

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

D.G., by Next Friend G. Gail Stricklin; et al.,)	
)	
Plaintiffs,)	
v.)	Case No. 08-CV-074-GKF-FHM
)	
C. BRAD HENRY, et al.,)	
)	
Defendants.)	
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**OKDHS DEFENDANTS’ RESPONSE TO OKLAHOMA PUBLIC EMPLOYEES
ASSOCIATION MOTION AND BRIEF FOR LEAVE TO APPEAR AS *AMICUS
CURIAE* IN SUPPORT OF PLAINTIFFS’ MOTION FOR CLASS CERTIFICATION
AND PROPOSED BRIEF OF *AMICUS CURIAE* (Dkt. # 237)**

The OKDHS Defendants respectfully submit this as their response to the “Motion and Brief of the of the Oklahoma Public Employees Association For Leave to Appear as *Amicus Curiae* In Support of Plaintiffs’ Motion for Class Certification and Proposed Brief of *Amicus Curiae*.” (Dkt. # 237). Despite its contention that it has a “fundamentally different perspective and interest” from the parties in this case, Brief at p. 1, the Oklahoma Public Employees Association (OPEA) essentially parrots the Plaintiff’s factual and legal position, adding nothing of substance to the Court’s consideration of class certification issues.

1. Standard for granting leave to file an amicus brief.

An amicus brief should normally be allowed when a party is not represented competently, or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide [citations omitted]. Otherwise, leave to file an amicus curiae brief should be denied. *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Chief Judge Posner, in chambers). Amicus briefs filed by allies of the litigants which duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief, are an abuse and should not be

allowed. *Id.* The term “amicus curiae” means friend of the court, not friend of a party. *Id.*

JPMorgan Chase Bank, N.A. v. Fletcher, 2008 WL 73233 at *1 (N.D. Okl. 2008)

2. The OPEA is a friend of the Plaintiffs, not a friend of the Court.

The OPEA duplicates the arguments made by the Plaintiffs, and clearly supports the Plaintiffs entirely, while adding nothing beyond conclusory factual statements or arguments supporting the Plaintiffs’ arguments on commonality. Consequently, the Court should decline to consider the OPEA *amicus* submission.

To the extent the Court considers or credits the conclusory factual assertions of commonality of the named Plaintiffs and the proposed class at this late date, the DHS Defendants will be prejudiced by their inability to conduct discovery to determine the truth of the factual assertions in the proposed brief, or the underlying factual basis for the arguments.

At its most extreme, OPEA claims that the experience of its Child Welfare membership supports the systemic deficiencies alleged by the Plaintiffs “which expose each and every child in OKDHS custody to the full range of harms that have already befallen the representative plaintiffs,” and “are common to all of these children.” Brief at ¶ 10, p. 6. OPEA gives no basis for the implausible assertion that the experience of 300-350 workers supports the conclusion that “each and every child” has been subjected to the same exact unconstitutional treatment allegedly suffered by the named Plaintiffs. The DHS Defendants dispute both the truth of Plaintiffs’ allegations of commonality, and the implausible assertions of the knowledge of OPEA about it.¹

¹ Ironically, because of their “hands on” perspective (Brief at p. 2) and the supposed universality of unconstitutional treatment of foster children, OPEA has essentially confessed that its Child Welfare members are personally involved in unconstitutional treatment of foster children and are, presumably, liable in damages for their involvement in it. The OKDHS Defendants disputes that its child welfare workers routinely provide unconstitutional care, and suspect the OPEA, in its eagerness to support the Plaintiffs, did not think through the implications of its argument.

The DHS Defendants will be seriously prejudiced if the Court credits OPEA's unqualified and unsupportable endorsement of the Plaintiffs' claims on class certification at this late date, without giving the OKDHS Defendants the ability to conduct discovery to counter it.

3. Class certification is not necessary to remedy the alleged constitutional violations.

OPEA suggests that class action litigation has been necessary to correct unconstitutional conditions in a variety of public service programs in Oklahoma. Brief at ¶ 9, at p. 5. Other means of judicial correction of allegedly unconstitutional conditions exist. For instance, the inability of Plaintiffs to have *this particular class* certified does not defeat their ability to have these issues reviewed either individually or even through the class action mechanism. *Shook v. Board of County Commissioners of County of El Paso*, 543 F.3d 597, 610 (10th Cir. 2008). Consequently, district courts should view bald assertions that class certification is necessary to remedy alleged violations with some skepticism. *Vallario v. Vandehey*, --- F.3d ----, 2009 WL 251938 at *10 (10th Cir. 2009).

4. The OPEA brief adds nothing substantive regarding commonality.

OPEA disputes the OKDHS Defendants' arguments that Plaintiffs have failed in their burden of establishing commonality of the named Plaintiffs with the other foster children in the proposed class. Brief at p. 7. OPEA argues that rejection of the "well-plead facts of the complaint" as a basis for certification would effectively foreclose any class action to correct system-wide unconstitutional conditions and practices in the state's social programs. Brief at p. 7. However, the simple fact that Plaintiffs bring such a suit does not establish that they have satisfied the provisions of Rule 23. *Vallario v. Vandehey*, --- F.3d ----, 2009 WL 251938 at *9 (10th Cir. 2009). First, facts as plead by the Plaintiffs do not support class certification. Second, even if, by conclusory allegations the Plaintiffs had artfully plead the necessary "magic words"

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2009, I electronically transmitted OKDHS Defendants' Response to Oklahoma Public Employees Association Motion and Brief for Leave to Appear as *Amicus Curiae* in Support of Plaintiffs' Motion for Class Certification and Proposed Brief of *Amicus Curiae* (Dkt. # 237) to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I hereby certify that on February 17, 2009, I served the same document by U.S. Postal Service, postage thereupon fully prepaid, on the following, who are not registered participants of the ECF system:

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