IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

Independent School District No. 5
of Tulsa County, Oklahoma,
a/k/a Jenks Public Schools, et al.,

Plaintiffs,

v.

Russell Spry, et al.,

Defendants.

Case No. CV 2011-00890

Judge Dana Lynn Kuehn

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The motion for summary judgment filed by the Plaintiff School Districts against the Defendant Parents is both procedurally and substantively flawed and should be denied. The School Districts assert that, as a matter of law, the Henry Scholarship Act—a state scholarship program allowing disabled children to attend private schools—violates the Oklahoma Constitution. Procedurally, the School Districts have no standing to sue, and even if they did, their claims against the Parents are non-justiciable and moot. Plaintiffs should know better, since the Oklahoma Supreme Court told them just four years ago that they cannot bring this kind of claim.

The claims are also unfounded on the merits. Nothing in the Oklahoma Constitution prohibits the scholarship program. The School Districts simply disapprove of the program and want to have it overturned by judicial fiat. The Oklahoma Courts, however, have consistently upheld the Legislature's prerogative to make policy determinations, and the School Districts have failed to identify any reason why the Court should not do the same here.

RESPONSE TO STATEMENT OF UNDISPUTED FACTS

For purposes of this motion, the Parents do not object to the School Districts' asserted "Undisputed Facts" numbered 1 through 13. The Parents do object to the asserted "Undisputed Fact" number 14 on the ground that it is supported only by hearsay statements from the *Tulsa World* newspaper, which is not "acceptable evidentiary material." Okla. Dist. Ct. R. 13(b), (c); Okl. St. §§ 2801, 2802 (hearsay inadmissible).

SUMMARY JUDGMENT STANDARD

A motion for summary judgment may be sustained only when "the pleadings, affidavits, depositions, admissions, or other evidentiary materials establish that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." *K &*

K Food Servs., Inc. v. *S & H, Inc.*, 2000 OK 31, ¶ 16, 3 P.3d 705, 711. All inferences from any evidentiary materials submitted must be made "in the light most favorable to the party opposing the motion." *Id.*

Plaintiffs have the burden of proving jurisdiction, including standing, justiciability, and lack of mootness. *Oklahoma Educ. Ass'n* v. *State*, 2007 OK 30, ¶ 7, 158 P.3d 1058, 1062, 1066.

ARGUMENT

The School Districts lack standing to challenge the constitutionality of the statutory scholarship program for disabled children. But even with standing, their claims would be non-justiciable political questions. The claims would also be moot because there is no relief that can be granted vis-à-vis the Parents. And in addition to these procedural bars, the School Districts are wrong on the merits. The Henry Scholarship Act easily fits within the confines set by the Oklahoma Constitution.

I. The School Districts' claims are procedurally barred.

The Court cannot properly exercise subject matter jurisdiction over this matter for three independent reasons. The School Districts lack standing, their claims present a non-justiciable political question, and their claims are moot. The motion for summary judgment fails to surmount any of these obstacles.

A. The School Districts lack standing.

A party invoking the court's jurisdiction must first establish that it has standing to seek relief. *Oklahoma Educ. Ass'n*, 2007 OK at ¶ 7, 158 P.3d at 1062. An opposing party may challenge the plaintiff's standing at any time. *Hendrick* v. *Walters*, 1993 OK 162, ¶ 4, 865 P.2d 1232, 1236. Here, the School Districts have failed their burden to establish standing, because they have not identified any injury suffered to an interest protected by law.

The School Districts essentially claim that they are injured by the scholarship program, because it diverts funds from public to private schools, thereby depriving public school students of a free public education. In *Oklahoma Education Association* v. *State* ("*OEA*"), the Oklahoma Supreme Court has already expressly held that Oklahoma School Districts—specifically including Plaintiff Jenks Public Schools—lack standing to challenge school funding decisions by the Legislature on such grounds. *OEA*, 2007 OK at ¶ 7, 158 P.3d at 1062. There has been no intervening change in the law since *OEA* that would cause this Court to diverge from the Oklahoma Supreme Court's ruling in that case.

In *OEA*, the school districts sought a declaratory judgment that the legislative funding mechanism for public education violated the Oklahoma Constitution, because it failed to adequately fund a free system of public education as required by Article XIII, § 1 and Article I, § 5, and because it violated the equal protection provisions of Article II, § 7. Addressing standing, the Court applied a three-pronged test requiring the plaintiffs to show "(1) a concrete, particularized, actual or imminent injury in fact, (2) a causal connection between the injury and the alleged misconduct, and (3) a protected interest within a statutorily or constitutionally protected zone." *OEA*, 2007 OK at ¶ 7, 158 P.3d at 1062-3.

In an effort to satisfy these requirements, the *OEA* school districts claimed two kinds of injury. First, they alleged that "students enrolled in Oklahoma school districts are denied their fundamental right to a basic, adequate education as required by the Oklahoma Constitution." *Id.* at ¶ 14, 158 P.3d at 1064. The Court dismissed this claim of injury as insufficient for standing, because the school districts failed to allege that any of their own students were "failing to receive a basic, adequate education." *Id.* In addition, the Court noted that Jenks and the other school dis-

tricts had cited no authority "to show that they have standing to assert the violation of the constitutional rights of students generally across this state." *Id.*

The school districts next claimed injury because the legislative funding mechanism deprived them of sufficient funds to meet statutory and constitutional requirements to provide a uniform, adequate education, for which they alleged they could be sanctioned or penalized. *Id.* at ¶¶ 16-17, 158 P.3d at 1064. Reviewing Article XIII, § 1 and Article I, § 5 of the Oklahoma Constitution—i.e., two of the same constitutional provisions raised by the School Districts here—the Supreme Court held that there could be no such injury to the school districts: "We do not find that either of these two constitutional provisions places any duty on local school districts, school boards, or school employees to maintain or establish public schools, and the plaintiffs have failed to point to any." *OEA*, 2000 OK at ¶ 17, 158 P.3d at 1065. The Court concluded that the school districts thus lacked standing, because they had failed "to allege any facts that would support a finding that [they] have an interest which is within a constitutionally protected zone." *Id.*

The School Districts here fail the same standing test for the same reasons. They have wholly failed to identify any "concrete, particularized, actual or imminent injury in fact." *Id.* at ¶ 7, 158 P.3d at 1063. They do not allege an injury in the form of sanctions or penalties for failure to meet statutory mandates. They do not allege that the loss of specific funds will render them unable to provide students a uniform, adequate education. They do not claim that their own students have been harmed or that they represent the rights of students generally across the state. They have not identified any constitutional provision that requires ***them*** to maintain or establish public schools. Thus, even more so than in *OEA*, the School Districts here lack any semblance of standing. The only suggestion of injury is the broad generalization that the School Districts must be receiving less funding than they would without the scholarship statute. (*See, e.g.*, Pet. ¶¶ 18, 31). Yet the

School Districts have identified no statutory or constitutional right to the amount of funding they want to receive. Thus, for the same reasons set forth in *OEA*, the School Districts here lack standing to pursue their claims. *OEA*, 2007 OK at ¶ 14, 158 P.3d at 1064.

In an apparent attempt to avoid *OEA*, the School Districts simply ignore it—never addressing it in their brief in support of summary judgment. Instead, in support of standing, they rely erroneously on an older case, *Indepedent School District No. 9 of Tulsa County* v. *Glass,* 1982 OK 2, 639 P.2d 1233. In *Glass*, the plaintiff school district sought to enjoin a refund of a tax overpayment to a single taxpayer on the ground that the refund violated a procedural statute and would result in a "direct and pecuniary" loss to the school district. Before denying the injunction, the Court declared—with no specific analysis—that the school district had standing. *Id.* at ¶ 11, 639 P.2d 1233, 1237-38.

Besides being less on point than *OEA*, *Glass* is not applicable to the facts in this case. *Glass* addressed an injunction preventing a county tax board from granting a personal property tax refund to a specific taxpayer, in a specific dollar amount, for a specific year, and in a manner that the plaintiff claimed violated a specific state statute resulting in a "direct and pecuniary" loss to the plaintiff. *Id.* Here, by contrast, the School Districts are not seeking to enjoin an allegedly unconstitutional ***application of law on one occasion*** based on a claim that they would suffer a direct, specific, and identified loss. Rather, they ask the Court to ***facially invalidate*** a statute of broad application because it *might* cause the transfer of public funds in unknown amounts to private entities, causing unstated injury to unknown school districts at some unspecified point in time.

The Court's detailed evaluation of standing in *OEA*, made twenty-five years after *Glass* and on facts directly analogous to those at issue here, is controlling. *OEA* devoted significant evalua-

tion and reasoning to the standing issue; *Glass* treated it summarily. In fact, after the *OEA* Court cited *Glass* to establish the standing test, *OEA*, 2007 OK at ¶ 7, 158 P.3d at 1063, it applied the test to determine that the plaintiff school districts, which included Plaintiff Jenks, failed to establish standing under facts nearly mirroring those at issue here. *Id.* at ¶¶ 14, 17, 158 P.3d at 1064-65. The School Districts' failure even to mention *OEA* is at best willful blindness.

B. The School Districts' claims present a non-justiciable political question.

The School Districts' claims also fail because they would force this Court to resolve a question of state policy that properly resides with the Legislature. In *OEA*, the Supreme Court held that the school districts' attack on school funding amounted to just such a non-justiciable political question. *Id.* at ¶ 18, 158 P.3d at 1065. The Court held that "[e]xcept for the reservation of the power of initiative and referendum, the state's policy-making power is vested exclusively in the Legislature. The Legislature's policy-making power specifically includes both public education and fiscal policy." *Id.* at ¶ 20, 158 P.3d at 1065. The Court thus concluded:

> The legislature has the exclusive authority to declare the fiscal policy of Oklahoma limited only by constitutional prohibitions. The plaintiffs have failed to provide us with any applicable limitations. The plaintiffs are attempting to circumvent the legislative process by having this Court interfere with and control the Legislature's domain of making fiscal-policy decisions and of setting educational policy by imposing mandates on the Legislature and by continuing to monitor and oversee the Legislature. To do as the plaintiffs ask would require this Court to invade the Legislature's power to determine policy. ***This we are constitutionally prohibited from doing.***

Id. at ¶ 25, 158 P.3d at 1066 (emphasis added).

The School District's attack on the Henry Scholarship Act via this litigation is similarly nothing more than an attempt to turn back the Legislature's policy preferences in favor of the School Districts'. As the Supreme Court made clear in *OEA*, such attempts must be rejected.

C. The School Districts' claims are moot.

The School Districts' only claim against the Parents—a claim for injunctive relief—is moot because it asks the Court to stop the Parents from doing something the Parents can no longer do. Specifically, the School Districts seek to enjoin the Parents from "pursuing administrative claims against the Plaintiff School Districts before the State Department of Education ('SDE') based on [the Parents'] allegations that [the School Districts] failed to comply with HB 3393 during the 2010-2011 school year." (Petition at 1-2). But the Parents seek no further relief against the School Districts. And because the Parents are no longer pursuing—and, indeed, cannot pursue—administrative claims with the SDE to force compliance by the School Districts, there is nothing left for the Court to enjoin.

The doctrine of mootness is rooted in the conviction that courts should not "decide abstract or hypothetical questions disconnected from the granting of actual relief or make determinations where no practical relief may be granted." *Saxon* v. *Macy*, 1990 OK 60, ¶ 5, 795 P.2d 101, 102 (citation omitted). The *Saxon* court dismissed as moot the plaintiff's motion to enjoin the production of documents, because the defendant no longer had possession. An act already performed cannot be enjoined. *Id.*; *see also State ex rel. Schulte* v. *Hallco Envtl., Inc.*, 1994 OK 138, 886 P.2d 994 (claim to enjoin moratorium dismissed as moot after moratorium lifted); *Town of Centrahoma* v. *Carter Oil Co.*, 1955 OK 120, 283 P.2d 199 (petition to enjoin defendant from filing application with a state agency dismissed as moot where application completed before court ruled on injunction).

The deadline for Parents to file refund applications with the SDE was October 1, 2011. No parent that was entitled to file such an application—including the Defendant Parents—can do so now. The Parents either filed their applications before the deadline expired or they did not. In either event, the Parents' right to file no longer exists. A thing that does not exist cannot be en-

joined. In short, the Parents can take no action that could possibly be prohibited by an injunction. The School Districts' sole claim against the Parents is thus moot and must be dismissed. In their zeal to strike down the scholarship fund, the School Districts have sued the wrong parties. If anyone, they should be suing the State in Oklahoma County District Court, not the parents of disabled children in Tulsa.

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For all the foregoing reasons, the School Districts' claims are procedurally barred. The School Districts lack standing and their claims are both non-justiciable and moot.

II. The School Districts' motion should also be denied on the merits.

The School Districts seek to have this Court summarily declare the Henry Scholarship Act unconstitutional. The Court lacks subject matter jurisdiction to do so, because the School Districts' claims are procedurally barred. But even if the Court reaches the claims' merits, it should deny the School Districts' motion, because the Henry Scholarship Act is constitutional both on its face and as applied.

The School Districts allege that the Act violates four provisions of the Oklahoma constitution: (1) the prohibition against funding sectarian institutions; (2) the requirement to maintain free public schools; (3) the prohibition against gifting public funds; and (4) the equal protection component of Oklahoma's due process clause. As a general rule, Courts must construe statutes, if at all possible, to comply with constitutional provisions. "It is the duty of the Courts to uphold legislative acts unless it plainly and clearly violates the Constitution, and, if its language is susceptible to a meaning that will remove the objections to its validity, such interpretation should be adopted." *Way* v. *Grand Lake Ass'n, Inc.*, 1981 OK 70, ¶ 39, 635 P.2d 1010, 1017. Indeed, "a statute is ***presumed*** constitutional, and will be upheld unless it is clearly and plainly inconsistent

with the Constitution." *Fraternal Order of Police Lodge No. 165* v. *City of Choctaw*, 1996 OK 78, ¶ 14, 933 P.2d 261, 266 (emphasis added). Applying this principle of constitutional avoidance here creates no difficulties, as the Henry Scholarship Act fully complies with all of the constitutional provisions alleged to be violated.

A. Funding scholarships for disabled children does not violate the Oklahoma Constitution's restriction on using funds for "sectarian" purposes.

By its plain terms, the Oklahoma Constitution's Blaine Amendment, Art. II § 5, which restricts public funding of sectarian institutions, does not prohibit the Henry Scholarship Act. But even if it arguably did, the Blaine Amendment should be construed as broadly as possible to avoid such a result. Otherwise, the Blaine Amendment itself may be deemed unconstitutional.

1. The Act is consistent with the plain terms of the Blaine Amendment.

By its own clear terms, the Oklahoma Constitution's Blaine Amendment only prohibits transfers "for the use, benefit or support of any sect . . . or sectarian institution ***as such***." Okla. Const. Art. II, § 5 (emphasis added). In fact, the Oklahoma courts have long recognized that many transfers of public funds to private religious entities are fully permissible. In *Murrow Indian Orphans Home* v. *Childers*, for example, the Court found that the payment of public funds to a private, religious home for orphaned children did not violate the Blaine Amendment, because the payment was for a public purpose and for adequate consideration. 1946 OK 187, ¶ 9, 171 P.2d 600, 603. After noting that the State has the duty to care for needy children, the Court ruled that the way in which the State meets this duty is generally left to the Legislature, which has "***discretion in this matter***, and may care for needy children through any scheme that seems appropriate to them, omitting, of course, to offend other constitutional provisions." *Id.* ¶ 6, 171 P.2d at 602 (emphasis added).

Adequate consideration is the core of this analysis. When there is adequate consideration, the use of public funds is constitutionally sound. *See State for Use and Benefit of Town of Pryor* v. *Williamson*, 1959 OK 207, 347 P.2d 204 (upholding use of public trust funds to build a chapel on the property of a State-owned children's home); *Sharp* v. *City of Guthrie*, 1915 OK 768, ¶ 30, 152 P. 403, 408 ("The city having the right to sell the property, and the consideration being adequate, it would make no difference whether the grantee be a sectarian institution or not.").

Through the Henry Scholarship Act, the State is fulfilling its public purpose of providing education to children with disabilities. The State receives consideration in the form of parental assumption of the overall financial responsibility for educating the child, the educational services of the school, and the school's compliance with statutory requirements it could otherwise ignore. All of this consideration benefits the public at large, and meets the State's constitutional obligation to educate students. The School Districts' notion that the State receives no consideration because the State no longer has an obligation to educate a scholarship recipient once the student enters private school is exactly backwards. The State had the obligation to educate the student to begin with; it is only in return for payment to the private school that the State is relieved of that obligation. The result is simple consideration. That the service may at times be contracted out to a religiously-influenced educational institution is irrelevant.

The School Districts inaccurately cite two Oklahoma cases to support their claim that ***any*** transfer of public funds to private religious schools automatically violates the Blaine Amendment. In *Gurney* v. *Ferguson*, the Court held that a statute requiring public school boards to provide transportation for certain parochial school children violated the provision because it aided parochial schools. 1941 OK 397, ¶ 9, 122 P.2d 1002, 1003-4. Similarly, in *Board of Education for Independent School District No. 52* v. *Antone*, the Court granted an injunction sought by a

taxpayer to prohibit a public school system from providing transportation to parochial school children on the ground that the transaction resulted in aid to the parochial school. 1963 OK 165, ¶ 12, 384 P.2d 911, 914. Both *Gurney* and *Antone* are inapplicable here, because both cases involved transfers of public funds to religious schools *without consideration* and *with no public purpose*. The facts of those cases merely failed to pass the public purpose/consideration test set forth in *Murrow Indian Orphans Home*. 1946 OK 187, ¶ 9, 171 P.2d 600, 603.

The School Districts' remaining Oklahoma authority in support of their position—a group of three advisory Attorney General Opinions at 1970 OK AG 128, 1979 OK AG 132, and 1980 OK AG 196—barely warrants mention. Those opinions give broad and uneven treatment to Oklahoma case law. But more importantly, the School Districts fail to disclose to the Court that a more recent 2008 Attorney General Opinion clearly confirms the applicable public purpose/consideration test. *See* Okl. A.G. Opin. No. 08-10. In that opinion, the Attorney General concluded that a statute funding faith-based organizations to provide training and programs for inmate reintegration did not facially violate the Blaine Amendment because the grants "furthered a public purpose" and because it could not be concluded from the face of the statute that "the State would receive inadequate consideration in exchange for the grants." *Id.* at 9. The Court should reach the same conclusion here.

The School Districts instead urge the Court to declare the Henry Scholarship Act unconstitutional both facially and as applied. Either declaration would be wrong. The Court cannot say ***from the face*** of the Act that it serves no public purpose or that any consideration the State might receive would be inadequate. And, ***as applied***, the School Districts have not and cannot provide any admissible evidence of undisputed, material facts to support a finding that the Act has failed either the public purpose or consideration test.

2. Construing the scholarship statute to violate the Blaine Amendment would create unnecessary conflict with the United States Constitution.

Constitutional challenges require courts to follow the "well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby* v. *Schultz*, 487 U.S. 474, 483 (1988). The School Districts' strained application of the Blaine Amendment to the Henry Scholarship Act would put the Oklahoma Constitution into conflict with the United States Constitution for at least two reasons.

First, construing the Blaine Amendment to prohibit religious institutions from contracting with the State to perform educational services for disabled children would treat religious institutions as particularly suspect, thus running afoul of the federal Free Exercise Clause. *See Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 533 (1993). The Blaine Amendment's references to "sect" and "sectarian institution" would raise particular concern, because federal and state Blaine Amendments "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell v. Helms,* 530 U.S. 793, 828 (2000) (plurality op.); *see also Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) (stating that "the term 'sectarian' imparts a negative connotation").

Second, the School Districts' interpretation of the Oklahoma Constitution would put it into conflict with the federal Equal Protection Clause, because religion is a suspect classification. *See Abdulhaseeb* v. *Calbone,* 600 F.3d 1301, 1322 n.10 (10th Cir. 2010). When a law distinguishes between two classes on the basis of a suspect classification—as the School Districts' "blacklist" interpretation would do—the law is subjected to strict scrutiny under federal Equal Protection. *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 357 (1978); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976).

The Court need not, and indeed should not, enter this constitutional thicket. Because the case is procedurally barred, the Court should not reach the merits. And if the Court does reach the merits, it should construe the Blaine Amendment using the public policy/consideration test to avoid conflicts with the United States Constitution.

B. Funding scholarships for disabled children does not violate the Oklahoma Legislature's duty to maintain a system of free public schools.

Courts show great deference to the Legislature in maintaining a public school system. In *OEA*, the Court held that "[e]xcept for the reservation of the power of initiative and referendum, the state's policy-making power is vested exclusively in the Legislature." *OEA* ¶ 20, 158 P.3d at 1065. This policy-making power "specifically includes both public education and fiscal policy." *Id.* The *OEA* Court's refusal to "circumvent the legislative process" by interfering with the "Legislature's domain of making fiscal-policy decisions and of setting educational policy," *id.* ¶ 25, 158 P.3d at 1066, is both instructive and controlling.

It is absurd to assert that the Oklahoma Legislature is not providing a free system of public education. No credible argument can be made that the Henry Scholarship Act in any way eliminates the public school system. Moreover, the School Districts' argument that Article I, § 5 and Article XIII, § 1 "authorize[] the legislature to fund only 'a system of free public schools'" (Pls.' Mot. Summ. J., p. 3, ¶ 1) is baseless. The Oklahoma Legislature holds general powers, and it "has no limitation as to expenditures, save and except those which are expressly placed on" it by the State Constitution. *Way*, 1981 OK at ¶ 39, 635 P.2d at 1017. Nothing in Article I, § 5 or Article XIII, § 1 states that the Legislature must fund ***only*** a system of free public schools, and the School Districts' bald assertion to the contrary presents no legitimate challenge to the Henry Scholarship Act.

C. Funding scholarships for disabled children in exchange for educational services is not a gift.

While Oklahoma may purchase services from private individuals and entities, it cannot make a gratuitous transfer of public funds:

> Except as provided by this section, the credit of the State shall not be given, pledged, or loaned to any individual, company, corporation, or association, municipality, or political subdivision of the State, nor shall the State become an owner or stockholder in, nor make donation by gift, subscription to stock, by tax, or otherwise, to any company, association or corporation.

Okla. Const. Art. X, § 15.

Section 15 is satisfied with simple consideration. In *Childrens Home & Welfare Ass'n.* v. *Childers*, 1946 OK 180, 171 P.2d 613, a non-religious, non-profit corporation provided for the care of orphan children under contract with the State Board of Public Affairs, pursuant to specific authorizing legislation. The Court found that the arrangement complied with Section 15 because there was adequate consideration for the public funds to be paid. The Court held that ***when consideration is present there is no gift***, and that when the private party takes care of orphan children "it is furnishing the State a valuable consideration sufficient to support the payment" to it of public money. *Id.* ¶ 5, 171 P.2d at 614.

As in private contracts, consideration between a public entity and a private entity "may be measured by benefit to one party or by forbearance, detriment, loss or responsibility assumed by the other party." *Burkhardt* v. *City of Enid*, 1989 OK 45, ¶ 13, 771 P.2d 608, 611. Consideration can also be provided by the requirements and related terms of the authorizing statute itself. In *Way* v. *Grand Lake Ass'n,* the Court found that an appropriation to a private entity complied with Section 15, because it was supported by services and the detailed requirements, qualifications, governmental controls, and safeguards established by statute. *Way* at ¶ 40, 635 P.2d at 1018.

While all funds appropriated by the Legislature must be used for a public purpose, Okla. Const. Art. X, § 14, the Legislature is given great deference in determining the presence and scope of a public purpose:

> The meaning of "public purposes" for which governmental exaction of money may be had is not within a narrow and restricted sense. At any rate the ***courts cannot interfere to arrest legislative action*** where the line of distinction between that allowable and that which is not is faint and shadowy. In such instances ***the decision of the Legislature is accepted as final.***

Helm v. *Childers*, 1938 OK 34, ¶ 5, 75 P.2d 398, 399 (emphases added). A purpose may be public even though it primarily benefits a relatively small group of people. *Bd. of Comm'rs of Marshall Cnty.* v. *Shaw*, 1947 OK 181, ¶ 36, 182 P.2d 507, 515. If any public purpose is present, courts cannot rule the provision "unconstitutional as conferring a gift . . . unless such fact clearly appears." *Id.* at ¶ 44, 182 P.2d at 516.

It is beyond doubt that providing for the education of every Oklahoma child is a public purpose. The work of education redounds to the general good of the State residents. *See, e.g.,* Okla. Const. Art. I, § 5 (provision to be made for the establishment of a school system); Okla. Const. Art. XIII, § 1 (Legislature shall establish and maintain a system of free public schools); Okla. Const. Art. XIII, § 5 (the supervision of instruction shall be vested in the Board of Education).

It is also beyond doubt that providing for the education of students with disabilities is very much in the public interest. The Legislature has expressly authorized the provision of special education and related services for children with disabilities, as required by the federal Individuals with Disabilities Education Act. 70 O.S. §§ 13-101, *et seq*.

In adopting the Henry Scholarship Act, the Legislature has determined that the use of public scholarship funds helps meet the State's public work and obligation of educating students with special needs. Oklahoma may pay for the educational needs of the students by providing services

directly through the public school system, or it may pay for the needs through scholarships to approved private schools. A legislative finding of a public purpose "should be reversed only upon a clear showing that it was manifestly arbitrary, capricious, or unreasonable." *State ex rel. Brown* v. *City of Warr Acres*, 1997 OK 117, ¶ 18, 946 P.2d 1140, 1144. The School Districts make no such showing here.

The State receives consideration for the scholarship dollars from both the students' families and the private schools. The students' parents or guardians give consideration by "assum[ing] ***full financial responsibility*** for the education of the student." 70 O.S. § 13-101.2(F)(2) (emphasis added). The State is relieved of the burden of providing services for the student, and the actual cost to the State is limited to the value of the scholarship as calculated annually under the provisions of the Act. 70 O.S. § 13-101.2(J)(2) and (3). Thus, the actual cost becomes determined, known, and limited.

The State also receives consideration from the private schools in the form of educational services. Absent acceptance of the scholarship funds, the private schools would have no obligation to provide the educational services to the subject students. By accepting the funds, the private schools subject themselves to certain requirements, qualifications, controls, and safeguards from which they would otherwise be free. 70 O.S. § 13-101.2(H).

Because the Henry Scholarship Act serves a public purpose and the State receives adequate consideration for the transfer of public funds, the scholarships do not constitute an unconstitutional gift.

D. Funding scholarships for disabled children does not violate equal protection.

In *Fair School Financial Council* v. *State*, the Oklahoma Supreme Court established that "state funds do not have to be allocated to the districts on an equal per-pupil basis, but may be distributed as the Legislature sees fit." 1987 OK 114, 746 P.2d 1135, 1150. Thus, there is "no

authority to support the . . . contention that the school finance system should be subjected to strict judicial scrutiny." *Id.* Rather, decisions by the Oklahoma Legislature regarding how to fund public education are entitled to great deference and must be upheld if supported by a rational basis. *Barnes* v. *Barnes*, 2005 OK 1, 107 P.3d 560 (legislation must be upheld if the basis for the difference is neither arbitrary nor capricious, and it bears a reasonable relationship to a legitimate governmental aim); *Nelson* v. *Nelson*, 1998 OK 10, ¶12, 954 P.2d 1219, 1224 ("A statute will be upheld unless it is clearly, palpably and plainly inconsistent with fundamental law"); *Okla. Ry. Co. v. St. Joseph's Parochial Sch.*, 1912 OK 697, 127 P. 1087 (discrimination is not to be presumed).

The Court clearly stated the rational-basis standard in *Gladstone* v. *Bartlesville Indep. Sch. Dist. No. 30*:

> Rational-basis scrutiny is a highly deferential standard that proscribes only that which clearly lies beyond the outer limit of a legislature's power. A statutory classification is constitutional under rational-basis scrutiny so long as there is ***any reasonably conceivable state of facts*** that could provide a rational basis for the classification. The rational-basis review in equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. For these reasons, legislative bodies are generally ***presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequity.***

2003 OK 30, ¶ 12; 66 P.3d 442at 448 (emphasis added, internal quotations ommitted).

The Henry Scholarship Act draws a line between students with disabilities who are subject to Individual Educational Programs ("IEP"s), and all other students. But the mere existence of a classification in the Act does not offend equal protection. "Making classifications is at the heart of the legislative function. In the economic sphere, it is *only the invidious discrimination*—the purely arbitrary act that cannot stand in harmony with the federal and state equal rights guarantee—which will doom legislation." *Gladstone*, ¶ 18, 66 P.3d 442 at 451.

The Scholarship Act at issue does not state the reasoning behind the classification. But the rational-basis test does not require the Legislature to "actually articulate the purpose or rationale that supports its classification," and absent such a statement, "[a] court will hypothesize reasons for the law's enactment." *Id.* ¶15, 66 P.3d at 449. A lengthy discussion of all possible reasons for the classification is unnecessary. Several are obvious. Perhaps the Legislature reasoned that the needs associated with the disabilities contemplated by the Act could be better met in schools that are smaller than typical public schools, or that can tailor services to specific needs. Perhaps it found that disabled students are more susceptible or sensitive to bullying and that smaller, private schools could better protect them. It may have determined that the Act would reduce the State's actual cost of educating disabled students or make the cost more predictable, but that no corresponding savings would be realized by funding students without disabilities.

The School Districts argue that the Act violates equal protection provisions, ***as applied***, because it offers scholarships to students on IEPs under the IDEA, but not to students on accommodation plans under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The School Districts, however, fail to meet jurisdictional requirements to raise such a claim because they have not identified any student on an accommodation plan who is an injured party. Nor have the School Districts offered evidence to support an undisputed material fact that any member of the allegedly "injured" class has sought and been denied a scholarship. And even if such a hypothetical claim were in actual controversy, the Act would pass the rational basis-test because there are numerous potential rationales for the classification. The Legislature may have determined that only students who have completed the process required to be placed on an IEP have undergone sufficient evaluation to justify participation in a private program at State expense. It may have reasoned that placement in a private program with public funds is appropriate only af-

ter the collaboration between parents and educators that the IEP process requires. Perhaps the Legislature determined that the cost of funding scholarships for all students with disabilities was beyond the capacity of the State's coffers. Any one of these reasons would suffice.

The School Districts also allege that the Act, ***as applied***, offends equal protection because it hypothetically discriminates between students who were once, but are no longer, on an IEP and students who were never on an IEP. Again, the School Districts lack standing to bring such a claim and fail to provide any evidence that any student in their districts has actually been harmed in this manner. But, again, even if such a speculative claim were properly in controversy, the Act would pass the rational-basis test. In this instance, the Act expressly states a purpose for the classification: to provide "continuity of educational choice." 70 O.S. § 13-101.2(B)(2). In addition, the Legislature may have determined that requiring students to move between private and public schools when IEPs are removed or replaced would create administrative chaos for the schools, or personal chaos for the students.

All of these bases for class distinction are reasonably conceivable. None are invidious. All bear a reasonable relation to the State's purpose of educating children. None are arbitrary or capricious. Their wisdom, fairness, and logic are beyond the scope of judicial review. *Gladstone*, ¶ 12, 66 P.3d at 448. The task of placing people in classes for governmental purposes "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, judgment." *Id.* ¶ 18, 66 P.3d at 451. Moreover, a system of class distinction "may not be struck down simply because other methods may involve lesser disparities. The relative desirability of a system, as compared to alternative

methods, is not constitutionally relevant as long as there is some rational basis for it." *Fair Sch.*, ¶ 48, 746 P.2d at 1147.

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While the School Districts' claims are procedurally barred, they are also unfounded on the merits. The Henry Scholarship Act easily satisfies each of the constitutional limitations identified, and to the extent there is any doubt, the limitations should be broadly construed to avoid conflict with the United States Constitution.

CONCLUSION

For all of the foregoing reasons, the School Districts' motion for summary judgment should be denied.

Dated: Dec. 5, 2011

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on December 5, 2011, I served a true and correct copy of the above instrument, by first-class mail and facsimile, to all known counsel of record, listed below:

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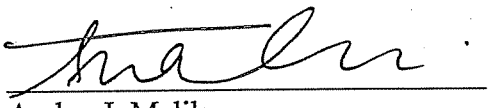

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