

**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.)

REPLY OF OKLAHOMA PUBLIC EMPLOYEES ASSOCIATION IN SUPPORT OF
MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFF’S MOTION FOR CLASS ACTION CERTIFICATION

On February 11, 2009, the Oklahoma Public Employees Association (OPEA) filed a Motion and Brief for Leave to Appear as *Amicus Curiae* in Support of Plaintiff’s Motion for Class Action Certification (Dkt. #237). Plaintiffs did not oppose the motion. Defendants requested an opportunity to review the motion before indicating whether they opposed it or not, and counsel for *Amicus* granted that request. Thereafter, counsel for defendants indicated their opposition to the motion. Defendants have now filed a Response to the motion of *Amicus* in which they assail the sincerity and plausibility of the positions taken by a significant percentage of their own Child Welfare workforce. (Dkt. #244). *Amicus* submits this reply to make clear its own interest in class certification.

Despite defendants’ naked assertion to the contrary, OPEA’s Child Welfare membership does possess a fundamentally different perspective and interest from the

parties. OPEA had thought it had made its interest clear when it articulated the concerns of its Child Welfare membership of “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,...[the] inability to protect foster children from harm, inadequate wages, and the inability to attract and retain an adequate number of foster homes....” *Amicus Motion*, ¶4 at 3 (Dkt. #237). OPEA further explicated its interest by noting that the systemic deficiencies alleged by the plaintiffs have caused its Child Welfare membership to suffer from “extraordinary levels of stress, excessive burn-out, high rates of turnover, and exposure to personal liability.” *Amicus Motion*, ¶6 at 4.

The parties have not particularly addressed these latter issues, yet they directly affect the working conditions of OPEA’s Child Welfare membership, although they also affect the children in the proposed class. Indeed, the well-documented system-wide deficiencies in Oklahoma’s foster care program that make the working conditions of OPEA’s Child Welfare membership so intolerable, *e.g.*, grossly excessive caseloads and inadequate foster home placements, are the very same deficiencies that make class certification appropriate in this case because they are capable of class-wide relief.¹ *See Shook v. Board of County Commissioners*, 543 F.3d 597, 605 (10th Cir. 2008) (finding that class-wide relief is “conceivable” must be made at class certification stage); *Vallario v. Vandehey*, No. 08-502, 2009 WL 251938 (10th Cir. Feb 4, 2009) (same). *See also* Plaintiff Children’s Statement of Relief Sought, ¶II.A at 2-3. (Dkt. #241).

¹ / Defendants’ complaint that they are deprived of necessary discovery with respect to OPEA’s assertions is a red herring. OKDHS Defendants Response at 2-3. Not only do defendants fail to indicate what discovery they must have, but also it is notable that defendants did not rely upon any discovery to challenge any of the plaintiffs’ assertions in their class certification motion.

Amicus fails to see how its interests are any less unique or different from the parties than were the interests of the Group Homes that were permitted to appear as *amici* in support of defendants' Motion to Dismiss. It is singularly disingenuous for defendants to oppose the appearance of OPEA as *amicus curiae* simply because the interests of its Child Welfare membership align with those of the plaintiffs.² Defendants certainly had no objection to the appearance of the Group Homes as *amici* when the Group Homes aligned themselves with the position of the defendants on the issues raised by defendants' Motion to Dismiss. *See* Motion of [Group Homes] for Permission to File Brief as *Amicus Curiae* in Support of Defendants' Motion to Dismiss at 3 (Dkt. #106).

OPEA finds it especially outrageous and insulting that those who have been the architects of Oklahoma's failed foster care system would stoop to accuse their own workforce of having "confessed" to being "personally involved in the unconstitutional treatment of foster children,..." OKDHS Defendants' Response at 2 n. 1 (Dkt. #244). OPEA's Child Welfare membership does the absolute best they can given the systemic deficiencies that are built into the OKDHS child welfare operations. Nevertheless, they are keenly aware that foster children continue to be harmed and exposed to harm as a result of the wholly inadequate resources and maladministration provided by OKDHS. Indeed, it is this circumstance that motivated OPEA to come forward as an *amicus curiae* to inform the Court of the interests of its Child Welfare membership. OPEA contends that the unique information and perspective of its Child Welfare membership meets the

² / It is typical that entities wishing to appear as *amici* will align themselves with the relief being sought by one party or the other. For example, the National Rifle Association often appears as *amicus* to support the position of the party seeking to enforce rights under the Second Amendment, to the United States Constitution, as well as to articulate its own particular interests. *See, e.g., District of Columbia v. Heller*, 128 S. Ct. 2783, 2857-58 (2008). In short, alignment with the position of a party is not mutually exclusive with the existence of a unique or different perspective possessed by an *amicus*.

standard for an appearance of *amicus curiae* as articulated in *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir. 1997).

Amicus is cognizant of the guidance provided by the Tenth Circuit's decision in *Vandehey* where it is noted "an action for damages would allow a court to review the constitutionality of [defendants'] policies." *Vandehey*, 2009 WL 251938 at *10. Nevertheless, Oklahoma's historical imperative is that class action litigation has been an essential component for system-wide remedies in its prison system, its institutional system for children, and its institutional system for persons with mental retardation. *See* Motion of OPEA for Leave to Appear as *Amicus*, ¶9 at 5 (Dkt. #237).

Moreover, an individual judgment for an injured child would do nothing to decrease system-wide excessive caseloads, increase the number of quality foster homes, or ensure adequate worker training. The thousands of children in foster care who have either already been harmed or who are at unreasonable risk of harm because of grossly excessive caseloads and the inadequacies those caseloads engender should not have to wait a moment longer to have their day in court.³ History in Oklahoma and elsewhere teaches that there is no adequate individual remedy, because the underlying problems are systemic and only a systemic remedy will provide complete relief.

Defendants' assertion that the OPEA "add[s] nothing of substance to the Court's consideration of the class certification issues" demonstrates an utter disregard for the universally adverse working conditions of their own staff, which in turn is symptomatic

³ / *Amicus* has reviewed the Plaintiff Children's Statement of Relief Sought. From the perspective of OPEA's Child Welfare membership, each of the items of relief denominated appear to be designed to remedy system-wide deficiencies they have experienced or observed. Each of the items of relief, if implemented, would significantly improve the working conditions for OPEA's Child Welfare membership. And each of the items of relief, if implemented, would substantially reduce the risks of harm facing the foster children of Oklahoma.

of defendants' disregard for the foster children in their charge. OKDHS Defendants' Response at 1. Based upon the experiences of its Child Welfare membership, *Amicus* contends that it cannot reasonably be denied that the same system-wide deficiencies that make the working conditions of OPEA's Child Welfare membership so difficult are the very same system-wide deficiencies that have caused harm to children in foster care and that expose all children in foster care to the risks of various harms. Therein lies the commonality that seems to have eluded the defendants.

In this litigation, nobody has been addressing the issues and concerns of the Child Welfare workers who are being called upon by the defendants to do the impossible. OPEA's Child Welfare membership clearly has a direct interest in both the certification of the proposed class and the ultimate resolution of this action. That interest lies not only in their working conditions, but also in the welfare of the State's most vulnerable children for whom they have chosen social work as their profession. OPEA contends that its voice should be heard, and respectfully requests that the Court grant its Motion to Appear as *Amicus Curiae*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 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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