



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-027

June 11, 2015

Tony Wood, Commissioner
Arkansas Department of Education
#4 Capitol Mall
Little Rock, Arkansas 72201-1019

Dear Mr. Wood:

I am writing in response to your request for my opinion concerning your question about the period during which a disabled child is eligible under state law to receive free public education. You ask whether the statutory language “between three (3) and twenty-one (21) years of age” means “3 to 21” or “3 through 21.”

RESPONSE

In my opinion, existing law is equivocal on the question, but the Arkansas Department of Education (the “Department”) may continue to apply the law as if it reads “3 to 21.”

DISCUSSION

The Children With Disabilities Act of 1973 (the “Act”) requires “school districts and the state to provide free public education for children with disabilities”¹ It defines “child with a disability” as a person “between three (3) and twenty-one (21) years of age” with one or more specified disabilities.²

The meaning of “between three (3) and twenty-one (21) years of age” is not necessarily obvious. The word “between” means “[i]n the interval separating (two

¹ Ark. Code Ann. § 6-41-206(a)(1) (Repl. 2013); *see also* Ark. Code Ann. §§ 6-41-202, -205 (Repl. 2013).

² Ark. Code Ann. § 6-41-203(1) (Repl. 2013).

points of time, events, etc.).”³ So “between 4:00 and 6:00” ends at 6:00, not at 6:59 or 7:00. On the other hand, we commonly refer to a person aged 21 years, 11 months, as being “21 years old,” so the phrase might reasonably be interpreted to include the entire year during which a person is “21 years old.”

Federal law provides for financial assistance to the states to provide free appropriate public education (“FAPE”) to disabled children.⁴ Assistance is available to any state that provides FAPE to children with disabilities “between the ages of 3 and 21, inclusive,”⁵ but permits states to exclude children “18 through 21” under state law or practice.⁶ Federal law does not, therefore, preclude an interpretation of Arkansas law to the effect that eligibility for FAPE ends when a person becomes 21 years old.

In connection with awarding assistance to the states under the Individuals with Disabilities Education Act (“IDEA”), the United States Department of Education (“USDE”) annually restates its understanding of each state’s upper age limit for FAPE and asks each state to correct USDE’s understanding if wrong or if the state has changed its law or practice.⁷ USDE’s understanding of state law and practice in this regard appears to be based on each state’s representations to USDE not on USDE’s own interpretation of state law and practice.⁸

³ *New Shorter Oxford English Dictionary* 220 (Lesley Brown ed., 1993).

⁴ 20 U.S.C. §§ 1400 *et seq.*, the Individuals with Disabilities Education Act (“IDEA”).

⁵ 20 U.S.C. § 1412(a)(1)(A). The United States Department of Education (“USDE”) is of the view that IDEA covers individuals until they become 22 years old. *See* Memorandum from Melody Musgrove, Director, Office of Special Education Programs, USDE, to Chief State School Officers and State Directors of Special Education (Dec. 1, 2014) and accompanying chart captioned “Year of Age Cohort (for years of age 3 through 21) for Which FAPE is Ensured (10/15/14)” (on file in this office). Notwithstanding federal law’s use of the word “inclusive,” USDE’s view is not necessarily universally shared. *Compare, e.g., Smith v. Special School Dist. No. 1 (Minneapolis)*, 184 F.3d 764, 770 (8th Cir. 1999) (under IDEA, “FAPE must be made available *through* twenty-first year of age”) (emphasis in original), *with Birmingham v. Omaha School Dist.*, 298 F.3d 731, 733 (8th Cir. 2002) (“IDEA entitles [one] to education *until* she is age 21”) (emphasis added).

⁶ 20 U.S.C. § 1412(a)(1)(B)(i).

⁷ *See* Musgrove Memorandum, *supra* note 5.

⁸ *See id.*

As early as 2004 and each following year, USDE has restated its understanding that Arkansas law provides that eligibility for FAPE ends when a person becomes 21 years old.⁹ That understanding is based on the Department's representation of Arkansas law to USDE.

Accordingly, the Department has consistently interpreted the Act to mean "3 to 21," at least in connection with its dealings with USDE regarding IDEA.

When a regulatory agency responsible for administering and enforcing a statute has interpreted it to mean a certain thing, the courts will give that interpretation considerable deference.¹⁰ This is particularly true where the administrative interpretation is of long standing,¹¹ or where the statute is ambiguous.¹² In such a case, the administrative interpretation will not be disregarded unless it is clearly wrong.¹³

Here, the Act is susceptible of two or more reasonable interpretations, and the Department has held to one of them for a significant period of time.¹⁴ It is, therefore, my opinion that a court would defer to the Department's interpretation

⁹ See Musgrove Memorandum, *supra* note 5, and Memorandum from Alexa Posny, Director, Office of Special Education Programs, USDE, to State Directors of Special Education (Mar. 6, 2006) and accompanying chart captioned "Age Cohort (for years of age 3 through 21) for which FAPE is Ensured (03/01/07)" (on file in this office).

¹⁰ See, e.g., *Matter of Sugarloaf Mining Co.*, 310 Ark. 772, 840 S.W.2d 172 (1991); *Arkansas Dept. of Human Services v. Greene Acres Nursing Homes, Inc.*, 296 Ark. 475, 757 S.W.2d 563 (1988).

¹¹ See, e.g., *Pledger v. Boyd*, 304 Ark. 91, 799 S.W.2d 807 (1990).

¹² See, e.g., *Leathers v. W.S. Compton Co., Inc.*, 316 Ark. 10, 870 S.W.2d 710 (1994).

¹³ See, e.g., *id.*; *Pledger*, *supra* note 8.

¹⁴ Additionally, the Department's interpretation comports with that of the United States Circuit Court of Appeals for the Eighth Circuit interpreting another Arkansas statute with language identical in relevant part. See *Birmingham v. Omaha School Dist.*, 220 F.3d 850, 853 (8th Cir. 2000) ("Arkansas law mandates that school districts educate persons either to the age of twenty-one or until they complete the secondary education program") (interpreting Ark. Code Ann. § 6-18-202(b)(1), which requires public education for persons "between five (5) and twenty-one (21) years of age"; emphasis added); and *Birmingham*, *supra* note 5.

that the language at issue means “3 to 21.” The Department accordingly may continue to apply the Act as though it expressly so provided.¹⁵

Assistant Attorney General J.M. Barker prepared this opinion, which I approve.

Sincerely,

A handwritten signature in blue ink, appearing to be 'LR', is written over the typed name 'LESLIE RUTLEDGE'.

LESLIE RUTLEDGE
Attorney General

LR/JMB:cyh

¹⁵ Your request also alluded to the question whether the Act should be interpreted to permit a person to finish the academic year during which he becomes 21 years old. The law states no clear rule in this regard. While the Act does not require FAPE to continue beyond the day on which a person becomes 21 years old, neither does it prohibit continuance. *See also* Ark. Const. art. 14, § 1 (“the General Assembly and/or public school districts may spend public funds for the education of persons over twenty-one (21 years of age”). The matter appears to be left to the discretion of the Department and the responsible school districts.