

August 10, 2011

OFFICIAL OPINION 2011-7

Dr. Tony Bennett
Superintendent of Public Instruction
Indiana Department of Education
200 W. Washington St.
Indianapolis, IN 46204

RE: Right to Transfer into Local Public School After Attendance at Charter School

Dear Dr. Bennett:

In your letter of June 2, 2011, you advised that a superintendent of a local public school corporation has indicated that he will bar students attempting to transfer into the local public school corporation from charter schools after the annual count date for Average Daily Membership (ADM). According to your letter and the published accounts attached thereto, the superintendent of the local public school corporation intends to bar such students solely upon their having been enrolled in a charter school on the ADM count date, even though the students have legal settlement in the public school corporation.

According to your letter, the Indiana Department of Education (DOE) questions whether such an action by a superintendent of a public school corporation is contrary to Indiana law. Children of school age are required to attend school under the Compulsory School Attendance Act, Ind. Code Chpt. 20-33-2, and have the right to attend school in the school corporation where they have legal settlement, pursuant to Ind. Code Chpt. 20-26-11. In addition, the DOE asserts that school officials, including local superintendents, are required to enforce Indiana's compulsory school attendance laws. See Ind. Code § 20-33-2-26, Ind. Code § 20-33-2-29. DOE's questions whether the local superintendent's intention to bar such students from enrolling is contrary to Indiana law in that it infringes upon a student's right to an education as guaranteed by the Indiana Constitution and as provided for in statute. You asked our office to analyze these issues and offer a legal opinion regarding the school corporation's proposed actions and questions raised by DOE with respect to those actions.

BRIEF ANSWER

A local public school corporation cannot bar a student from transferring to the school corporation based solely upon the student's previous enrollment in a public charter school. Such an action is contrary both to the Indiana Constitution, Art. 8, § 1, and numerous statutory provisions.

ANALYSIS

The Indiana Constitution provides at Art. 8, § 1 as follows:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to

encourage, by all suitable means, moral, intellectual scientific, and agricultural improvement; and provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Often referred to as the “Education Clause,” it expresses two duties of the General Assembly. One duty is aspirational in nature (to encourage moral, intellectual, scientific, and agricultural improvement). “The second is the duty to *provide* for a general and uniform system of open common schools that do not charge tuition.” *Bonner v. Daniels*, 907 N.E.2d 516, 520 (Ind. 2009) (emphasis original). The second duty is “more concrete” in that certain performance standards must be established by the legislature, to wit: establishment of system of Common Schools¹ that are “general and uniform,” where “tuition shall [be] without charge,” and “equally open to all.” *Id.* A “common school” is one that is “open to the children of all the inhabitants of a town or district.” *Embry v. O’Bannon*, 798 N.E.2d 157, 162 n. 4 (Ind. 2003). See also *Nagy v. Evansville-Vanderburgh School Corporation*, 844 N.E.2d 481, 491 (Ind. 2006) (“The duty rests on the legislature to adopt the best [school] system that can be framed[.]”); *Robinson v. Schenck*, 1 N.E. 698, 705 (Ind. 1885) (the Education Clause “imperatively enjoins the general duty upon the legislature” to establish a system of Common Schools).

Pursuant to its constitutional responsibility, the General Assembly has enacted a number of statutes to establish a system of Common Schools, including the creation of two main types of public schools: the school corporation² and the charter school.³

State tuition support for a school corporation and a charter school is determined in significant part by the ADM pupil count. Pursuant to Ind. Code § 20-43-4-2 (2011), a school corporation’s⁴ ADM is the number of eligible pupils enrolled “on a day to be fixed annually” by the Indiana State Board of Education, “and as subsequently adjusted not later than January 30 under the rules adopted by the state board.” The annual date “must fall within the first thirty (30) days of the school year.” Ind. Code § 20-43-4-3. The State Board of Education has established the ADM count day as the second Friday following Labor Day. See 511 Ind. Admin. Code 1-3-1(h).⁵

From the published accounts, the local superintendent intends to deny enrollment to students from charter schools who attempt to enroll in the school corporation after the ADM count date, even where the students have legal settlement in the school corporation.

¹ The phrase “common schools” is synonymous with “public schools.” See *State v. O’Dell*, 118 N.E. 529, 530 (Ind. 1918).

² See Ind. Code § 20-18-2-16.

³ See Ind. Code § 20-24-1-4.

⁴ “School corporation” for ADM purposes includes a charter school. See Ind. Code § 20-43-1-23.

⁵ The local superintendent expressed an opinion that the charter schools were “enticing” students within his school corporation to enroll in the charter schools and then encouraging the students to re-enroll in the school corporation after the ADM count date. If the local superintendent believes that there is an “extreme pattern” of “in-migration” or “other unusual conditions” that have caused the school corporation’s enrollment “to be unrepresentative of the school corporation’s enrollment throughout a school year,” the school corporation can petition the State Board of Education to “designate another day for determining the school corporation’s enrollment.” See Ind. Code § 20-43-4-3.

“Legal settlement” of a student determines the “responsibility” of a school corporation “to allow the student to attend its local public schools without the payment of tuition[.]” Ind. Code § 20-18-2-11. Typically, “legal settlement” is where the student “resides.” See Ind. Code § 20-26-11-1. There are a number of statutory provisions that expand upon the concept of “legal settlement” and assist in its determination. See, *e.g.*, Ind. Code § 20-26-11-2, Ind. Code § 20-26-11-2.5, and Ind. Code § 20-26-11-30.⁶ “Legal settlement” is important to a school corporation because a school corporation has attendance areas. Charter schools do not have attendance areas. See, *e.g.*, Ind. Code § 20-24-5-1 (“A charter school...must be open to any student who resides in Indiana.”)

“A school corporation *shall*...conduct an educational program for all children who reside within the school corporation in kindergarten and in grades 1 through 12[.]” Ind. Code § 20-26-5-1(a)(1) (emphasis added). A school corporation does have the authority, under specific circumstances, to suspend, expel or exclude a student from its schools. This would include suspension and expulsion as disciplinary sanctions under Ind. Code § 20-33-8-14 and Ind. Code § 20-33-8-15; expulsion for lack of legal settlement under Ind. Code § 20-33-8-17;⁷ prohibiting enrollment during the period of expulsion or separation determined by a previous school, as permitted by Ind. Code § 20-33-8-30; exclusion for failure to present immunization record under Ind. Code § 20-34-4-5; or exclusion for illness, infestation with parasites, or having a communicable disease, as permitted by Ind. Code § 20-34-3-9.

As noted *supra*, the Education Clause requires the General Assembly to ensure that the system of Common Schools is “equally open to all.” To this end, the legislature has declared that Indiana public schools “are open to all children until the children complete their course of study, subject to the authority vested in school officials by law.” Ind. Code § 20-33-1-2. The legislature has not authorized school corporations to refuse enrollment of students who have legal settlement but previously attended a charter school.

The General Assembly has determined that a “student is entitled to be admitted and enrolled in a public school in the school corporation in which the student resides without regard to race, creed, color, socioeconomic class, or national origin,” Ind. Code § 20-33-1-4(a), nor may admission to a public school be approved or denied based upon race, creed, or color. Ind. Code § 20-33-1-5(b). The legislature has also prohibited discrimination against students who have attended public charter schools.

IC § 20-24-10-1 Transfer of students from charter to noncharter school; discrimination prohibited

Sec. 1. (a) A public noncharter school that receives a transfer student from a charter school *may not discriminate* against the student *in any way*, including by placing the student:

- (1) in an inappropriate age group according to the student's ability;
- (2) below the student's abilities; or
- (3) in a class where the student has already mastered the subject matter.

⁶ The State Board of Education does have the authority to determine administratively the “legal settlement” of a student, as well as a student’s “right to attend school in any school corporation.” See Ind. Code § 20-26-11-15(a)(3)(A), (C).

⁷ An expulsion for lack of legal settlement is not a disciplinary sanction. Such an expulsion can be appealed to the Indiana State Board of Education under Ind. Code § 20-26-11-15(a)(1).

(b) If a student who previously was enrolled in a charter school enrolls in another public school, the public noncharter school shall accept all credits earned by the student in courses or instructional programs at the charter school in a uniform and consistent manner, according to the same criteria that are used to accept academic credits from other public schools. (Emphasis added.)

A “[d]iscriminatory purpose...implies that a decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group.” *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996). Based upon the reported accounts, the local superintendent intends to single out an identifiable group (former charter school students who have legal settlement in the school corporation) for disparate treatment. A school corporation would be a “public noncharter school.” The school corporation is strictly prohibited from discriminating against a charter school student “in any way.” The legislature did not confine or otherwise restrict this admonition.

CONCLUSIONS

The General Assembly is charged with the establishment of system of Common Schools that are, *inter alia*, “equally open to all.” To this end, the legislature has established two main public schools, the school corporation and the charter school. A student has the right to attend the public school of the school corporation in which the student resides or has legal settlement, subject to the authority vested in a school corporation to suspend, expel, or exclude the student.

The General Assembly has not authorized a school corporation to refuse enrollment to a student who resides or has legal settlement in the school corporation based solely upon the student’s desire to transfer from a charter school. The legislature has definitively prohibited a school corporation from discriminating against such a student “in any way,” including singling out such a student for disparate treatment based upon previous enrollment in a charter school.

A school corporation that refused enrollment to such a student would have engaged in activity that is both unconstitutional and illegal.

Sincerely,

Gregory F. Zoeller
Attorney General

Kevin McDowell
Deputy Attorney General