

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION**

**RON AND KATHY TEAGUE, on and behalf of
minor children, T.T. and S.T.;**
**DARRIN AND JULIE HARDY, on and behalf
of minor child, C.H.;**
**RHONDA RICHARDSON on and behalf of
minor child, A.R.;**
**MARK AND JENNIFER DRAPER on and
behalf of minor children, A.D. and S.D.**

PLAINTIFFS

v.

CASE NO. 6:10-cv-6098

ARKANSAS BOARD OF EDUCATION;
**JIM COOPER; BRENDA GULLETT; SAMUEL
LEDBETTER; ALICE WILLIAMS MAHONY;**
**DR. BEN MAYS; JOE BLACK, TOYCE
NEWTON, MIREYA REITH, and VICKI
SAVIERS, in their official capacity;**
**MAGNET COVE SCHOOL DISTRICT:
KAREN SCOTT, DANNY LINAM, LISA
LOFTIS, KIM BRAY, and JACK RYNDERS, in
their official capacity;**
**THE ARKANSAS DEPARTMENT OF
EDUCATION**

DEFENDANTS

**CAMDEN-FAIRVIEW SCHOOL DISTRICT
NO. 16 OF OUACHITA COUNTY;**
**EL DORADO SCHOOL DISTRICT #15,
UNION COUNTY, AR**

INTERVENORS

**BRIEF IN SUPPORT OF STATE
DEFENDANTS' MOTION FOR STAY**

Come now the State Board Defendants, Jim Cooper, Brenda Gullett, Samuel Ledbetter, Alice Williams Mahony, Dr. Ben Mays, Joe Black, Toyce Newton, Mireya Reith, and Vicki Saviers, in their official capacities only as members of the Arkansas State Board of Education, and the Arkansas Department of Education (ADE) by and through their attorneys, Arkansas

Attorney General Dustin McDaniel and Assistant Attorney General Scott P. Richardson, and for their *Brief in Support of State Defendants' Motion for Stay*, state:

I. INTRODUCTION

Arkansas law requires students to attend school in the district within which the students reside or to which school age children “have been legally transferred . . . for education purposes.” Ark. Code Ann. § 6-18-202(b)(1).¹ As the Court noted in its Memorandum Opinion and Order, over 15,000 students have been granted transfer to non-resident school districts under Arkansas laws including the school choice law that is the subject of this lawsuit. The Court’s order and Judgment entered June 8, 2012 (DE # 98), raises the question of whether the students who have been granted transfers under the School Choice Act (§ 6-18-206) before the opinion and Judgment were entered “have been legally transferred” and therefore may continue to attend school in the non-resident school district. The purpose of this motion is to request a stay (or a clarification, if the Court deems that action more appropriate) of the Court’s injunction so that the injunction will only operate prospectively to prohibit new applications for transfer subsequent to the entry of the Court’s judgment and will not prohibit transfers that had been previously granted under the Act before June 8, 2012.

II. ARGUMENT

Federal Rule of Civil Procedure 62 governs stays of injunctions. It provides as follows:

While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

¹ This statute also provides that it “shall not be construed to restrict a student’s ability to participate in a tuition agreement with a nonresident school district or to officially transfer to another school district pursuant to the Arkansas Public School Choice Act of 1989, § 6-18-206.” Ark. Code Ann. § 6-18-202(g).

Fed. R. Civ. Pro. 62(c). The Eighth Circuit has established the following factors to consider when a Court addresses the question of a stay: “(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.” *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981); *see also Brady v. National Football League*, 640 F.3d 785, 789 (8th Cir. 2011).

As explained above, the Court’s order and injunction raise the question of the legality of student transfers granted under § 6-18-206 prior to the Court’s order entered June 8, 2012. The ADE and the Attorney General’s Office are of the opinion that those transfers were “legal” because at the time they were granted the law allowed school officials to grant those transfer requests. This opinion is enhanced by the fact that the Court did not hold that the “granting” of transfers under the Act caused it to be unconstitutional, but only the denial of transfers based solely on race. However, school district officials may take a contrary view and attempt to require students to return to their resident school district on the theory that because the law allowing those transfers has been held to be unconstitutional those students were not “legally transferred.”

(1) Threat of Irreparable Harm: No students in the situation just described are parties to this case. They may, however, suffer irreparable harm if they are required to leave their chosen school district before they complete their organizational level (i.e. elementary, middle, or high school). Moreover, state funding follows each of these students. Ark. Code Ann. § 6-20-2303(setting foundation funding and categorical funding amounts for school districts). The data presented with the Boardman Affidavit demonstrates that many school districts receive a significant number of students through choice transfers. State funding would transfer with these

students. Departure of a significant number of students in the 2012-13 school year could cause a significant change in revenue in the 2013-14 school year for school districts that receive a substantial number of students pursuant to transfers under § 6-18-206.

(2) Harm Absent Stay: No party to this case argued any harms flowing from the grant of transfers under § 6-18-206. The harm argued was denial of transfers based solely on race. None of the parties to this case will be harmed by allowing those students who had previously been granted transfers to continue in their chosen school.

(3) Likelihood of Success on the Merits: The Court decided this case on the “narrow tailoring” aspect of this equal protection challenge. The State Defendants argued that § 6-18-206 was narrowly tailored because it was one of a number of choice transfer laws which, when read together, allow consideration of individual student needs in requesting transfers of which race is only one factor. The Court acknowledges that school transfer laws that are not “based solely on a student’s race” but that also include “consideration of their individual circumstances” are constitutional. Memorandum Opinion and Order (DE # 98) p. 25, 28. However, the Court did not address this position and did not provide any reasoning for why § 6-18-206 should not be considered in the full context of the State’s transfer laws. Accordingly, the State Defendants believe that they have a “fair chance of success on the merits” of any appeal that may be filed. *Brady*, 640 F.3d at 789.

(4) The Public Interest: The public interest favors allowing students who transferred in good faith reliance on state law to continue in the district in which they have enrolled.

For these reasons, the State Defendants request that the Court stay the effect of the injunction while this case is appealed. See *Lakeview School Dist. No. 25 v. Huckabee*, 351 Ark. 31, 96-97, 91 S.W.3d 472, 510-511 (2002)(staying mandate to “give the General Assembly an

opportunity to meet in General Session and the Department of Education time to implement appropriate changes”).

III. CONCLUSION

For the foregoing reasons, the State Board Defendants respectfully request that this Court issue a stay of its judgment pending outcome of the appeal and grant all other relief to which State Defendants are entitled.

Respectfully submitted,

DUSTIN McDANIEL
Attorney General

By: /s/ Scott P. Richardson
Scott P. Richardson # 01208
Assistant Attorney General
Attorneys for ADC Defendants
323 Center Street, Suite 200
Little Rock, AR 72201-2610
Telephone: (501) 682-1019
Facsimile: (501) 682-2591
scott.richardson@arkansasag.gov

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following:

William C. Brazil
bamo@conwaycorp.net, lanaymoney@gmail.com

David M. Fuqua
dfuqua@fc-lawyers.com, bgaines@fc-lawyers.com

Allen P. Roberts
allen@aprobertslaw.com, ashley@aprobertslaw.com

Jess L. Askew, III

jaskew@williamsanderson.com, fbeaugard@williamsanderson.com,
ssmith@williamsanderson.com

Andrea L. Davis
andidavis32@gmail.com, kimbabb10@gmail.com

Whitney Foster
wfoster@fc-lawyers.com, tsims@fc-lawyers.com

/s/ Scott P. Richardson
SCOTT P. RICHARDSON