

MINUTES
JOINT MEETING
OF THE
HOUSE AND SENATE INTERIM COMMITTEES ON EDUCATION

Monday, September 17, 2012
10:00 A.M.
Room 171, State Capitol
Little Rock, Arkansas

Representative Johnnie Roebuck, the Vice Chair of the House Interim Committee on Education, called the meeting to order at 10:00 a.m.

MEMBERS OF THE SENATE INTERIM COMMITTEE ON EDUCATION IN ATTENDANCE: Senator Jimmy Jeffress, Chair; Senator Mary Anne Salmon, Vice Chair; Senator Gilbert Baker; Senator Joyce Elliott; Senator Kim Hendren; and Senator Gene Jeffress.

MEMBERS OF THE HOUSE INTERIM COMMITTEE ON EDUCATION IN ATTENDANCE: Representative Johnnie Roebuck, Vice Chair; Representative Les Carmine; Representative Robert Dale; Representative Jody Dickinson; Representative Debra Hobbs; Representative Karen Hopper; Representative Randy Stewart; Representative Tim Summers; Representative Kathy Webb; and Representative Tommy Wren.

NON-VOTING MEMBERS OF THE HOUSE INTERIM COMMITTEE ON EDUCATION IN ATTENDANCE: Representative John Catlett; Representative Justin Harris; Representative Andrea Lea; and Representative Kelley Linck.

OTHER MEMBERS OF THE GENERAL ASSEMBLY IN ATTENDANCE: Senator Cecile Bledsoe; Senator Jim Luker; Senator Eddie Joe Williams; Representative Tommy Lee Baker; Representative Nate Bell; Representative John Burris; Representative Billy Gaskill; Representative Jon Hubbard; Representative Buddy Lovell; and Representative James Ratliff.

Representative Roebuck announced that anyone wishing to speak to Item C on the agenda please sign the testimony form. She stated that members will be recognized first for questioning, after which nonmembers will be recognized. Representative Roebuck remarked that these rules were referred to the House and Senate Interim Committees on Education for review by the Administrative Rules and Regulations Subcommittee of the Arkansas Legislative Council (ALC), and will go back to the Subcommittee for their consideration tomorrow, regardless of any action taken today by the Committees. She stated that the Committees would hear the full explanation of the rules before any questions are entertained. Representative Roebuck requested that Ms. Mary Cameron explain the process.

Ms. Mary Cameron, Legislative Attorney, Legal Division, Bureau of Legislative Research, was recognized. Ms. Cameron said as the General Assembly has given authority to the House and Senate Interim Committees on Education to conduct oversight of the various educational programs established by the General Assembly, including the Arkansas Better Chance (ABC) Program, the proposed ABC Rules are before the Committees for review, and the House and Senate Interim Committees on Education will report any recommendation for review, non review, or no action taken back to the Administrative Rules and Regulations Subcommittee.

Review of Department of Education Rule Concerning the Arkansas Better Chance (ABC) Program Referred to the Committees by the Administrative Rules and Regulations Subcommittee of the Arkansas Legislative Council

Mr. Jeremy Lasiter, General Counsel, Arkansas Department of Education, and **Mr. Breck Hopkins**, Chief Counsel, Office of Chief Counsel, Arkansas Department of Human Services, were recognized. A copy of the proposed *Arkansas Department of Education Rules Governing the Arkansas Better Chance Program* was in each member's packet.

Mr. Lasiter provided a background for the rules. He explained that Arkansas Code Annotated § 6-45-101 created the ABC Program through the Arkansas Department of Education (ADE). He said that under the applicable statutes, the ADE creates the Program and funds it, but it's the Department of Human Services (DHS) that serves as the Program's administrator and reviews and approves program applications and provides monitoring for the programs. He said a part of the law that was passed by the General Assembly is § 6-45-106 (a)(1)(b), which requires that ABC Program applications submitted by sectarian or sectarian-affiliated programs must first be reviewed to ensure that any approval of funding will not result in a violation of the First Amendment to the United States Constitution. Mr. Lasiter stated the First Amendment to the United States Constitution contains two clauses having to do with religion, and are aptly called the "religion clauses." He said both of these clauses apply to the State of Arkansas through the application of the Fourteenth Amendment to the United States Constitution. He explained the first of the two "religion clauses" is the *establishment clause*, and it's the one that says that Congress shall make no law respecting an establishment of religion. The second is the *free exercise clause*, which states that Congress shall make no law prohibiting the free exercise of religion. Mr. Lasiter commented that the struggle for the various branches of government throughout the history of our country has always been on how to strike an appropriate balance between those two equally important clauses of the First Amendment. He said the basic idea is that there should be government neutrality toward religion. Mr. Lasiter noted it's against this backdrop that the rules have been drafted to meet not only the requirements of the establishment clause but to also respect the equally important requirements of the free exercise clause. The question in every case is whether state funds impermissibly aid a religiously-based or affiliated entity in discharging its religious mission, and the best way to answer that is to identify those public funds and be able to determine their use. Mr. Lasiter said there are four primary components in the proposed revisions:

1. All ABC instruction and instructional materials must be neutral with respect to religion.
2. Religious activity cannot take place during the seven-hour ABC day.
3. State funds cannot be used to fund religious activities at any time, even after the seven-hour period.
4. Separate bank accounts are required. ABC funds cannot be comingled with other funds.

Mr. Lasiter stated that in these rules, we're not attempting to cover private religious activities, only those activities that can be done during that seven-hour ABC day or with public funds. He also mentioned that the revisions to these rules may be new, but the principles underlying them are not. He said, as a state government, we've always had to be responsible for ensuring that public funds aren't used for religious purposes. The rules are meant to provide clarity, not only for the DHS monitors, but for the providers of these programs, so that they know what is contained in this regard in the rules and in the law.

Mr. Hopkins thought Mr. Lasiter covered the issue very well. He said cases from the Supreme Court and from other federal courts were reviewed and those decisions closely followed without making the rule so legalistic that it would defeat its purpose of providing information and notice to providers and to those who are trying to apply the rule. Mr. Hopkins stated the goal is very simple: public funds cannot directly aid religion.

Ms. Tonya Russell, Director, Division of Child Care and Early Childhood Education, Arkansas Department of Human Services, and **Ms. Kristen Gould**, Staff Attorney, Arkansas School Boards Association, were recognized, and participated, as needed, in the extensive discussion following the presentation. Topics included:

- ∴ enactment of Arkansas Code Annotated § 6-45-101,
- ∴ religious posters and materials on walls or in classrooms during the seven-hour ABC day,
- ∴ religious activities during the seven-hour ABC day,
- ∴ oral religious instruction during the seven-hour ABC day,

- ∴ getting outside the seven-hour ABC public program day for religious activities,
- ∴ clarification of “falsifying a report” in Section 22.04,
- ∴ responsibility of the adult instructor to adroitly answer questions regarding religious icons in the classroom,
- ∴ comparing the rule to the federal Head Start program rules,
- ∴ communication of the rule to other areas of state government that may be affected,
- ∴ prayer at lunch as a private activity and as a religious activity during the seven-hour ABC day,
- ∴ atheism and the rule,
- ∴ parental rights and sensitivity to other children regarding private behavior,
- ∴ standards of definition for the word “impressionable” for adults and for children,
- ∴ the rule as concerns grant recipients,
- ∴ number of programs identified as being run by religious groups,
- ∴ funding sources for the ABC Program,
- ∴ latest date of the Supreme Court ruling,
- ∴ providing a neutral explanation of the Ten Commandments if posted in a classroom,
- ∴ the Supreme Court criteria regarding programs and religion,
- ∴ state dollars ensuring that a curriculum should take up the day,
- ∴ whether rule changes serve as a disincentive to current participants or potential recruits of the ABC Program,
- ∴ change in the rule is an amendment intended to clarify constitutional and federal jurisprudence, not to impose anything new,
- ∴ children praying on their own during the seven-hour ABC day,
- ∴ how schools are identified as having a religious purpose,
- ∴ requirement of religious neutrality in the music used to teach children,
- ∴ whether employing a *balance* of sacred/secular music and/or art is permissible,
- ∴ *context* as the criteria for which sacred/secular music and/or art can be used in public schools,
- ∴ case law regarding music and law,
- ∴ the rule not trying to regulate the point at which prayer is private and not part of the public program at the state level,
- ∴ the need for a facility and parents to have a meeting of minds regarding the issue of prayer, and working out in advance what happens during the child’s day at the facility,
- ∴ clarification of the fee scale for the ABC Program,
- ∴ waiting list for state programs in which children are not being served because of a funding deficit; having an even playing field, and
- ∴ existence of any court case that allows direct support of religious instruction.

Representative Roebuck thanked Mr. Lasiter, Mr. Hopkins, Ms. Russell, and Ms. Gould.

Representative Roebuck announced that the Committees would next hear from interested parties who signed the testimony form.

The Honorable Justin Harris, State Representative, District 87, was recognized. Representative Harris noted that this discussion of religious freedoms is taking place on Constitution Day. He wanted to make clear that these are private programs receiving ABC funds. He said he was at the meeting to represent children, parents, educators, childcare providers, and the 110 low-income children who attend Growing God’s Kingdom, a preschool that he runs. He said there are two choices in the small town of West Fork: whether to send children to a faith-based program or to a secular program. He said their choice is the faith-based program. He stated that with the adoption of the rules, this choice would be taken away. Representative Harris provided additional background to the issue and objected to not having had input into the formulation of the rules before public

hearing. He said he didn't think the rules needed to be implemented at this time. Representative Harris said he was here today to defend others' rights to be able to read, pray, and do what they want to do in private programs.

Ms. Stephanie Lacey, Attorney, allied with, but not a representative of, the Alliance Defense Fund, was recognized, and said she was at the meeting as a citizen, as an attorney who has a focus on Constitutional law, and as a former teacher. Ms. Lacey cited U.S. Supreme Court cases, *Agostini v. Felton* and *Mitchell v. Helms*, to point out flaws in the rules and to clarify and to correct statements that had previously been made. She said the proposed rules will cause greater problems, constitutionally, than they will fix.

Mr. Jerry Cox, President, Family Council, was recognized, and waived time to present testimony.

Ms. Donna Schillinger, Parent, was recognized. Ms. Schillinger related a story about her son and enrolling him in a day care program in Clarksville, Arkansas, not because it was an ABC Program, but because it was conducted by a trusted person with the same values she has. She objected to the new Section 23 of the rules and had expressed her opinion during the public comment period. She noted additional changes made after the public comment period made the rules even more stringent. She specifically objected to Section 23.04.4 No religious activity may occur during any ABC day, and Section 23.04.5 (b) No religious activity may occur during any ABC day regardless of the source of funds used to support the activity. She requested that these sections be removed from the rules.

Ms. Tonya Russell, Director, Division of Child Care and Early Childhood Education, Arkansas Department of Human Services, was recognized, and participated, as needed, in the discussion that followed. Topics included:

- input into the formulation of the rules,
- the need for clarification from ADE and DHS on what is neutral,
- the need for clarification from ADE and DHS on the balance between what is religious and what is secular,
- state and federal funding for private, faith-based programs,
- distinguishing between *faith-based* and *religious* programs,
- state funding for *all* 296 preschool programs, including any faith-based programs,
- changes and new language in the rules,
- language in the rules and its potential for creating constitutional issues,
- clarification of the cases, *Agostini v. Felton* and *Mitchell v. Helms*, and relevance to the rules,
- application process is identical for religious and non-religious institutions,
- monitoring involved for ensuring compliance with the First Amendment,
- teaching the Bible without violating the First Amendment or case law,
- confusion about ABC Programs and voucher programs,
- funding with regard to unused slots,
- applying for programs and abiding by the rules,
- Section 23 clarifying principals and practices already in place, and
- sending the rules back to the Administrative Rules and Regulations Subcommittee for further review.

Representative Roebuck stated that, hopefully, clarification of questions raised would be given tomorrow at the meeting of the Administrative Rules and Regulations Subcommittee.

The Honorable Robert Dale, State Representative, District 70, was recognized, and made a motion to "not review" the proposed rules and report the Committees' action to the Administrative Rules and Regulations Subcommittee.

The Honorable Jimmy Jeffress, State Senator, District 24, was recognized, and clarified that there was not a quorum present, so a vote could not be taken.

Representative Roebuck acknowledged that Senator Jeffress was correct. There were ten (10) voting members in the room which was not a quorum. She explained that since two Committees meeting jointly were in the room, it would take five (5) members of the Senate and eleven (11) members of the House to take a vote.

Representative Roebuck announced that the Senate Interim Committee on Education and the House Interim Committee on Education would meet jointly with the Senate Interim Committee on Children and Youth and the House Interim Committee on Aging, Children and Youth, Legislative & Military Affairs at 10:00 a.m. on Tuesday, September 25, 2012, in Room 171, of the State Capitol in Little Rock.

There being no further business, the meeting adjourned at 1:05 p.m.

Approved: 11/26/12