



COMMONWEALTH OF KENTUCKY  
OPINION OF THE ATTORNEY GENERAL

CHRIS GORMAN  
ATTORNEY GENERAL

OAG 95-36

STATE CAPITOL  
FRANKFORT 40601

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Subject: School Curfew Legislation

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Syllabus: A municipal ordinance may not be in conflict with state laws of general character or the state constitution. This opinion analyzes a proposed ordinance in a detailed manner to determine whether or not a conflict exists.

OAGs Cited: OAG 93-45; OAG 83-251; OAG 80-502; OAG 80-467; OAG 77-514; OAG 80-389; OAG 60-1027; OAG 43,204; and OAG 40,583.

Statutes Construed: KRS 67A.070; KRS 159.080; KRS 159.130; KRS 159.140

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The following questions, in substance, have been presented:

1. Does KRS 159.080 to 159.140 preempt anyone other than the director of pupil personnel from enforcing school curfew violations?
2. Can the Lexington-Fayette Urban County Government enforce, by ordinance or policy, compulsory attendance violations similar to those enacted in Charleston, South Carolina, in conformance with state law?

1

The Doctrine of Preemption

It is a basic tenet of municipal law that a municipality is an instrument of the state, possessing only those powers expressly or impliedly granted by the legislature. A municipality is prohibited from exercising authority in excess of the grant, or differently from that permitted. Boyle v. Campbell, Ky., 450 S.W.2d 265, 268 (1970). Furthermore,

[m]unicipal ordinances are inferior in status and subordinate to the laws of the state. An ordinance in conflict with a state law of general character and statewide application is universally held to be invalid.

Id., quoting 37 Am.Jur., Municipal Corporations, Section 165, p. 787. Therefore, the ordinance-making power of an urban-county government is determined by the statutory grant of authority. As an instrumentality of the state, it has only such powers as have been expressly granted by the legislature, or are necessarily implied.

The ordinance-making powers given to a municipality have been codified by the legislature and are found in KRS 67A.070, which states:

(1) Urban-county governments may enact and enforce within their territorial limits such tax, licensing, police, sanitary and other ordinances not in conflict with the constitution and general statutes of this state now or hereafter enacted, as they shall deem requisite for the health, education, safety, welfare and convenience of the inhabitants of the county and for the effective administration of the urban-county government.

(2) Urban-county government ordinances shall be deemed to conflict with general statutes of this state only:

- (a) When the ordinance authorizes that which is expressly prohibited by a general statute; or
- (b) When there is a comprehensive scheme of legislation on the same subject embodied in a general statute.

Therefore, the Lexington-Fayette Urban County government can enact a municipal ordinance as long as it is not in conflict with the constitution and general statutes of this state. A conflict occurs when an ordinance authorizes that which is expressly prohibited by a general statute, or there is a comprehensive scheme of legislation on the same subject embodied in a general statute. See, KRS 67A.070(1) and (2), OAG 93-45; OAG 83-251; OAG 80-502; and OAG 80-467. When a municipality enacts an ordinance that is in conflict with the constitution or general laws of this state, the ordinance is preempted and deemed invalid.

II.

Comprehensive Scheme of Legislation

If a "comprehensive scheme of legislation" is embodied in a state statute on a given subject, an urban county government lacks the authority to enact an ordinance on the matter. In OAG 93-45 we thoroughly examined what constitutes a "comprehensive scheme of legislation."

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It is not defined as 'all-inclusive.'

In State v. Wornach, Mo., 196 S.W.2d 809, 812 (1946) the Court, in discussing the definition of the term 'comprehensive scheme' indicated:

Relators construe the term 'comprehensive' . . . as being synonymous with and meaning 'all inclusive,' but this is erroneous. The express grant of power to municipalities (subject to the limitation of consistency with the state act) is itself a negation of all inclusiveness; but the act is comprehensive in the sense of 'including much; comprising many things; having a wide scope; inclusive.' Webster's New Int. Dict., 2d Ed.

Given the definition of 'comprehensive,' broad, detailed, patterned legislation regarding a given subject, which addresses all or most of the key matters of significance regarding a given subject, must reasonably be viewed as a 'comprehensive scheme of legislation' concerning that subject. KRS 67A.070(2)(b). The fact that legislation does not address some aspect of a subject will not render a legislative scheme other than comprehensive.

OAG 93-45, p. 5.

### III.

#### Analysis

##### A. The Lexington-Fayette Urban County Government's Proposal

In an effort to alleviate daytime juvenile crime, the Lexington-Fayette Urban County Government proposes to enact a school curfew ordinance. The ordinance would allow the police to stop youths who are off school property during school hours, and return to their schools those who do not have a legitimate excuse for their absence. This legislation is based upon a similar statute in Iowa and a special order of the police implemented in Charleston, South Carolina.

The urban county government acknowledges that the director of pupil personnel is a statutory position. Their goal is to supplement his authority with police manpower to increase the speed at which truants are removed from the streets and returned to the schools. They want to know if the statutory provisions of KRS 159.080 to 159.140 preempt anyone other than the director of pupil personnel from enforcing curfew violations.

##### B. Statutory Provisions

A director of pupil personnel and the number of assistants deemed necessary shall be appointed by the superintendent of each local school district. KRS 159.080. The powers of the director of pupil personnel are explicitly set forth in KRS 159.130 which states:

The director of pupil personnel and his assistants shall be vested with the powers of peace officers, provided, however, that they

shall not have the authority to serve warrants. They may investigate in their district any case of nonattendance at school of any child of compulsory school age or suspected of being of that age. They may take such action in accordance with law as the superintendent directs. They may under the direction of the superintendent of schools and the board of education or the State Board for Elementary and Secondary Education, institute proceedings against any person violating any provisions of the laws relating to compulsory attendance and the employment of children. They may enter all places where children are employed and do whatever is necessary to enforce the laws relating to compulsory attendance and employment of children of compulsory school age. No person shall refuse to permit or in any way interfere with the entrance therein of a director of pupil personnel or in any way interfere with any investigation therein.

Finally, the legislature delineated the duties of the director of pupil personnel in KRS 159.140, which reads in pertinent part:

The director of pupil personnel shall:

- (1) Devote his entire time to the duties of his office;
- (2) Enforce the compulsory attendance and census laws in the attendance district he serves;
- \* \* \*
- (4) Ascertain the causes of irregular attendance and truancy, and seek the elimination of these causes; and
- (5) Secure the enrollment in school of all children who should be enrolled and keep all enrolled children in reasonably regular attendance . . . .

Together, these sections mandate the appointment of a director of pupil personnel who is to devote his entire time to enforcing compulsory attendance laws, and ascertaining and eliminating the causes of irregular attendance and truancy. To perform these mandated duties, he has been given the ability to investigate such cases and institute proceedings against any person violating the compulsory attendance laws. OAG 77-514. (See also, OAG 80-389; OAG 60-1027; OAG-43,204; and OAG-40,583—addressing the amount of time a director of pupil personnel must devote to his position.)

### C. KRS 159.080 to 159.140 Establishes a Comprehensive Scheme of Legislation

The legislature's enactment of KRS 159.080 to 159.140 establishes a comprehensive scheme of legislation which addresses all or most of the key matters of significance concerning the director of pupil personnel and his duty to enforce the compulsory attendance laws. It is broad and detailed in scope, and inclusive in nature. Specifically, it provides for his appointment, sets minimum qualifications and creates allotments for expenditures. The director of pupil

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personnel is vested with the power of a peace officer and is further empowered to investigate cases on nonattendance and institute proceedings against violators of the compulsory attendance laws.

Admittedly, KRS 159.140 does not specifically state that the director of pupil personnel and his assistants shall return truant children to school. Instead, such action would be inferred from the broad language of subsection (2) which states that the director of pupil personnel shall "[e]nforce the compulsory attendance laws in the attendance district he serves." Therefore, returning truant children to their schools could be viewed as an inherent part of his duties.

As previously stated, the fact that the legislation does not address every conceivable facet of a subject does not render it less than comprehensive. Thus, the legislature has established a comprehensive scheme through the enactment of KRS 159.030 to 159.140. The next step, therefore, is to determine whether or not the proposed legislation is in conflict with the current statutes.

#### **D. Current Legislation Does Not Preempt the Lexington-Fayette Urban County Government from Enacting Its Proposed Ordinance**

The courts when addressing the doctrine of preemption have set a number of standards. For example, the court in Boyle adopted a test for preemption, similar to the guidelines set out in In Re Hubbard, Ca., 396 P.2d 809, 815 (1964). If,

(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality,

then the proposed legislation will be preempted.

In essence, it involves a plain reading of the statute to glean the legislative intent. Thus, if the legislature indicates that it has exclusive jurisdiction, or forbids local legislation, or if it appears to have an adverse effect on the transient citizens of the state which is greater than the benefit to the municipality, then the local legislation must be preempted.

A few years later, the court in Maryland and D.C. Rifle and Pistol Association, Inc. v. Washington, 442 F.2d 123, 130 (D.C. Cir. 1971) expanded the analysis of the doctrine of preemption as follows:

The important consideration, . . . , is not whether the legislature and municipality have both entered the same field, but whether in doing so they have clashed. Statutory and local regulation may coexist in identical areas although the latter, not inconsistently with the former, exacts additional requirements, or imposes additional

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penalties. The test of concurrent authority . . . is the absence of conflict with the legislative will.

The Kentucky Supreme Court followed this analysis in Commonwealth v. Do, Inc., Ky., 674 S.W.2d 519 (1984). There the court held that the mere presence of the state in a particular area of law does not automatically prohibit a local government from enacting an ordinance. Indeed, the court stated,

[i]t must be understood that there are many individual situations where local police power may operate on the same subject matter to supplement the general law by providing additional reasonable requirements.

Id. at 521, 522.

Addressing the doctrine of preemption, the court noted the confusion with the doctrine that there should be no conflict between state and local laws. It stated,

[t]he true test of concurrent authority is the absence of conflict. . . . The mere fact that the state has made certain regulations does not prohibit local government from establishing additional requirements as long as there is no conflict between them.

Id. at 522.

Therefore, the mere fact that the legislature has enacted KRS 159.080 to 159.140 does not automatically preempt the Lexington-Fayette Urban County Government from enacting local legislation. Analyzing the proposed legislation pursuant to the above-mentioned tests, it is apparent that the proposed ordinance is not in conflict with the legislative scheme and thus is not preempted.

#### **E. The Lexington-Fayette Urban County Government's Proposed Ordinance Is In Conflict With The Juvenile Laws Of The This State.**

The proposed ordinance would allow the police to stop youths who are off school property during school hours, and return to their schools those who do not have a legitimate excuse for their absence. When a police officer places a child in his cruiser and transports the child to his school, that child is in custody. Custody has been defined as, "[T]he care and control of a thing or person. . . . Also the detainer of a man's person by virtue of lawful process or authority." Black's Law Dictionary, 6th Ed. (1990). The term can mean either actual imprisonment or merely physical detention. Thus, if the child believes he cannot leave, he is in custody.

Said activity by the police would be in direct contravention with the state juvenile code. Specifically, KRS 630.030 which defines the circumstances under which a status offender may be taken into custody, says:

Under the provisions of this chapter a child may be taken into custody by any peace officer:

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(1) Pursuant to an order of the court for failure to appear before the court for a previous status offense; or

(2) If there are reasonable grounds to believe that the child has been an habitual runaway from his parent or person exercising custodial control or supervision of the child.

Id.

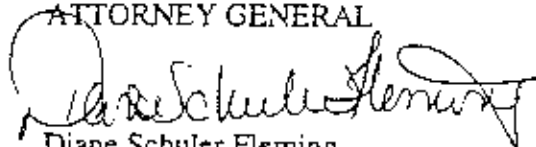
In conclusion, a police officer may not put a suspected truant in custody, even for the purpose of returning the child to school. The legislature has made only two provisions for taking a status offender into custody. Thus, placing a truant in a police cruiser to transport him back to school would be beyond the scope of KRS 630.030. Therefore, the proposed Lexington-Fayette Urban County Ordinance is in conflict with the general laws of this state and as such would be deemed invalid.

#### IV.

#### Conclusion

When the legislature enacted KRS 159.080 to 159.140, it developed a comprehensive scheme by creating a director of pupil personnel whose duty is to enforce the compulsory school attendance laws. While the proposed ordinance is not in conflict with the legislation, it is in conflict with the specific provisions of the juvenile code. Specifically, status offenders may only be taken into custody pursuant to a court order, or a finding that they are habitual runaways. The current proposal which would entail placing a suspected truant into police custody for the purpose of being transported back to school is in direct contravention to the Juvenile Code, and as such is preempted by the Code.

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#### SYNOPSIS

A proposed municipal ordinance would allow police to stop youths who are off school property during school hours, and return to their schools those who do not have a legitimate excuse for their absence. When a police officer places a child in his cruiser and transports the child to his school, that child is in custody.

Said activity by the police would be in direct contravention with the state juvenile code. See KRS 630.030.