



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-051

July 17, 2015

The Honorable Alan Clark
State Senator
P.O. Box 211
Lonsdale, AR 72087

Dear Senator Clark:

This is in response to your request for my opinion concerning certain provisions of Act 560 of 2015, which amended the Public School Choice Act of 2013. As background for your questions, you state:

The passage of Act 560 of 2015 (Act) made certain amendments to the primary Arkansas laws governing public school choice and poses several questions with regard to the nature and scope of the obligations placed upon the Arkansas Department of Education (ADE) and public school districts.

Section 1 of the Act creates a new § 6-13-113 of the Arkansas Code and requires school districts that are subject to a desegregation [sic] or desegregation order to notify the Department of Education in writing by January 1, 2016. The section also requires a school district that is subject to a desegregation order or a desegregation-related order to include in the written notice certain information.

In Section 6 of the Act, the Act amends Ark. Code Ann. § 6-18-1906, which now states, in pertinent part:

(a)(1) 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.

(2) If a school district claims a conflict under subdivision (a)(1) of this section, the school district shall immediately submit proof from a federal court to the Department of Education that the school district has a genuine conflict under an active desegregation order or active court-approved desegregation plan with the interdistrict school choice provisions of this subchapter.

In light of the foregoing background information, you have posed the following questions:

1. What are the legal obligations with which a school district must comply in order to declare a conflict with the interdistrict school choice provisions of the Act?
2. Must a school district provide proof of a conflict on an annual basis?
3. If a school district declares a conflict with the interdistrict school choice provisions of the Act, what obligations, if any, does the ADE have to review a school district's declared conflict to determine whether the school district met the requirements of the Act? Specifically, does the ADE have any obligation or authority to review the information provided by the school district and determine:
 - (a) Whether a school district has provided sufficient proof of a conflict with a desegregation order or court-approved desegregation plan?
 - (b) Whether the desegregation order or court-approved desegregation plan remain active?
 - (c) Whether a genuine conflict exists between the school district's desegregation order or court-approved desegregation plan and the interdistrict school choice provisions of the Act?

- (d) Whether it can require a school district to provide additional information or deny a determination of a limitation of the Act until the information is provided?
4. If a school district declares a conflict with the interdistrict school choice provisions of the Act and the ADE is required to make any of the determinations set forth in 3(a)-(c) above, is the ADE required to provide notice of those determinations? And, if so:
- (a) To whom must the notice be provided?
- (b) May a student or a student's parent(s) continue to make application for school choice transfer under the interdistrict school choice provisions of the Act if the ADE has not made, and provided notice of, any of the determinations set forth in 3(a)-3(c) above?
- (c) May a nonresident district accept applications for school choice transfer from a student who resides in a school district which declares a conflict with the interdistrict school choice provisions of the Act if the ADE has not made, and provided notice of, any of the determinations set forth in 3(a)-3(c) above?
5. What is the applicability, if any, of Section 1 of the Act (§ 6-13-113) with regard to the remainder of the Act? Is the section simply a notice requirement for a school district that does not, alone, constitute a declaration that a school district has a conflict with any interdistrict school choice provisions governed by the remainder of the Act?

RESPONSE

With respect to Question 1, the legal obligations on a school district to be able to claim a conflict with the Public School Choice Act are clear in the statute. The answer to Question 2 is "no," in my opinion. As to Question 3, in my opinion, the Arkansas Department of Education does not have the authority to take the actions about which you have inquired. Question 4 is moot in light of my response to Question 3. It is my opinion in response to Question 5 that simply providing the information required by section 1 of Act 560 of 2015, to be codified at Ark. Code

Ann. § 6-13-113, would not, by itself, serve as a claim of conflict under Ark. Code Ann. § 16-18-1906(a)(2), as amended by Act 560.

DISCUSSION

Before addressing your questions, I will summarize the relevant portions of what is now called the Public School Choice Act of 2015¹ (“the Public School Choice Act”), as well as the relevant changes made to that act by Acts 2015, No. 560 (“Act 560”). The Public School Choice Act² sets forth a public school choice program that is obligatory for each school district³ unless certain statutory limitations apply.⁴ One of those limitations is if the transfer conflicts “with an enforceable judicial decree or court order remedying the effects of past racial segregation in the school district.”⁵ The statute states that “[i]f 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 [court] order or plan shall govern.*”⁶

¹ Ark. Code Ann. § 6-18-1901 *et seq.* (Repl. 2013), as amended by Acts 2015, No. 560. Act 560 went into effect on March 20, 2015.

² By way of background, in 2012, a federal district court declared an earlier enactment—the Public School Choice Act of 1989 (formerly codified at Ark. Code Ann. § 6-18-206 (2012) *repealed by* Acts 2013, No. 1227)—unconstitutional because of the law’s explicit race-based exception to interdistrict transfers. *See Teague v. Ark. Bd. of Educ.*, 873 F. Supp. 2d 1055 (W.D. Ark. 2012), *vacated by Teague v. Cooper*, 720 F.3d 973 (8th Cir. 2013). The 1989 law provided, with certain exceptions, that “[n]o student may transfer to a nonresident district where the percentage of enrollment for the student’s race exceeds that percentage in the student’s resident district....” Ark. Code Ann. § 6-18-206(f)(1) (2012). The court’s ruling led the General Assembly in 2013 to repeal section 6-18-206 and to enact a new public school choice law. *See* Acts 2013, No. 1227.

³ *See* Ark. Code Ann. § 6-18-1903(b) (Repl. 2013) (“Each school district shall participate in a public school choice program consistent with this subchapter.”)

⁴ These limitations are found at Ark. Code Ann. § 6-18-1906 as amended by Act 560.

⁵ Ark. Code Ann. § 6-18-1901(b)(3) (Repl. 2013).

⁶ Ark. Code Ann. § 6-18-1906(a) (Repl. 2013) (renumbered as subsection (a)(1) by Act 560) (emphasis added).

One significant change made by Act 560 to the Public School Choice Act was an attempt to require proof from a school district that wishes to claim an exemption from the Public School Choice Act because of a desegregation-related court order. Before Act 560, a school district that wished to exempt itself from school choice needed only to declare annually that “the school district is subject to the desegregation order ... remedying the effects of past racial segregation.”⁷ This declaration was irrevocable for one year and could be renewed each year by notice to the ADE. A school district’s board of directors also had the option, after an exemption year, “to 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.”⁸

Act 560, however, repealed that provision and added a new subsection that states:

If a school district claims a conflict under subdivision (a)(1) of this section, the school district shall immediately submit proof from a federal court to the Department of Education that the school district has a genuine conflict under an active desegregation order or active court-approved desegregation plan with the interdistrict school choice provisions of this subchapter.⁹

This new language imposes more of a burden on a school district. It is no longer sufficient for a school district to simply declare itself exempt because of a court’s desegregation order. Now, the school district seeking exemption must submit to the ADE “proof from a federal court [of] a genuine conflict” with such an order. Act 560, however, provides no guidance as to what would be both necessary and sufficient to constitute such “proof” from a federal court. It is similarly silent as to what the ADE is supposed to do with such proof once it is submitted.

Act 560 also added a new section within the general provisions chapter regarding school districts.¹⁰ That section requires a school district to provide the ADE written notice by January 1, 2016 that the district is subject to a desegregation or

⁷ Ark. Code Ann. § 6-18-1906(b) (Repl. 2013).

⁸ *Id.*

⁹ Act 560, § 6 at p. 5 (to be codified at Ark. Code Ann. § 6-18-1906(a)(2)).

¹⁰ *Id.* at § 1 (to be codified at Ark. Code Ann. § 6-13-113).

desegregation-related order.¹¹ This notice also must contain certain information about that school district's existing desegregation orders.¹² Moreover, that section requires school districts that are released from court supervision related to such orders to "promptly notify" the ADE.¹³ Additionally, the ADE is to post all such written notifications on its website.¹⁴ School districts that fail to meet these requirements will be deemed in violation of state accreditation standards.¹⁵

With this summary of the law and the relevant changes brought by Act 560 in mind, I will now respond to your particular questions.

Question 1: What are the legal obligations with which a school district must comply in order to declare a conflict with the interdistrict school choice provisions of the Act?

In my opinion, Act 560 makes clear what a school district must do if it claims a conflict with the provisions of the Public School Choice Act. The school district "shall immediately submit proof from a federal court to the Department of Education that the school district has a genuine conflict under an active desegregation order or active court-approved desegregation plan with the interdistrict school choice provisions of this subchapter."¹⁶ Beyond stating this obligation, however, the statute is silent. As noted above, there is no indication or guidance as to what would be both necessary and sufficient to constitute such "proof from a federal court."

¹¹ *Id.* (to be codified at Ark. Code Ann. § 6-13-113(a)).

¹² *Id.* (to be codified at Ark. Code Ann. § 6-13-113(b)). The information required by the statute comprises 1) a copy of the court's desegregation or desegregation-related order; 2) the case heading and case number of each case in which the order was entered; 3) the name and location of each court with jurisdiction over such orders; and, 4) a description of the school choice student transfer obligations related to such order to which the school district may be subject.

¹³ *Id.* (to be codified at Ark Code Ann. § 6-13-113(c)).

¹⁴ *Id.* (to be codified at Ark Code Ann. § 6-13-113(e)).

¹⁵ *Id.* (to be codified at Ark Code Ann. § 6-13-113(d)).

¹⁶ Act 560 at § 6, p. 5 (to be codified at Ark. Code Ann. § 6-18-1906(a)(2)). The Public School Choice Act places other limitations on school districts' abilities to accept school choice transfers, such as a numerical net maximum limit on such transfers. *See id.* at § 6, p. 6 (to be codified at Ark. Code Ann. § 6-18-1906(b)). Because the other limitations do not appear to be the focus of your inquiry, I only mention them here.

Question 2: Must a school district provide proof of a conflict on an annual basis?

“No,” in my opinion. The Public School Choice Act, as amended by Act 560, contains no language requiring annual declarations or renewals. As stated above, Act 560 repealed the law granting school districts the option to declare an exemption from school choice each year.¹⁷

Moreover, as a practical matter, there would be no need for a school district to resubmit its proof of a conflict. A court’s desegregation order to a school district remains in place, as written, until it is lifted, modified or, by its own terms, comes to an end. A lower court’s order also could be overturned or vacated by a higher court. Absent such a change, however, the school district’s conflict remains.

Question 3: If a school district declares a conflict with the interdistrict school choice provisions of the Act, what obligations, if any, does the ADE have to review a school district’s declared conflict to determine whether the school district met the requirements of the Act? Specifically, does the ADE have any obligation or authority to review the information provided by the school district and determine (a) whether a school district has provided sufficient proof of a conflict with a desegregation order or court-approved desegregation plan; (b) whether the desegregation order or court-approved desegregation plan remain active; (c) whether a genuine conflict exists between the school district’s desegregation order or court-approved desegregation plan and the interdistrict school choice provisions of the Act; and (d) whether it can require a school district to provide additional information or deny a determination of a limitation of the Act until the information is provided?

This question seems to boil down to whether the ADE can or must make a determination as to the veracity of a school district’s claim of a conflict and/or the adequacy of the “proof” it has submitted. The question also asks whether the ADE can require a school district to provide additional information (presumably if the proof is in some way deemed “insufficient”) or deny a school district’s excusal from the Act until the information is provided.

In my opinion, the ADE is neither authorized nor obligated to take the actions contemplated. As mentioned above, the law is silent on what, if anything, the

¹⁷ See text accompanying notes 7-9 *supra*.

ADE is supposed to do with the “proof” that a school district submits. The Public School Choice Act, as amended by Act 560, does not charge the ADE to undertake to verify a school district’s claim of exemption¹⁸ or make a determination as to the sufficiency or truth of the proof submitted.¹⁹ Nor has my research yielded any other law assigning such a role to the ADE.

I will note that this may raise a problematic aspect of the new law. Suppose, for instance, a school district submits “proof” that is patently inadequate to show a “genuine conflict” with the Public School Choice Act. I see no clear procedure under the law for challenging such a submission. I can speculate that a parent of a student would mount a challenge by seeking relief from a court of competent jurisdiction in such a case. But the law is not clear in this regard, suggesting the need for legislative clarification.

Question 4: If a school district declares a conflict with the interdistrict school choice provisions of the Act and the ADE is required to make any of the determinations set forth in 3(a)-(c) above, is the ADE required to provide notice of those determinations? And, if so: (a) To whom must the notice be provided; (b) May a student or a student’s parent(s) continue to make application for school choice transfer under the interdistrict school choice provisions of the Act if the ADE has not made, and provided notice of, any of the determinations set forth in 3(a)-3(c) above; and (c) May a nonresident district accept applications for school choice transfer from a student who resides in a school district which declares a conflict with the interdistrict school choice provisions of the Act if the ADE has not made, and provided notice of, any of the determinations set forth in 3(a)-3(c) above?

This question is rendered moot in light of my response to Question 3. As a

¹⁸ It is my understanding that the ADE takes the position that it is neither authorized nor equipped to construe federal court desegregation orders issued to individual school districts for the purposes of the Public School Choice Act.

¹⁹ The ADE does not appear to assume this authority either, according to its proposed “Rules Governing the Public School Choice Act of 2015,” found at http://www.arkansased.gov/public/userfiles/Legal/Legal-Pending%20Rules/Public_School_Choice_Draft_for_Public_Comment_April_2015.pdf (last accessed June 10, 2015). It is well established that the construction of a state statute by an administrative agency, while not binding, is afforded great deference by the courts and will not be overturned unless it is clearly wrong. See e.g., *Brookshire v. Adcock*, 2009 Ark. 207, 307 S.W.3d 22, 26; *Ford v. Keith*, 338 Ark. 487, 494, 996 S.W.2d 20, 25 (1999).

general matter, however, I will note that the ADE has no notification responsibilities to parents of students under the Public School Choice Act.

Question 5: What is the applicability, if any, of Section 1 of the Act (§ 6-13-113) with regard to the remainder of the Act? Is the section simply a notice requirement for a school district that does not, alone, constitute a declaration that a school district has a conflict with any interdistrict school choice provisions governed by the remainder of the Act?

Upon codification as Ark. Code Ann. § 6-13-113, section 1 of Act 560 will be found in chapter 13 of Title 6, whereas the Public School Choice Act is found in chapter 18. Thus, standing alone, section 1 of Act 560 will not be found as part of the Public School Choice Act. However, that section does have a tangential relation to the Public School Choice Act. One of the pieces of information it requires school districts to submit to the ADE by January 1, 2016 is a “description of the school choice transfer obligations, if any, the school district is subject to, related to that [desegregation] order.”²⁰

As to whether the submission required by section 1 of Act 560 would, by itself, serve as the claim of a conflict under Ark. Code Ann. § 6-18-1906, the answer is “no,” in my opinion. The language of Ark. Code Ann. § 6-18-1906, as amended by Act 560, requires that a school district claiming a conflict with the Public School Choice Act because of a court desegregation order take an action to assert such conflict by submitting “proof” from a federal court to the ADE. Again, what constitutes such “proof” and how its sufficiency and veracity is to be determined are matters left unaddressed by the Public School Choice Act, as amended by Act 560.

Assistant Attorney General Ray Pierce prepared this opinion, which I hereby approve.

Sincerely,



LESLIE RUTLEDGE
Attorney General

LR/RP:cyh

²⁰ Act 560, § 1 (to be codified at Ark. Code Ann. § 6-13-113(b)(4)).