

DISTRICT COURT
IN THE DISTRICT COURT OF TULSA COUNTY **FILED**
STATE OF OKLAHOMA

DEC 21 2011

INDEPENDENT SCHOOL DISTRICT)
NO. 5 OF TULSA COUNTY, OKLAHOMA,)
a/k/a JENKS PUBIC SCHOOLS,)
et al.,)

Plaintiffs,)

vs.)

RUSSELL SPRY, STEPHANIE SPRY,)
et al.,)

Defendants.)

DALLY HOWE SMITH, COURT CLERK
STATE OF OKLA. TULSA COUNTY

Case No. CV 2011-00890

Judge Dana Lynn Kuehn

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

By conceding that undisputed material facts nos. 1-13 in the Plaintiff School Districts' opening brief are, in fact, undisputed, the Defendants admit that the "Lindsey Nicole Henry Scholarships for Students with Disabilities Program Act," OKLA. STAT. tit. 70, §§ 13-101.1 and 13-101.2 (2011 Supp.) (the "Act") diverts public funds to sectarian institutions. The Oklahoma Supreme Court has defined the term "sectarian institution" to include "a school or institution of learning which is controlled by a church and which is avowedly maintained and conducted so that the children of parents of that particular faith would be taught in that school the religious tenets of the church." *Gurney v. Ferguson*, 1941 OK 397, ¶ 7, 122 P.2d 1002, 1003. Undisputed material facts nos. 3-8 leave no doubt that the religious schools receiving public funding under the Act are sectarian institutions.

Because they know they cannot prevail on the merits in this dispute, the Defendants continue to devote most of their efforts to trying to prevent the Court from reaching the merits. Like their other attempts to foreclose a ruling on the Act's constitutionality, the

Defendants' argument that the Plaintiff School Districts lack standing also fails. Because the undisputed facts establish that the Act violates the Oklahoma Constitution, the Plaintiff School Districts' motion for summary judgment should be granted and the Court should enter its judgment granting the Plaintiff School Districts declaratory and injunctive relief.

Argument and Authorities

The Plaintiff School Districts Have Standing. The Defendants criticize the Plaintiff School Districts for analyzing their standing to bring this suit under *Independent School District No. 9 of Tulsa County v. Glass*, 1982 OK 1233, 639 P.2d 1233, instead of *Okla. Educ. Ass'n v. State*, 2007 OK 30, 158 P.3d 1058. The Defendants imply that *OEA* is a dramatic departure from *Glass* and *Glass* is no longer good law. The Defendants assert that the School Districts' failure to address *OEA* is "willful blindness." Defendants' Brief, p.6.

OEA is not a departure from *Glass*. To the contrary, the Oklahoma Supreme Court cited *Glass* no less than three (3) times in *OEA*. *OEA*, ¶ 7, 158 P.3d at 1063, n.11; ¶ 10, 158 P.3d at 1063, n.14; ¶ 16, 158 P.3d at 1064, n.25. The court in *OEA* stated that to have standing, a plaintiff must 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*, ¶ 7, 158 P.3d at 1063, quoting *Glass*, ¶ 10, 639 P.2d at 1237. The court went on to say that "[w]hen a party does not rely on a particular statute or constitutional provision authorizing suit, the question of standing depends on whether the party has 'alleged a person stake in the outcome of the controversy.'" *OEA*, ¶ 16, 158 P.3d at 1064, quoting *Glass*, ¶ 8, 639 P.2d at 1237.

In *Glass*, the Oklahoma Supreme Court recognized that public school districts have a legally protectable interest in protecting their revenues. *Id.* at ¶ 11, 639 P.2d at 1238. That

is exactly the interest the Plaintiff School Districts are seeing to protect by bringing this action to challenge the diversion of public funds to private schools.

The plaintiffs in *OEA* sued the state and the legislature in the attempt to compel them to come up with additional funding for public education. The plaintiffs in *OEA* were not challenging any specific expenditure by the legislature or contending that public funds were being wrongfully diverted to a private use, as is the situation in this case. Rather, the plaintiffs in *OEA* wanted the court to compel the legislature to come up with more money.

The foregoing makes clear that it is the Defendants who have deliberately closed their eyes to the law. The Plaintiff School Districts have identified a concrete injury in fact: the reduction of funding for public education caused by the diversion of public funds to private schools, and they have shown that this injury is caused by the Act. Because *Glass* establishes that a school district's interests in protecting its revenues falls within a statutorily or constitutionally protected zone, the Plaintiff School Districts have clearly satisfied all three (3) of the elements of standing and have standing to bring this action.

The Act Violates the No-Funding Principle of OKLA. CONST. art. II, § 5. The Defendants argue that sectarian institutions may receive public funds if consideration is present, relying on *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, 171 P.2d 600. The Defendants argue that “adequate consideration is the core of this analysis,” and they assert that the State of Oklahoma receives consideration by being relieved of the obligation to educate students attending private schools under the Act. Defendants' Brief, p.10.

Contrary to the Defendants' assertion, *Murrow* has no application to this case because it dealt with a situation – providing for orphaned children – for which the constitution does not specify how the state's obligation is to be satisfied. The Oklahoma Constitution does,

however, clearly specify how the state's obligation to provide education is to be satisfied: through a system of public schools. In *Board of Ed. for Independent School District No. 52 v. Antone*, 1963 OK 165, 384 P.2d 911, the Oklahoma Supreme Court made clear that questions regarding aid to religious schools continue to be governed by *Gurney v. Ferguson*, *supra*, rather than by *Murrow v. Antone*, ¶ 9, 384 P.2d at 913. The court concluded:

The law leaves to every man the right to entertain such religious views as appeal to his individual conscience and to provide for the religious instruction and training of his own children to the extent and in the manner he deems essential or desirable. **When he chooses to seek for them educational facilities which combine secular and religious instruction, he is faced with the necessity of assuming the financial burden which that choice entails.**

Antone, at ¶ 11, 384 P.2d at 914 (emphasis added). This statement, coming 17 years after *Murrow*, establishes that the Defendants' "consideration argument" is untenable. If the Defendants' were correct, the Oklahoma Supreme Court would have reached the opposite conclusion in both *Gurney* and *Antone*. If being relieved of the duty to educate students in the public schools could be sufficient consideration to justify providing **funding** to students attending private schools, that same consideration would certainly be sufficient to justify providing **transportation** to students attending private schools. The Defendants' "adequate consideration" argument is completely refuted by *Gurney* and *Antone*.

The Act Makes a Gift of Public Funds in Violation of OKLA. CONST. art. X, §§ 14 and 15. The Defendants contend that the Act is not an unconstitutional gift because "providing for the education of students with disabilities is very much in the public interest." Defendants' Brief, p.15. The Defendants thus suggest that the constitutional requirement that an expenditure of public funds must have a public purpose is met if the act serves some general public good. The Oklahoma Supreme Court expressly rejected this argument in

Veterans of Foreign Wars v. Childers, 1946 OK 211, ¶ 14, 171 P.2d 618, 621. The court also rejected such claims in *Antone*, ¶ 5, 384 P.2d at 912 (rejecting argument that “expenditure of tax-raised funds can be justified if the purpose for which it is made is for the furtherment of the general welfare of the community as a whole”), and *Gurney*, ¶ 9, 122 P.2d at 1003 (rejecting argument that the expenditure benefitted children rather than religious schools, pointing out that “practically every proper expenditure for school purposes aids the child”). These cases establish that identifying a general “public interest” does not trump the Oklahoma Constitution.

To serve a public purpose, the expenditure of public funds must be controlled by the government. *Veterans*, ¶ 14, 171 P.2d at 621; *Orthopedic Hospital of Okla. v. Okla. Dept. of Health*, 2005 OK CIV APP 43, ¶ 9, 118 P.3d 216, 221. The Act contains no restrictions on the use of public funds. In fact, the Act does not even require private schools use the funds diverted to them to educate disabled students. The funds can be used for religious proselytizing or any other purpose.

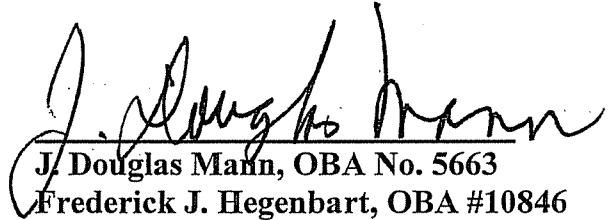
Moreover, in order to qualify for public funding, the Act requires parents of students with disabilities to surrender the protections granted to them by federal law under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* OKLA. STAT. tit. 70, § 13-101.2(F)(1). It is the height of hypocrisy to claim that depriving families of these rights serves a public purpose.

The Plaintiff School Districts are entitled to summary judgment on all issues in this case.

Respectfully submitted,

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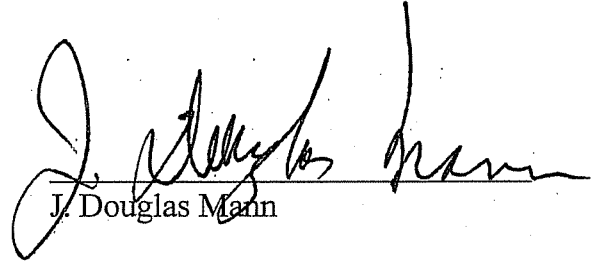
CERTIFICATE OF MAILING

I hereby certify that on the 21st day of December, 2011, I caused a true and correct copy of the above and foregoing instrument to be mailed, via certified mail, return receipt requested, with sufficient postage prepaid thereon, to:

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