year of exemption, the board of directors may elect to participate in public school choice under this section if the school district's participation does not conflict with the school district's federal court-ordered desegregation program.***

***(3) A school district shall notify the department by April 1 if in the next school year the school district intends to:***

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<sup>4</sup> Compare A.C.A. § 6-18-227(e)(2) (Repl. 2013), contained within the Arkansas Opportunity Public School Choice Act of 2004, which conditions as follows transfers from a school district in academic distress: “If any part of this section conflicts with the provisions of a federal desegregation court order applicable to a school district, the provisions of the federal desegregation court order shall govern.”

<sup>5</sup> On its face, this provision appears to authorize a school district to declare an exemption if it is “subject to” a desegregation order regardless of whether the district’s participation in a school choice program would conflict with that order. My inquiries suggest that the ADE thus interprets the statute.

(A) *Declare an exemption* under this section; *or*

(B) *Resume participation* after a period of exemption.<sup>6</sup>

The pertinent provisions of the Act may be summarized as follows:

1. Subsection (a) declares that provisions of a desegregation plan will control over any conflicting provisions in the Act. This provision acknowledges the preemptive effect of the federal court's directives over the provisions of what would otherwise be compulsory district participation in the Act's school choice program. To the extent of any conflict between the order and the Act, then, the order will control.
2. Subsection (b)(1) declares that a school district subject to a desegregation order "*annually may* declare an exemption" from participation in a school choice program. (Emphasis added.) In my opinion, this provision affords any district subject to a desegregation order the discretion to declare an exemption even if the order on its face or as enforced would not preclude the district's participation in a school choice program. However, as reflected in subsections (a) and (b)(2)(B), this discretion is limited by the condition that the district may not participate in a school choice program if doing so would contravene the desegregation order.<sup>7</sup>

Furthermore, although subsection (b)(1) requires that the ADE be notified *annually* of a district's election to exempt itself from participation, even in the absence of such notice, a district would be precluded as a matter of preemptive federal law from participating in a school choice program to the extent that doing so would contravene the provisions of a desegregation order.

3. Subsection (b)(3) requires either (i) annual notice by April 1 of an intent to declare an exemption; or (ii) notice by April 1 of an

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<sup>6</sup> A.C.A. § 6-18-1906 (emphases added).

<sup>7</sup> Although subsection (b)(2)(B) is focused on renewed participation, in my estimation, the principle set forth therein applies equally to initial declarations of exemption.

intent to resume participation after a period of exemption. Neither this subsection nor any other provision of the Act addresses what would be the consequences if a district that had been exempt failed either to renew its exemption or to express an intent to resume participation.

The above summary and analysis should serve to frame my responses to your particular questions.

***Question 1: Once a school district notifies the Arkansas Department of Education (the "ADE") of its intent to declare an exemption from participation in [the Act], pursuant to A.C.A. 6-18-1906, must that school district annually notify the ADE of its intent to declare the exemption in order for the exemption to continue during subsequent school years?***

Although the statute directs that a district annually declare its intent to declare an exemption, it imposes the same condition with respect to a district's intention to resume participation in a school choice program. The statute fails altogether to address what would be the effect if a district subject to an exemption failed to express either intention for the following year.

Nothing in the statute, which is far from a model of clarity, dictates that a district will automatically be deemed to have reentered the program if it fails to provide timely notice of its intent to declare the exemption for the following year. Beyond declaring that a district may under no circumstances flout the terms of a desegregation order, the statute is silent regarding the effect of a currently exempt district's failure to make timely notice of either intention. I consequently cannot answer your question beyond noting that the district will remain bound by the order. Legislative clarification is warranted.

In the absence of such clarification, in my opinion, the ADE may exercise considerable interpretive discretion in administering the statute. As this office has previously noted, administrative "regulations and interpretation of the statutes will be upheld unless clearly wrong"<sup>8</sup> – a policy consistent with the general proposition that administrative decisions warrant substantial deference provided they are not

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<sup>8</sup> Op. Att'y Gen. 99-151, citing *ACW Inc. v. Weiss*, 329 Ark. 302, 947 S.W.2d 770 (1997).

arbitrary and do not contradict the laws they are intended to administer.<sup>9</sup> As reflected in the following statement of hornbook law:

Administrative agencies, particularly under specific statutory authority, may, and should, interpret or construe the statutes which they are called on to administer or enforce, and they may develop guidelines in aid of such interpretation. The question of statutory interpretation, or the defining of a particular statutory term, is a function that should, in the first instance, be left to the appropriate administrative body.<sup>10</sup>

Given that the statute apparently anticipates that a school district will participate in the school choice program unless a desegregation order or court-approved plan applies, the ADE might arguably treat an exempt district as having reentered the program if it provides no annual notice of renewed exemption. This reading of the statute might, on the other hand, be rejected as rendering meaningless the requirement that a district notify the ADE of its intention to reenter the school choice program. Under the circumstances, I am unable to provide the ADE with any guidance in the exercise of its discretion. I can only note that the State Board

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<sup>9</sup> See *Pledger v. C.B. Form Co.*, 316 Ark. 22, 871 S.W.2d 333 (1994); *Allen v. Ingalls*, 182 Ark. 991, 33 S.W.2d 1099 (1930); Op. Att’y Gen. 97-259.

<sup>10</sup> 73 C.J.S. *Public Administrative Law and Procedure* 67 (footnotes omitted), cited in Op. Att’y Gen. 89-097. With respect to the weight assigned such administrative interpretations, the treatise quoted in my text further notes:

Administrative interpretations, although not to be given the force of statutory authority or law, are entitled to consideration and weight, particularly where they involve a contemporaneous construction. They are persuasive as an expression of the view of those experienced in the administration of the statute. Moreover, administrative interpretations may be entitled to great weight, particularly where they have been long-continued, or where they have been acquiesced in by the legislature for a long period of time. Under such conditions, administrative interpretations should not be overturned except for cogent or weighty reasons, and, ordinarily, they will be held controlling and followed unless they are clearly wrong, unreasonable, or unauthorized.

*Id.* See also *Morris v. Torch Club*, 278 Ark. 285, 287, 645 S.W.2d 938 (1983) (“It is a familiar rule of law that in the construction of a statute the manner in which it has long been interpreted by executive and administrative officers is to be given consideration and will not be disregarded by the courts unless it is clearly wrong.”).

of Education is empowered to make rules to implement the Act,<sup>11</sup> and it would appear to be within the Board's power to make a rule governing an exempt district's treatment in a later year following its failure to comply with the Act's notice requirements. Again, legislative clarification is warranted.

***Question 2: Once declared by a school district, does the exemption automatically continue until such time that the school district notifies the [Department] of its intent to resume participation in the [Act]?***

As noted above, subsections (b)(1) and (b)(3)(A) require annual notice of a district's intent to declare an exemption in the upcoming school year. The Act consequently does not contemplate that the exemption will "automatically continue" until the district, pursuant to subsection (b)(3)(B), files notice of its intent to reenter the program. Again, the statute is silent regarding the effect if the school district simply fails to file notice of either intent. The only opinion I can render regarding that circumstance is that the district will remain bound by the terms of the desegregation order. Legislative clarification is warranted.

***Question 3: If a school district notifies the DOE of its intent to declare an exemption but, in a subsequent year, does not affirmatively notify the DOE of its intent to resume participation in the Act, does the school district remain exempt from participation in the Act?***

See response to question 2.

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

Sincerely,



DUSTIN McDANIEL  
Attorney General

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<sup>11</sup> See A.C.A. § 6-18-1907(a).