

**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' REPLY IN SUPPORT OF THEIR  
MOTION FOR SUMMARY JUDGMENT**

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**I. The School Districts have failed to justify their Complaint’s jurisdictional defects.**

The School Districts have identified no valid defense to the jurisdictional flaws identified in the Parents’ motion for summary judgment. Notably, they do not even address the holding in *Oklahoma Education Association* (“*OEA*”) that school districts lack standing to challenge the constitutionality of school-funding laws. 2007 OK 30, ¶ 14, 158 P.3d 1058, 1064.<sup>1</sup> Similarly, the Parents’ mootness claim is all but ignored. In opposition, the School Districts merely cite their brief opposing the Parents’ earlier motion to dismiss, *see* Opp. at 7, presumably referring to their arguments that *Barzellone v. Presley* and *Cherokee Nation v. Nomura* hold that constitutional challenges to statutes do not have to be brought directly against the state. But both those cases were brought against state actors responsible for enforcing the challenged law. *Barzellone*, 2005 OK 86, ¶¶ 9-10, 126 P.3d 588, 591-92 (official capacity suit against Court Clerk challenging jury fee); *Cherokee Nation*, 2007 OK 40, ¶ 17, 160 P.3d 967, 974 (official capacity suit to stop Administrator of Oklahoma Interstate Compact on the Placement of Children from considering Oklahoma Indian Child Welfare Act). Here, in contrast, the School Districts have sued the Parents, who have no control or influence over administration of the Scholarships Act. Moreover, it is undisputed that the Parents’ deadline for seeking relief directly from the School Districts has passed.

The School Districts’ contention that these jurisdictional flaws should be ignored because the Parents single-spaced a section of their brief is absurd. An alleged technical formatting error cannot confer standing that is otherwise lacking. Moreover, this motion does not turn on facts. The School Districts mount a *facial* challenge, which requires showing that the Act *always* vi-

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<sup>1</sup> The School Districts’ opposition brief cites *OEA* twice, but only to contend that its holding that funding decisions are nonjusticiable does not apply if the specific funding decision at issue violates the Oklahoma Constitution. *See* Opp. at 2, 18-19. But as confirmed throughout this reply, the Act’s scholarship program is constitutionally sound.

olates the Constitution. *Frisby v. Schultz*, 487 U.S. 474, 483 (1988). The only relevant questions are legal: how to construe the Act and Constitution. The School Districts concede that fact statements “are irrelevant to the legal issues presently before this Court.” Opp. at 5.<sup>2</sup>

Also, contrary to the School District’s claims, neither this nor the federal court has yet resolved the jurisdictional flaws in the School Districts’ favor. This Court denied the Parents’ earlier motion to dismiss without explanation, not by ruling—as claimed—that “this case presents an actual, justiciable controversy that this court can and should decide.” See Opp. at 7; see also 11/17/2011 Order. Similarly, Judge Eagan’s suggestion in the federal lawsuit that a separate action by the School Districts would present “a live controversy” plainly contemplated a *proper* action against a state actor with responsibility for the Act, not an *improper* action against the parents of disabled children. See *Kimery v. Broken Arrow Public Schools*, Case No. 11-CV0249-CVE-PJC, Order at 10, n.8 (N.D. Okla. Jul 18, 2011) [Dkt. 52]. In any case, the federal court could not validate claims pending in this Court, and jurisdictional issues can be raised and reconsidered at any time. *Hendrick v. Walters*, 1993 OK 162, ¶ 4, 865 P.2d 1232, 1236.

## **II. The School Districts have failed to establish constitutional harm.**

The School Districts’ substantive claims fare no better than their procedural defenses, as the Scholarships Act does not violate any of the constitutional provisions raised in the Complaint.

### **A. Article X, §§ 14 and 15.**

Sections 14 and 15 of Article X of the Oklahoma Constitution forbid “gift[s]” and require all tax appropriations to have a “public purpose.” The School Districts’ reliance on three cases to argue that the Act violates these provisions does not withstand scrutiny. In all three cases, the

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<sup>2</sup> Accordingly, to the extent that the brief is formally deficient, the Parents respectfully ask the Court to accept their opening brief in the interests of justice and judicial economy or, alternatively, to grant leave to amend and double space the fact section to bring the brief within the twenty-page limit. The fact section is significant only to provide context for the current version of the Act.

Supreme Court struck down direct appropriations, to private entities, not subject to any control by the state. *Vette v. Childers*, 1924 OK 190, 228 P. 145, 149 (“[I]t would be extremely dangerous to permit an appropriation of public funds for the assistance of a group of individuals, who are under neither oath nor bond to the state, in carrying out a private business enterprise.”); *Veterans of Foreign Wars v. Childers*, 1946 OK 211, 171 P.2d 618, 623 (embracing “consensus of opinion . . . that public money may not be appropriated to a private corporation or organization, operating entirely without governmental supervision or control, no matter how wholesome may be the purpose”); *Orthopedic Hosp. of Okla. v. Okla. State Dep’t of Health*, 2005 Okla. Civ. App. 43, 118 P.3d 216, 221 (striking distributions “to private facilities without any government control or contractual requirements . . . [and] with no restrictions on how to use the money”).

Similarly, all three cases distinguish—and tacitly or expressly approve—appropriations to private entities, to perform government functions, subject to contractual or other restrictive conditions. *See Vette*, 1924 OK 190, 228 P. at 148 (indicating funds appropriated “to enable the state to perform a governmental function which it had undertaken in the exercise of its sovereign power” would not be prohibited); *Veterans of Foreign Wars*, 1946 OK 211, 171 P.2d at 623-24 (reserving question whether appropriations to private organization would *always* be appropriate based on only “some control over the private institution,” but approving appropriations to private parties performing government services like building roads or providing orphan care); *Orthopedic Hosp.*, 118 P.3d at 221 (upholding appropriations to private entities “expended for the public good” and “controlled by [a] public agency directly or by a contractual agreement”); *see also Way v. Grand Lake Ass’n, Inc.*, 1981 OK 70, 635 P.2d 1010, 1018 (finding no violation of Article X, §§ 14 and 15, because of “the detailed requirements and qualifications together with the governmental controls and safeguards which are an integral part of the statutory plan”).

The Act here falls within the latter category. No direct appropriations are made to any private entity. Rather, the Act creates a scholarship fund to provide educational services to disabled children. Providing a public education falls squarely within the State's sovereign powers, and indeed, is required by the Constitution. Okla. Const. Art. XIII, § 1. The Scholarships Act simply allows the State to contract out some of that function to private entities, subject to rigorous controls. Only students with an "IEP" can participate in the program, Okla. Stat. tit. 70, § 13-101.2(A); the student must have "regular and direct contact with the private school teachers at the physical location of the private school," § 13-101.2(D); the student's parents must "assume full financial responsibility for the education of the student," § 13-101.2(F); and the private school must comply with a litany of state-imposed requirements regarding its accreditation, fiscal soundness, antidiscrimination policies, health and safety standards, educational accountability, teacher qualifications, and discipline procedures, § 13-101.2(H).<sup>3</sup> These government controls and safeguards, combined with the private school assuming responsibility for the student's education, comprise more than sufficient consideration to avert any violation of Article X.<sup>4</sup>

## **B. Article II, § 5.**

The Parents do not dispute that some private schools attended by disabled students under the Act are "sectarian" under Article II, § 5. But the School Districts fail to rebut the clear holding of *Murrow Indian Orphans Home* that "so long as [contracts with private religious entities] involve the element of substantial return to the State and do not amount to a gift, donation, or appropria-

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<sup>3</sup> It is simply false that "the Act makes clear that it is not imposing any obligations on private schools." See Opp. at 9 (citing Okla. Stat. tit. 70, § 13-101[2](M)). Subsection (M) expressly states that the Act shall not "expand the regulatory authority of the state or any school district to impose any additional regulation of private schools *beyond those reasonably necessary to enforce the requirements expressly set forth in this section.*" § 13-101.1(M) (emphasis added). As demonstrated above, the "requirements expressly set forth" in the Act are extensive.

<sup>4</sup> The School Districts' fear that the state "could lawfully pay every family that home schools . . . \$10,000 per child," Opp. at 8, is overwrought. There is no suggestion that the state could plausibly enact such a program with restrictions sufficient to ensure state control, let alone restrictions as thorough as those found in the Scholarships Act.



tion to the institution having no relevancy to the affairs of the State, there is no constitutional provision offended.” 1946 OK 187, 171 P.2d 600, 603. *Antone*, 1963 OK 165, 384 P.2d 911, and *Gurney*, 1941 OK 397, 122 P.2d 1002, both failed this basic test because the bussing to private schools was provided without consideration. The School Districts now argue that *Murrow* “turned on the duty imposed by the Constitution to provide for needy children.” Opp. at 2. But the Constitution also mandates a system of free public education. Moreover, the same provision that covers “needy children” authorizes “relief and care” of the disabled. Okla. Const. Art. XXV, § 1. Another provision authorizes state support for educational institutions for the benefit of the insane, blind, deaf, and mute,” or others “as the public good may require.” Okla. Const. Art. XXI, § 1. The Act merely outsources—for substantial consideration—a subset of these core government functions to private parties. And discriminating against religious private parties in this process would violate the U.S. Constitution’s Free Exercise and Establishment Clauses. *See Employment Div. v. Smith*, 494 U.S. 872 (1990). Read properly, Article II, § 1, averts this conflict.

The School Districts’ construction, in contrast, would render numerous services the state purchases from private religious institutions constitutionally infirm. The Oklahoma Higher Learning Access Program, known as “Oklahoma’s Promise” funds scholarships to private colleges, including religious colleges. Oklahoma has long funded after- and pre-school programs, schools for the deaf and blind, daycare services, academic scholarships, and countless other programs through funds to private institutions, including religious institutions. The School Districts’ rule would render all such programs unconstitutional, radically altering long-established public policy.

### **C. The remaining Articles.**

The Parents’ opposition to the School Districts’ motion for summary judgment fully explains why the Act does not violate the “free public schools” or “equal protection” clauses.

Dated: Dec. 21, 2011

Respectfully submitted,

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## **CERTIFICATE OF MAILING**

I hereby certify that on December 21, 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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