

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

D.G., by Next Friend G. Gail Stricklin,)
et al., for themselves and all those)
similarly situated,)

Plaintiffs,)

vs.)

No. 08-CV-074-GKF-FHM
Class Action

C. BRAD HENRY, in his official)
Capacity as Governor of the State of)
Oklahoma, et al.,)

Defendants.)

**MOTION AND BRIEF 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**

The Oklahoma Public Employees Association (hereafter “OPEA” or “Amicus”) moves the Court for leave to appear as *amicus curiae* in support of the Plaintiffs’ Motion for Class Action Certification and Appointment of Class Counsel (Dkt. #4). Counsel for *Amicus* has conferred with counsel for the plaintiffs and the defendants regarding the relief sought by this motion. Counsel for the plaintiffs does not oppose this motion. Counsel for defendants, after requesting and being given an opportunity to review this motion before filing, opposes this motion.

OPEA has a fundamentally different perspective and interest from all the parties in this action, and asserts that this brief from OPEA will assist the Court in further understanding the issues pertaining to class certification and in deciding whether class certification should be granted in this action. In particular, OPEA desires to emphasize

and support the existence of commonality and the availability of appropriate relief that can be identified at this stage of the litigation, as it believes that its Child Welfare membership possesses a uniquely “hands-on” perspective with respect to these issues. OPEA believes that the parties have adequately briefed the legal issues pertaining to class certification and does not seek to appear as *amicus* merely to parrot the plaintiff’s legal arguments. Nevertheless, OPEA asserts that it is important for the Court to hear and understand the unique and different perspective of the very individuals who are called upon to be the “foot soldiers” in the war against child abuse and neglect.

It is the position of the OPEA that a denial of class certification would further damage the already significantly impaired ability of its Child Welfare membership to carry out their regulatory, statutory, and constitutional obligations to the children they serve, and in turn would continue to expose Oklahoma’s foster children to egregious and irreparable harm and unreasonable and systemic risks of such harm.

Although the Plaintiffs’ Motion for Class Action Certification is presently scheduled for hearing on February 24, 2009, the participation of OPEA as *amicus curiae* will not delay or unduly complicate consideration and decision of the issues. In view of the scheduled hearing date, and consistent with the guidance provided by F.R.A.P. 29(b), this Motion encompasses the proposed brief of *amicus curiae* in a single document.

OPEA states as follows with regard to its interest, and the reasons why its appearance as *amicus* is desirable and relevant:

1. OPEA is a voluntary membership association of state employees in the State of Oklahoma. Membership is limited to state employees and the current membership exceeds 10,000 persons.

2. The State of Oklahoma was the last state in the country to form an association of state employees in 1975, and OPEA is presently one of only five state associations that do not have the right to collectively bargain or enjoy the other benefits of union status.

3. Of its membership, approximately 2500-3000 members are employees of the Oklahoma Department of Human Services (OKDHS) and of that number approximately 300-350 are employed as Child Welfare workers (the “OPEA Child Welfare membership”). Each of these workers provides services directly to members of the proposed class.

4. OPEA’s Child Welfare membership has for many years worked under the burdens of a crushingly excessive caseload, staff shortages, inadequate pre-service and in-service training and supervision, the inability to adequately supervise and monitor children in foster care placements and a consequent inability to protect foster children from harm, inadequate wages, and the inability of the agency to attract and retain an adequate number of foster homes that will protect children in the custody of OKDHS from further harm. For example, the Standards of the Child Welfare League of America establish a caseworker to foster child caseload ratio in the range of 1:12 to 1:15.¹ CWLA Standards of Excellence for Family Foster Care Services §3.48. OPEA’s Child Welfare membership, however, routinely experiences caseloads that are two to three times greater than this national standard. *See* Complaint at ¶67 (Dkt. #2).

¹ / The Child Welfare League of America (CWLA) is the nation’s oldest and largest organization devoted entirely to the well-being of America’s vulnerable children. It is a coalition of hundreds of private and public agencies serving vulnerable children and their families since 1920. Among the services it provides is a set of nationally recognized standards for child welfare. *See* www.cwla.org/whowhat/more.htm.

5. These deficiencies are systemic, common to all children in OKDHS custody, and are well documented in a variety of reports, studies, and statistics compiled by entities such as the Oklahoma Commission on Children and Youth, the Governor's Task Force on Children in Custody, the Oklahoma Child Death Review Board, the news media, and OKDHS itself. *See* Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Class Certification and Appointment of Class Counsel at 10-12 (Dkt. #137). *See also* Complaint at ¶¶62-72 (Dkt. #2).

6. As a result of these systemic deficiencies and the consequent risks of harm posed to the children in OKDHS custody, OPEA's Child Welfare membership has suffered extraordinary levels of stress, excessive burn-out, high rates of turnover, and exposure to personal liability.

7. As a further result of these systemic deficiencies, OPEA's Child Welfare membership is witness daily to foster children being harmed or exposed to unreasonable risks of harm that include physical and emotional abuse, extended placement in overcrowded shelters, excessive multiple foster care placements, a lack of adequate permanency efforts, inadequate medical and psychological care, and death.

8. OPEA, on behalf of its Child Welfare membership, has for the past decade engaged in substantial and repeated efforts with OKDHS to increase the resources devoted to Child Welfare and foster care services and to reduce worker caseloads. A 1999 Child Welfare workload analysis study supported by OPEA and commissioned by OKDHS reported that it was impossible for the agency to comply with state statutes because of grossly excessive caseloads. The OKDHS final report of the 2007 Oklahoma Child and Family Services Review (CFSR) found that caseloads and worker turnover

remained excessively high and that foster care placements remained insufficient. Last year, OPEA held a highly visible press conference to highlight these challenges facing Child Welfare workers. OPEA representatives meet with OKDHS Director Hendrick quarterly to discuss workplace issues, and the inadequacy of child welfare, foster care, and shelter services are often at the top of the agenda. Despite these efforts, OPEA's Child Welfare membership has seen no appreciable improvement in working conditions, caseloads, training, supervision, and services to foster children. Indeed, according to the 2007 CFSR report, OKDHS was substantially out of compliance with federal outcome benchmarks in every category relating to child safety, permanency planning, and child well-being. See www.okdhs.org/library/rpts/default.htm (links to Oklahoma Children and Family Services Review Executive Summary and Report).

9. The history in the State of Oklahoma over the past four decades demonstrates that class action litigation or its functional equivalent² has been necessary to correct unconstitutional conditions and practices in a variety of public service programs, including children's programs. See, e.g., *Terry D. v. Rader*, No. CIV-78-4-T (W.D. Okla. May 31, 1984) (Oklahoma children's institutions); *U.S.A. v. State of Oklahoma*, No. 06-CV-673-GKF-FHM (N.D. Okla. Sept. 9, 2008) (L. E. Rader juvenile institution); *Homeward Bound, Inc. v. Hissom Memorial Center*, 1987 WL 27104 (N.D. Okla. July 24, 1987) (Mental retardation institution); *Battle v. Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974)[subsequent history omitted] (Oklahoma prison system). These actions were

² / Actions brought by the United States Justice Department on behalf of the United States to correct constitutional violations in institutional settings under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997, *et seq.* or the Violent Crime Control and Law Enforcement Act, 42 U.S.C. §14141, are the functional equivalent of class actions, because the direct beneficiaries of the action are the residents of the institution.

necessitated by the State's unwillingness or inability to correct the alleged constitutional violations. OPEA's Child Welfare membership believes that class action certification is an essential component to remedy the alleged constitutional violations in this action. Indeed, this sentiment is echoed in the remark of a Child Welfare supervisor and OPEA member: "We need this lawsuit and the kids need to win it. If that doesn't happen, nothing will ever change. We know what to do and we've told administration what it needs to do – administration just won't do it."

10. It is the experience of OPEA's Child Welfare membership that the systemic deficiencies under which they must toil, and which unreasonably expose each and every child in OKDHS custody to the full range of harms that have already befallen the representative plaintiffs, are common to all of these children. In this regard, *Amicus* emphasizes that the alleged constitutional violations are complete when children are exposed to unreasonable risks of harm – it is not necessary for each member of the class to suffer an actual harm or the same harms. *Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982). Thus, commonality is established when the members of the proposed class are subject to the risk of harms already experienced by the representative plaintiffs. *See, e.g., Olivia Y. v. Barbour*, No. 04-CV-251-LN slip op. at 7 (S.D. Miss. Mar. 11, 2005) (attached as Exhibit 2 to Plaintiff's Brief in Support of Class Action Certification, Dkt. #4). *See also* cases cited by plaintiffs in Plaintiffs' Reply Brief in Support of Motion for Class Action Certification at 8-9 (Dkt. #137).

11. It is the view of OPEA that the following proposed remedies are exemplary of those that would be practical, achievable, and have an immediate beneficial

impact for both OPEA's Child Welfare membership and the children in the proposed class:

- Reduce foster care caseloads to be in accordance with national standards.
- Establish a comprehensive pre-service and in-service training program for caseworkers and supervisors that meets national standards.
- Conduct a statewide assessment of need and takes steps to ensure the safe placement of children, including the development of a sufficient number of qualified foster homes to meet the assessed need.

12. Based upon the history and activities of its Child Welfare membership, OPEA believes that class action certification in this action is essential to improve working conditions for its membership and concomitantly to correct the allegedly unconstitutional conditions and practices within Oklahoma's foster care system that its membership is witness to on a daily basis. Accordingly, OPEA supports and would welcome class action certification in this action.

ARGUMENT AND AUTHORITIES

Defendants' position is that plaintiffs cannot demonstrate the requisite commonality of fact or law necessary to certify a plaintiff class under Fed. R. Civ. P. 23(a)(2). To accept defendants' argument under the well-pled facts of the complaint in this case would effectively foreclose *any* class action to correct system-wide unconstitutional conditions and practices in a state's social programs. Such a result would run counter to decades of class action jurisprudence.

If class certification is denied, OPEA's Child Welfare membership will remain shackled to their system-wide inability to comply with their legal obligations and the

children they valiantly attempt to serve will remain condemned to suffer and be unreasonably exposed to the litany of horrors outlined in plaintiffs' complaint. On behalf of its Child Welfare membership, OPEA should be heard in this matter to explain how a grant of class certification will promote their interests and the interests of the children in the proposed class.

The Federal Rules of Civil Procedure contain no applicable rule governing the appearance of *amicus curiae* in federal district court proceedings. Nevertheless, there is precedent for the appearance of *amicus* in the trial court. For example, in the case of *Wilson v. Al McCord, Inc*, 611 F. Supp. 621 (W.D. Okla. 1985), *aff'd in part, rev'd in part on other grounds*, 858 F.2d 1469 (10th Cir. 1985), Judge Russell of the Western District of Oklahoma permitted the Oklahoma Department of Securities to appear as *amicus* in a case involving a dispute under Oklahoma securities law based upon the Court's view that *amicus* would assist the Court in interpreting Oklahoma securities law.

Although the views expressed by *Amicus* may be limited to the issues raised by the parties, the interests articulated by *Amicus* here are not redundant of those advanced by the plaintiffs.³ An *amicus* brief "should normally be allowed 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." *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir. 1997), *citing Miller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203 (9th Cir. 1982).

³ / In the absence of jurisdictional questions or matters of federalism and comity that the court may consider sua sponte, Courts are reluctant to address issues raised only by *amicus* except in exceptional circumstances. *Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224, 1230 n.2 (10th Cir. 2000). *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (10th Cir. 1997).

Even though there is no rule governing the appearance of *amicus* in the federal district courts, F.R.A.P. 29 sets out the standards for an *amicus* brief in the Courts of Appeal. F.R.A.P. 29 requires the movant to state its interest in the matter, and to explain why an *amicus* brief is desirable and how the matters asserted are relevant to the disposition of the case.

It is of no small moment that OPEA's Child Welfare membership chose to enter the field of social work to serve disadvantaged children. That choice was made as a commitment to serve society's most vulnerable children – those who must be removed from their own homes because of parental abuse and neglect. In this respect, OPEA's Child Welfare membership does not see its interests limited to their working conditions, but also inexorably intertwined with the interests of the children they have chosen to serve. In a challenge to the child welfare system in the District of Columbia, the Court's description of the case included it being "about beleaguered...employees trying their best to provide these necessities while plagued with excessive caseloads, staff shortages, and budgetary constraints." *LaShawn A. v. Dixon*, 762 F. Supp. 959, 960 (D. D.C. 1991). OPEA's Child Welfare membership clearly has a vital interest in this case.

Here, the interests of the workers charged with delivering services to the children who are the members of the proposed class would be dramatically and positively advanced by a grant of class certification, and consequently the rights and conditions of these most vulnerable children would also be dramatically and favorably advanced. OPEA urges the Court to exercise its discretion to grant class certification so that their interests and the interests of the children they serve will be advanced and protected.

OPEA respectfully requests that this Court grant it leave to appear as *amicus curiae*, accept this *amicus* brief in support of Plaintiff's Motion for Class Action Certification, and grant class action certification in this action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2009, I electronically transmitted the foregoing Motion and Brief to the Clerk of the this Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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