STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-088

September 1, 2015

The Honorable Bob Ballinger
State Representative
1757 Madison 7150
Hindsville, Arkansas 72738-9558

Dear Representative Ballinger:

You have asked for my opinion regarding the meaning and application of Act 137 of 2015. This Act prohibits "[a] county, municipality, or other political subdivision of the state" from "adopt[ing] or enforc[ing] an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law." You ask whether Act 137 "would prevent the adoption or enforcement, in whole or in part" of ordinances similar to those passed in Little Rock, Fayetteville, Hot Springs, Eureka Springs, and Pulaski County.

RESPONSE

The common thread among the five ordinances you cite is that they all amended their local laws to prohibit certain employers (and others) from discriminating on the basis of sexual orientation or gender identity. I take your questions as asking, in light of Act 137 of 2015, whether such ordinances are enforceable.

Act 137 renders unenforceable any ordinance that prohibits discrimination on a basis not already contained in state law. Because current state law does not prohibit discrimination on the basis of sexual orientation or gender identity, it is my opinion that Act 137 renders the five ordinances unenforceable in this respect.

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DISCUSSION

The Attorney General is not authorized to construe local ordinances. But this Office can discuss a local ordinance when its meaning is clear on its face and when state law necessarily requires a reading of the local ordinance in question. The local ordinances you ask about are, for purposes of this opinion, sufficiently clear that I can discuss how Act 137 would apply.

The common feature of the five recently-enacted ordinances you ask about is that they all updated their local nondiscrimination laws to prohibit businesses from contracting with the locality unless the business signs an agreement that it will not discriminate on the basis of (among other things) sexual orientation or gender identity. Given this common thread, I take your question to be asking whether this specific action by the localities conflicts with Act 137.

Before directly addressing your questions, I will (*a*) explain how I believe a court would interpret Act 137; (*b*) provide a few representative examples of nondiscrimination laws in Arkansas; and (*c*) explain why, notwithstanding the claims of some cities, Arkansas's anti-bullying statute is not a nondiscrimination statute.

I. The Meaning of Act 137

Act 137's critical provision states that "[a] county, municipality, or other political subdivision of the state shall not adopt or enforce an ordinance, resolution, rule, or policy ***that creates a protected classification or prohibits discrimination on a basis not contained in state law***."[1] Act 137's interpretation turns primarily on the meaning of the emphasized clause. Because the ordinances you reference all prohibit "discrimination" on certain bases, I will focus on that part of the emphasized clause.

The primary question regarding Act 137 is what the General Assembly intended by the phrase "prohibits discrimination ***on a basis not already contained in state law***." (Emphasis added.) Act 137 states that a "political subdivision of the state shall not adopt or enforce an ordinance…[that] prohibits discrimination on a basis not contained in state law."

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[1] Acts 2015, No. 137, § 1 (to be codified at Ark. Code Ann. § 14-1-403(a)) (emphasis added). The Act further provides that this prohibition does not apply to policies that pertain ***only*** to a political subdivision's own employees. *See* Ark. Code Ann. § 14-1-403(b).

This language indicates that the General Assembly intended Act 137 to "hold the field" with respect to antidiscrimination law. The Act expressly prohibits localities from regulating in that field. More specifically, the Act effectively prohibits cities and counties from prohibiting discrimination in a way that varies from state law. In federal jurisprudence, this kind of preemption is known as "express preemption." The Arkansas Supreme Court has employed this framework when assessing whether local laws are preempted by state law.[2] By removing the cities' and counties' ability to enact antidiscrimination laws at variance with state laws, Act 137 clearly holds the field and leaves no room for political subdivisions to act.

II. The Anti-Bullying Statute—Ark. Code Ann. § 6-18-514

One might accept the foregoing and still argue that the five ordinances you reference are not preempted by Act 137. Indeed, I note that two of the five ordinances you ask about appear to rely on Arkansas's anti-bullying statute—Ark. Code Ann. § 6-18-514—as the basis for including sexual orientation and gender identity in their nondiscrimination ordinances.[3] But such an argument is mistaken for two reasons.

First, the anti-bullying statute is not a nondiscrimination law as contemplated by Act 137. The state's anti-bullying statute states that "every public school student in this state has the right to receive his or her public education in a public school educational environment that is reasonably free from ***substantial intimidation,***

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[2] *See generally Emerald Development Co. v. McNeill*, 120 S.W.3d 605, 608–09 (Ark. App. 2003); *Kollmeyer v. Greer*, 267 Ark. 632, 636–37, 593 S.W.2d 29, 30–32 (1980).

[3] Fayetteville's ordinance cites the statute twice: "Whereas, the General Assembly has determined that attributes such as 'gender identity' and 'sexual orientation' require protection {A.C.A. § 6-18-514(b)(1)}....Whereas, the protected classifications in A.C.A. § 6-18-514(b)(1) for persons on the basis of gender identity and sexual orientation should also be protected by the City of Fayetteville to prohibit those isolated but improper circumstances when some person or business might intentionally discriminate against our gay, lesbian, bisexual, and transgender citizens." Further, a letter opinion from the Little Rock City Attorney specifically relies on the anti-bullying statute to support the claim that that city's ordinance is in harmony with Act 137: "State law already has specific provisions to prohibit discrimination based upon gender identity and sexual orientation." Opinion Letter of the Office of City Attorney for the City of Little Rock (dated April 19, 2015).

harassment, or harm or threat of harm by another student."[4] To further that right, the General Assembly specifically defined what is meant by "bullying":

> "Bullying" means the ***intentional harassment, intimidation, humiliation, ridicule, defamation, or threat or incitement of violence*** by a student against another student or public school employee by a written, verbal, electronic, or physical act ***that may address an attribute*** of the other student, public school employee, or person with whom the other student or public school employee is associated...."[5]

The statute defines an "attribute" as an "actual or perceived personal characteristic including without limitation race, color, religion, ancestry, national origin, socioeconomic status, academic status, disability, gender, gender identity, physical appearance, health condition, or sexual orientation."[6]

Several observations—from both the text of the anti-bullying statute and an analysis of the concepts of bullying and discrimination—show that the anti-bullying statute is not a nondiscrimination law within the meaning of Act 137:

1. The statute's text deals entirely with intentional harassment, intimidation, ridicule, and threats of violence. Unlike the foregoing nondiscrimination statutes, the anti-bullying statute is not addressing distinctions made between or among various persons or groups of persons. This is critical because it shows that one can be equally culpable for bullying one person as for bullying all persons. But it is logically impossible for one to equally discriminate against all persons. For if one had a policy that applied equally to all persons (both expressly and in terms of its impact), then—far from being discriminatory—such a policy would be neutral.

2. The anti-bullying statute deals with *students* who bully other students or public-school employees. The anti-bullying statute is not addressing the employment context. Far from being a nondiscrimination law, such a

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[4] Ark. Code Ann. § 6-18-514(a) (Repl. 2013) (emphasis added).

[5] Ark. Code Ann. § 6-18-514(b)(2) (emphases added).

[6] Ark. Code Ann. § 6-18-514(b)(1).

statute is essentially a civil analogue for such crimes as harassing communications[7] and terroristic threatening.[8]

3. The statute says that the bullying "may address" one of the listed attributes. Under the statute, one can bully another entirely without reference to the person's attributes. In contrast, the only way for a person to violate one of the nondiscrimination statutes noted above is for the person to discriminate on one of the listed bases.

4. Quite apart from the text of the anti-bullying statute, the definitions of bullying and discrimination are entirely separate. When "bully" is used as a verb, it means "1. To threaten, intimidate, embarrass, or pressure (a person) by force, taunt, or derision. 2. To use abusive language or behavior against."[9] Neither of these concepts is present in the definition of discrimination: "1. The intellectual faculty of noting differences and similarities. 2. The effect of law or established practice that confers privileges to a certain class because of race, age, sex, nationality, religion, or disability.... 3. Differential treatment; esp. a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored."[10] These definitions show that bullying is not a subset of discrimination and that discrimination is not a subset of bullying. The two concepts are distinct.

But even if one assumed, for purposes of argument, that the anti-bullying statute is a nondiscrimination law, the law would still not authorize the five ordinances. This is because, as noted above, Act 137 holds the field with respect to nondiscrimination laws. Thus, if the local ordinances vary at all from state laws that prohibit nondiscrimination, then the local ordinances are preempted by Act 137, which states that the local ordinances cannot be enforced. Local ordinances that are ostensibly based on the anti-bullying statute cannot vary from it. But, as noted above, the anti-bullying statute only applies to a public-school student and only in the public-school context. Therefore, when the local ordinances take the

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[7] Ark. Code Ann. § 5-71-209 (Repl. 2013).

[8] Ark. Code Ann. § 5-13-301 (Repl. 2013).

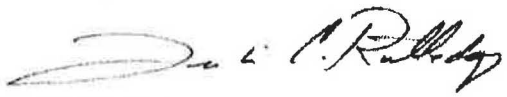
[9] *Black's Law Dictionary* 236 (Bryan A. Garner, ed., 10th ed. West 2014).

[10] *Id.* at 566.

words "sexual orientation" and "gender identity" entirely out of section 6-18-514's context, and try to apply them to an area the General Assembly has not, the ordinances are varying from state law and, thus, unenforceable to that extent.

Therefore, because no state law currently prohibits discrimination based upon someone's sexual orientation or gender identity, I can say that Act 137 renders the local ordinances you ask about unenforceable in this respect.

Sincerely,



Leslie Rutledge
Attorney General

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