

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

**DISTRICT COURT
FILED**

NOV 17 2011

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

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.)

Case No. CV 2011-00890

Judge Dana Lynn Kuehn

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs, Independent School District No. 5 of Tulsa County, Oklahoma (the "Jenks School District"), and Independent School District No. 9 of Tulsa County, Oklahoma (the "Union School District"), respectfully move for summary judgment pursuant to OKLA. STAT. tit. 12, § 2056 (2010 Supp.) and Rule 13 of the Rules for District Courts of Oklahoma, OKLA. STAT. tit. 12, Ch. 2, App. (2010 Supp.), on the ground that there is no dispute as to any material fact and the Plaintiff School Districts are entitled to judgment as a matter of law.

In support of their motion for summary judgment, the Plaintiff School Districts state:

1. The Plaintiff School Districts brought this action seeking a declaratory judgment 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.) (hereafter, the "Act"), is invalid and unenforceable because it violates the Oklahoma Constitution. The Plaintiff School Districts also seek a permanent injunction prohibiting the Defendant parents

from utilizing the Act to divert public funds to private schools in violation of the Oklahoma Constitution.

2. The Act allows certain students with disabilities to use public funds to pay their tuition to attend private schools, both secular and religious.

3. The Act violates the Oklahoma Constitution's prohibition on the use of public funds, directly or indirectly, to aid sectarian institutions. OKLA. CONST. art. II, § 5.

4. The Act violates the Oklahoma Constitution's requirement that the Oklahoma Legislature maintain a system of public schools in which the children of this state may be educated. OKLA. CONST. art. I, § 5, and OKLA. CONST. art. XIII, § 1. The Act unlawfully diverts public funds away from public schools to private schools.

5. The Act makes a gift of public funds in violation of OKLA. CONST. art. X, §§ 14 and 15.

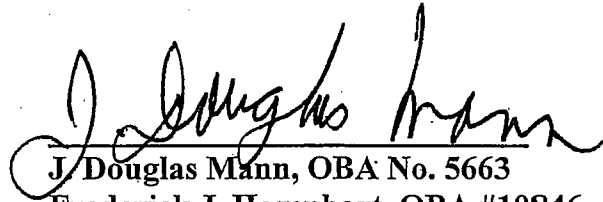
6. The Act violates the anti-discrimination component of the Due Process Clause of the Oklahoma Constitution, OKLA. CONST. art. II, § 7, by treating similarly situated students differently without a rational basis.

THEREFORE, the Plaintiff School Districts respectfully request that their motion for summary judgment be granted and that this Court enter judgment declaring the Act unconstitutional and unenforceable and permanently enjoining the Defendant parents from utilizing the Act to use public funds to pay for their children's private school educations.

Respectfully submitted,

ROSENSTEIN, FIST & RINGOLD

by



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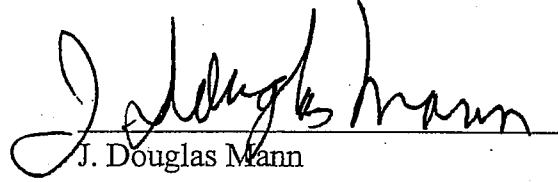
CERTIFICATE OF MAILING

I hereby certify that on the 17th day of November, 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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**OPENING BRIEF IN SUPPORT OF
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November 17, 2011

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The plaintiffs, Independent School District No. 5 of Tulsa County, Oklahoma (the "Jenks School District"), and Independent School District No. 9 of Tulsa County, Oklahoma (the "Union School District"), respectfully submit this brief in support of their motion for summary judgment.

The Plaintiff School Districts brought this action seeking a declaratory judgment 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.) (hereafter, the "Act"), is invalid and unenforceable because it violates the Oklahoma Constitution. The Act was passed by the Oklahoma Legislature on May 26, 2010, and was amended in the 2011 legislative session. *See* 2010 OKLA. SESS. LAWS § 381 and 2011 OKLA. SESS. LAWS § 356. A copy of the current version of the Act, as amended in the 2011 legislative session, is attached to this brief as Exhibit 1.

The Act allows children who attended an Oklahoma public school during the prior school year and had an individualized education program (“IEP”) under the federal Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (the “IDEA”), to receive a “scholarship” of public funds to be used to pay tuition to attend a private school, including a private religious school.¹ Beginning with the 2011-2012 school year, the Act requires the Oklahoma State Department of Education (the “SDE”) to determine the total amount of scholarship payments due to private schools under the Act and withhold that amount from the state aid to be distributed to all public school districts in the state:

The State Department of Education shall calculate the total cost of all scholarships for all eligible students in the state. The State Department of Education shall then reserve or retain from the total amount appropriated to the State Board of Education for State Aid purposes and any other revenue available for allocation for State Aid purposes the total cost for all scholarship payments;

See attached copy of OKLA. STAT. tit. 70, § 13-101.1(J)(1), as amended.

The Defendants are the parents of students with disabilities who reside within the boundaries of the Plaintiff School Districts and have obtained public funding under the Act to finance their children’s attendance at private schools, thereby diverting public money from the public schools of this state to private schools, including private religious schools.

Article II of the Oklahoma Constitution sets forth the Constitution’s Bill of Rights. Article II, Section 5 of the Bill of Rights precludes the use of public funds, directly or indirectly, for the use, benefit or support of sectarian institutions. The Oklahoma Supreme Court has unequivocally held that a statute requiring public school districts to provide transportation services to students attending private religious schools violated the no-funding

¹ “Scholarship” is the current term of choice used by advocates for what are more commonly known as “vouchers.”

clause of the Oklahoma Constitution. *Gurney v. Ferguson*, 1941 OK 397, ¶ 8, 122 P.2d 1002, 1003. In so holding, the Oklahoma Supreme Court expressly held that a religious school is a “sectarian institution” within the meaning of OKLA. CONST. art. II, § 5. *Id.* at ¶ 7, 122 P.2d at 1003. The Oklahoma Supreme Court reaffirmed its decision that the Oklahoma Constitution absolutely prohibits the use of public money to aid religious schools in *Board of Ed. for Independent School District No. 52 v. Antone*, 1963 OK 165, ¶ 10, 384 P.2d 911, 913. These decisions establish beyond question that the Act is unconstitutional under the no-funding clause of the Oklahoma Constitution.

In addition, the Oklahoma Constitution requires the state to establish and maintain a system of public schools. OKLA. CONST. art. I, § 5, and OKLA. CONST. art. XIII, § 1. Because the Oklahoma Constitution authorizes the legislature to fund only “a system of free public schools,” the Act violates the Oklahoma Constitution by diverting public school funds to private schools – whether sectarian or secular.

The Oklahoma Constitution also prohibits making a gift or charitable donation of public funds. OKLA. CONST. art. X, §§ 14 and 15. The Oklahoma Supreme Court has stated that a “gift” under the Oklahoma Constitution “includes all appropriations for which there is no authority or enforceable claim against the State.” *Orthopedic Hosp. of Oklahoma v. Oklahoma State Dept. of Health*, 2005 OK CIV APP 43, 118 P.3d 216. When a parent elects to send his or her child to a private school, the child is no longer a student of the Oklahoma public school system. The state has neither the legal obligation nor the right to expend public funds to educate students enrolled in private schools. By mandating the state to pay public funds to private schools without receiving anything in exchange, the Act makes an unlawful gift of public funds.

Finally, the Act violates the anti-discrimination component of the Oklahoma Constitution's due process clause. OKLA. CONST. art. II, § 7. The Act authorizes students with disabilities who are on an IEP under the IDEA to receive a scholarship, but it does not authorize students with disabilities who are on an accommodation plan under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, to receive a scholarship. Thus, the Act discriminates on its face between similarly situated students with disabilities.

The Act also allows students who receive a scholarship to continue to receive a scholarship in successive years, regardless of whether they remain in need of or eligible for special education services: "For purposes of continuity of educational choice, the scholarship shall remain in force until the student returns to a public school, graduates from high school, or reaches the age of twenty-two (22), whichever occurs first." *See* attached copy of OKLA. STAT. tit. 70, § 13-101.1(B)(2), as amended. Because the Act allows a student who was on an IEP at the time he or she received a scholarship to continue to receive a scholarship regardless of whether that student continues to need or be eligible for special education services, but does not allow a student who was never on an IEP an opportunity to obtain a scholarship, the Act also discriminates on its face between similarly situated students without disabilities.

The Act not only allows a student to continue to receive a scholarship even if such student has progressed to the point that the student would no longer meet IDEA eligibility criteria for an IEP if he or she were enrolled in a public school, the Act also provides that the amount of the scholarship is calculated as if the student still had a disability. *See* attached copy of OKLA. STAT. tit. 70, § 13-101.1(J)(2), as amended: "The disability weights used in calculating the scholarship amount shall include all disability weights which correspond to

the disabilities included in the multidisciplinary evaluation and eligibility group summary for the student at the time the request for a scholarship is made by the parent or legal guardian" (emphasis added). Because students with disabilities have greater weights under the formula by which state aid for public schools is calculated than do students without disabilities, OKLA. STAT. tit. 70, § 18-201.1(B)(2) (2010 Supp.), the Act provides more funding to a private school for a student who no longer meets IDEA eligibility criteria than the same student would generate in state aid if he or she were enrolled in a public school.

The Oklahoma Supreme Court has repeatedly ruled that "a declaratory judgment is an appropriate remedy when a person is adversely affected by an invalid statute and is threatened with its enforcement." *Southwestern Bell Telephone Company v. Oklahoma Corporation Commission*, 1994 OK 142, ¶ 7, 897 P.2d 1116, 1118. In addition, the Oklahoma Supreme Court has emphasized that "the declaratory judgment statutes are to be liberally construed to obtain the objective of expediting and simplifying the ascertainment of uncertain rights." *Barzellone v. Presley*, 2005 OK 86, ¶ 10, 126 P.3d 588, 592, n.16. Because the Defendant parents are utilizing the Act to divert public funds from public schools to private schools, including private religious schools, in contravention of the Oklahoma Constitution, this Court should enter a declaratory judgment declaring the Act unconstitutional.

Moreover, Oklahoma courts have repeatedly held that a continuing violation of a state statute is an irreparable injury to the state and its citizens that may be enjoined. *Independent School District No. 1 of Tulsa County v. Bd. of County Com'rs of Tulsa County*, 1983 OK 123, ¶ 13, 674 P.2d 547, 550. Given that an injunction will lie to restrain a continuing violation of a state statute, there can be no doubt that the continuing violation of the

Oklahoma Constitution likewise constitutes an irreparable injury for which injunctive relief is available. Therefore, the Plaintiff School Districts request that this Court permanently enjoin the Defendant parents from utilizing the Act to divert public funds to private schools in violation of the Oklahoma Constitution.

Because the undisputed facts establish that there is no dispute as to any material fact and the Plaintiff School Districts are entitled to judgment as a matter of law, the Plaintiff School Districts request that they be granted summary judgment and this Court enter its judgment herein granting declaratory and injunctive relief.

The Undisputed Facts

The Plaintiff School Districts submit the following statement of undisputed facts pursuant to OKLA. STAT. tit. 12, § 2056 (2010 Supp.) and Rule 13 of the Rules for District Courts of Oklahoma, OKLA. STAT. tit. 12, Ch. 2, App. (2010 Supp.):

1. The SDE's website currently lists 40 private schools that have been approved by the SDE to receive scholarship payments under the Act. Of the 40 approved schools, all but two – Town & County School and Rose Rock Academy – are religious schools. *See* <http://sde.state.ok.us/Curriculum/SpecEd/Scholarship.html> (last accessed on November 10, 2011). A copy of the SDE's list of approved private schools is attached as Exhibit 2.

2. All Saints Catholic School is on the SDE's list of approved schools. The website for All Saints Catholic School states: "The goals of Catholic education include teaching doctrine" *See* www.allsaintsnorman.org (last accessed on November 11, 2011). A hard copy of the relevant website pages is attached as Exhibit 3.

3. Good Shepherd Lutheran School and Child Development Center is on the SDE's list of approved schools. The website for Good Shepherd Lutheran School and Child Development Center states:

A PART OF THE MINISTRY OF GOOD SHEPHERD LUTHERAN CHURCH.

* * *

Good Shepherd Lutheran School exists as a vital component of Good Shepherd Lutheran Church's mission and ministry and, through Christian education, strives to equip its students to be disciples of Christ, applying Law and Gospel to all aspects of life and learning in order to be witnesses for him.

* * *

Good Shepherd Lutheran School is owned and operated under the jurisdiction of Good Shepherd Lutheran Church (a member of the Lutheran Church – Missouri Synod).

See www.goodshepherdlcms.ctsmemberconnect.net (last accessed on November 11, 2011).

A hard copy of the relevant website pages is attached as Exhibit 4.

4. Holy Trinity Catholic School is on the SDE's list of approved schools. The website for Holy Trinity Catholic School states: "The school shall integrate Catholic principles and values in the curriculum and offer opportunities for celebrating liturgy, sacraments, and prayer experiences." See www.holytrinityok.org (last accessed on November 11, 2011). A hard copy of the relevant website pages is attached as Exhibit 5.

5. Immanuel Lutheran Christian Academy is on the SDE's list of approved schools. The website for Immanuel Lutheran Christian Academy states: "Immanuel Lutheran Christian Academy was formed to further the evangelistic ministry and mission of Immanuel Lutheran Church and Immanuel Ministry and Education Corporation in Broken

Arrow, OK.” See www.ilcanews.org (last accessed on November 11, 2011). A hard copy of the relevant website pages is attached as Exhibit 6.

6. Marquette Catholic School is on the SDE’s list of approved schools. The website for Marquette Catholic School states: “Catholic values permeate our school’s programs, services and culture,” and, “As a service to the Parish of Christ the King, Marquette Catholic School teaches Catholic values” See www.marquetteschool.org (last accessed on November 11, 2011). A hard copy of the relevant website pages is attached as Exhibit 7.

7. Messiah Lutheran School is on the SDE’s list of approved school. The website for Messiah Lutheran School states: “Messiah Lutheran School is a mission of Messiah Lutheran Church.” See www.messiahokc.org (last accessed on November 11, 2011). A hard copy of the relevant website pages is attached as Exhibit 8.

8. Summit Christian Academy is on the SDE’s list of approved schools. The website for Summit Christian Academy states:

Summit Christian Academy is an inseparable and integral part of the ministries of The Assembly at Broken Arrow, Broken Arrow, Oklahoma, and, as such, subscribes to the same tenets of faith as its parent organization. The official church board of The Assembly at Broken Arrow governs SCA.

See www.sca-eagles.com (last accessed on November 11, 2011). A hard copy of the relevant website pages is attached as Exhibit 9.²

9. The Defendants, Russell and Stephanie Spry, are the parents of G.S., a minor student with disabilities who previously attended the Jenks School District. Russell and

² Space limitations preclude the Plaintiff School Districts from providing additional examples from the websites of other private religious schools approved to receive public funding under the Act.

Stephanie Spry live within the Jenks School District, and they applied for and obtained a scholarship under the Act to enable G.S. to attend Town & Country School, a private school. First Amended Complaint, *Kimery, et al. v. Broken Arrow Public Schools, et al.*, Case No. 11-CV-0249-CVE-PJC [Dkt. No. 45], ¶¶ 22 and 24. A copy of the First Amended Complaint filed in *Kimery* is attached as Exhibit 10.

10. The Defendants, Tim and Kimberly Tylicki, are the parents of M.T., a minor student with disabilities who previously attended the Jenks School District. Tim and Kimberly Tylicki live within the Jenks School District, and they applied for and obtained a scholarship under the Act to enable M.T. to attend Town & Country School, a private school. First Amended Complaint, ¶¶ 25 and 27.

11. The Defendants, Tim and Kristin Fisher, are the parents of K.F., a minor student with disabilities who previously attended the Jenks School District. Tim and Kristin Fisher live within the Jenks School District, and they applied for and obtained a scholarship under the Act to enable K.F. to attend Metro Christian Academy, a private religious school. First Amended Complaint, ¶¶ 9 and 11.

12. The Defendants, Stefan and Stephanie Hipskind, are the parents of L.H. and A.J.H, minor students with disabilities who previously attended the Union School District. Stefan and Stephanie Hipskind live within the Union School District, and they applied for and obtained scholarships under the Act to enable L.H. and A.J.H. to attend Immanuel Lutheran Christian Academy, a private religious school. First Amended Complaint, ¶¶ 12 and 14.

13. The Defendants, Jerry and Shanna Sneed, are the parents of B.S., a minor student with disabilities who previously attended the Union School District. Jerry and

Shanna Sneed live within the Union School District, and they applied for and obtained a scholarship under the Act to enable B.S. to attend Town & Country School, a private school. First Amended Complaint, ¶¶ 19 and 21.

14. The *Tulsa World* recently reported that during the 2011-2012 school year, \$483,804.45 will be paid to private schools in Tulsa County rather than distributed to the state's public school districts (see Special-Needs Scholarships Top \$700,000, http://www.tulsaworld.com/news/article.aspx?subjectid=19&articleid=20111017_19_A1_Atl_eas931722, published in the *Tulsa World* on October 17, 2011). A copy is attached as Exhibit 11.³

Argument and Authorities

Proposition I

The Act Violates the Oklahoma Constitution's Prohibition on Funding Sectarian Institutions

The Oklahoma Constitution expressly prohibits the use of public funds, directly or indirectly, for the use, benefit or support of sectarian institutions:

No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.

OKLA. CONST. art. II, § 5.⁴

³ The articles states that the statewide figure for 2011-2012 is \$700,000, and it could rise.

⁴ Article II, Section 5 is often referred to as the "no funding to religion provision" or the "no aid to religion provision." In this litigation, the Plaintiff School Districts will simply refer to it as the "no-funding provision."

In *Gurney v. Ferguson*, 1941 OK 397, 122 P.2d 1002, the Oklahoma Supreme Court held unconstitutional a state statute that provided far less aid to religious schools than the Act does. *Gurney* involved a statute that required public school districts that provided transportation services to their students also to provide transportation services to students of any parochial or private school located along or near the school bus route. *Id.* at ¶¶ 1 and 2, 122 P.3d at 1003. The Oklahoma Supreme Court ruled that the term “sectarian institution,” as used in the Oklahoma Constitution, “includes a school or institution of learning which is owned and controlled by a church and which is avowedly maintained and conducted so that the children of parents of that particular faith would be taught the religious tenets of that church.” *Id.* at ¶ 7; 122 P.3d at 1003. The court concluded that there is “no doubt” that Article II, § 5 “prohibits the use of public money or property for the sectarian or parochial schools.” *Id.* at ¶ 8, 122 P.2d at 1003 (emphasis added).

Supporters of the statute in *Gurney* argued that the public funds did not benefit the religious school but rather the children attending the religious school. The court characterized this argument as “not impressive,” pointing out that “practically every proper expenditure for school purposes aids the child.” *Id.* at ¶ 9, 122 P.2d at 1003-04. The court stated that the appropriation and use of public funds to transport public school children is to directly aid public schools, and it concluded that the purported extension of this aid to private religious schools is “a clear violation” of the Oklahoma Constitution. *Id.* at ¶ 12, 122 P.2d at 1004.

The court emphasized that its decision was required by the language of the Oklahoma Constitution, which the court was bound to follow: “[The Oklahoma Constitution] embraces the fundamental and basic law of the state, and courts and judges, like everybody else, are

bound to follow it. 'It is not the province of the courts to circumvent it because of private notions of justice or because of personal inclinations'" *Id.* at ¶ 12, 122 P.2d at 1003 (citation omitted).

In its conclusion, the court clearly and eloquently explained why the no-funding provision was placed in the Oklahoma Constitution's Bill of Rights, as its purpose is to guarantee the people's right to religious liberty:

[W]e must not overlook the fact that if the Legislature may directly or indirectly aid or support sectarian or denominational schools with public funds, then it would be a short step forward at another session to increase such aid, and only another short step to some regulation and at least partial control of such school by successive legislative enactment. From partial control to an effort at complete control might well be the expected development. The first step in any such direction should be promptly halted, and is effectively halted, and is permanently barred by our Constitution.

Id. at ¶ 16, 122 P.2d at 1004-05 (emphasis added).

The Oklahoma Supreme Court reached the same conclusion in the subsequent case of *Board of Ed. for Independent School District No. 52 v. Antone*, 1963 OK 165, 384 P.2d 911. In that action, a patron of the Midwest City School District sued the school district to enjoin its practice of providing transportation services to students of a private parochial school. The school district argued that *Gurney* was no longer controlling following the United States Supreme Court's decision in *Everson v. Board of Education*, 330 U.S. 1 (1947). In that case, the Supreme Court held that a New Jersey school district did not violate the United States Constitution by reimbursing the parents of children attending public and private schools for the cost of transporting their children to and from school on public carriers. *Antone*, at ¶¶ 3-5, 384 P.2d at 912.

The Oklahoma Supreme Court flatly rejected this contention, holding that *Everson* established only that providing transportation for students attending religious schools is not a violation of federal law. *Id.* at ¶¶ 6-8, 384 P.2d at 912-13. The court succinctly stated that the decision in *Everson* “does not change the effect of state constitutional provisions.” *Id.* at ¶ 6, 384 P.2d at 913. The court again unequivocally held that providing aid to a private, religious school violates the Oklahoma Constitution: “Any such aid or benefit [to a private religious school], either directly or indirectly, is expressly prohibited by the above quoted provision of the Constitution of Oklahoma. It must be upheld and enforced by all Courts.” *Id.* at ¶ 12, 384 P.2d at 914.

The Oklahoma Attorney General has likewise recognized that the Oklahoma Constitution expressly forbids the use of public funds to aid religious schools. *See* 1980 OK AG 196 (concluding that the State Board of Vocational and Technical Education cannot contract with a private sectarian educational institution to offer nurse training because it would “result in the appropriation and use of public money, directly or indirectly for the use, benefit, or support of the contracting sectarian institution”); 1979 OK AG 132 (concluding that the Oklahoma State Department of Energy cannot spend federal funds received through a grant for “assisting private parochial schools in the implementation of energy conservation modifications to their facilities”), and 1970 OK AG 128 (concluding that legislation authorizing public funds to be used for “the State’s public and private colleges and universities” is unconstitutional under both Article II, § 5 and Article X, § 15⁵). In 1979 OK AG 132, the Attorney General stated:

⁵ *See* pp. 17-19, *infra*.

It is difficult to imagine how the framers of our constitution could more completely and expressly state that public money shall not be directly or indirectly used for any sectarian purpose. The provision of the Constitution [Article II, § 5] has been interpreted by the Supreme Court of the State of Oklahoma on numerous occasions and in every instance given a strict interpretation so as to preclude the use of public funds for sectarian purposes in any manner.

Id. at ¶ 3.

Moreover, legal scholars agree that the no-funding provision of the Oklahoma Constitution is one of the strictest such provisions in the nation. Professor Frank R. Kemerer has stated that other than the Michigan Constitution, which expressly prohibits vouchers, “the most restrictive state constitutional provisions prohibit both direct and indirect aid to sectarian private schools. States in this category include Florida, Georgia, Montana, New York, and Oklahoma.” Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 ED. L. RPTR. 1, 5 (1997). *See, also*, Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL’Y 551, 587, 588 (2003) (including Oklahoma among the states that place “the broadest restrictions on government aid to religious schools and organizations”).

Courts of other states have held that “scholarship” programs comparable to the Act violate the corresponding no-funding provisions of their state constitutions. *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009), and *Bush v. Holmes*, 886 So.2d 340 (Fla. Dist. Ct. App. 2004).

The undisputed facts establish that the Act allows public funds to directly benefit sectarian institutions in violation of the Oklahoma Constitution. The statements on the websites for the seven (7) private religious schools set forth at Undisputed Material Facts 2-8 leave no doubt that these schools are sectarian institutions under the definition approved by the Oklahoma Supreme Court in *Gurney* at ¶ 7, 122 P.2d at 1003. Indeed, one of the central

purposes of religious schools is to instruct the children in the tenets of a specific religious faith. A 2006 article in a national periodical dealing with Catholic education made this point when it stated:

It is made abundantly clear in an unbroken list of statements, from the documents of the Second Vatican Council to Pope John Paul II's 1999 exhortation *The Church in America (Ecclesia America)* that Catholic schools play a vital role in the evangelizing mission of the Church.

Renewing Our Commitment to Catholic Elementary and Secondary Schools in the Third Millennium, CATHOLIC EDUCATION: A JOURNAL OF INQUIRY AND PRACTICE, Vol. 9, No. 3, March 2006, at p. 268 (emphasis added) (this article may be accessed online at <http://ejournals.bc.edu/ojs/index.php/catholic/article/view/699/686>).

The Act violates the Oklahoma Constitution because it authorizes state funding to private religious schools. Such funding directly benefits these sectarian institutions in their "evangelizing missions." This Court should therefore enter a declaratory judgment declaring the Act unconstitutional under Article II, Section 5 of the Constitution and enjoining the Defendant parents from using public funds to benefit such sectarian institutions.

Proposition II

The Act Violates the Oklahoma Constitution's Requirement that the Legislature Maintain a System of Free Public Schools

The Oklahoma Constitution requires the state to establish and maintain a system of public schools:

Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control; and said schools shall always be conducted in English: Provided, that nothing herein shall preclude the teaching of other languages in said public schools.

OKLA. CONST. art. I, § 5.

The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated.

OKLA. CONST. art. XIII, § 1.

The Oklahoma Supreme Court has recognized that the Oklahoma Constitution mandates the establishment of a system of public schools. “Public education is a function of the State. Art. XIII, § 1, Oklahoma Constitution. The Legislature is vested with plenary power to create, abolish, or change school districts ... in the exercise of this governmental function.” *Tyron Dependent School District No. 125 of Lincoln County v. Carrier*, 1970 OK 153, ¶ 4, 474 P.2d 131, 133. “Under the provisions of section 1, article 13, and section 5, article 1 of the Constitution, the Legislature is required to establish and maintain a system of free public schools, wherein all the children of the state may be educated, and which shall be open to all the children of the state.” *Board of Com'rs of Carter County v. Woodford Consol. School Dist. No. 36*, 1933 OK 138, ¶ 11, 25 P.2d 1057, 1059 (emphasis added).

In *Board of Ed. for Independent School District No. 52 v. Antone*, *supra*, the court emphasized that parents who choose to forego a public education by sending their children to private schools must accept the financial responsibility for that choice:

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).

In *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006), the Florida Supreme Court ruled that Florida's Opportunity Scholarship Program (“OSP”) violated the Florida Constitution's requirement that the legislature make adequate provision for a free public education for all

children of the state. The court held that the OSP violated the Florida Constitution because it “diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida’s children.” *Id.* at 398.

The Act does the same in Oklahoma. The Act diverts public funds away from public education and into a parallel system of private education. The Oklahoma Constitution does not authorize the legislature to fund private education. To the contrary, the Oklahoma Constitution expressly requires the legislature to “maintain a system of free public schools wherein all the children of the State may be educated.” As the court stated in *Tyron Dependent School District No. 125, supra*, “Public education is a function of the State” (emphasis added).

This Court should enter judgment declaring the Act unconstitutional under Article I, Section 5 and Article XIII, Section 1 of the Oklahoma Constitution and enjoining the Defendant parents from diverting public funds to private schools.

Proposition III

The Act Violates the Oklahoma Constitution’s Prohibition on Making a Gift of Public Funds

The Oklahoma Constitution prohibits making a gift or charitable donation of public funds.

Except as otherwise provided by this section, taxes shall be levied and collected ... for public purposes only

OKLA. CONST. art. X, § 14.

Except as provided by this section, the credit of the State shall not be given, pledged, or loaned to any individual, company, corporation, or association, municipality, or political subdivision of the State, nor shall the State become

an owner or stockholder in, nor make donation by gift, subscription to stock, by tax, or otherwise, to any company, association, or corporation.

OKLA. CONST. art. X, § 15.

Article X, § 15 of the Oklahoma Constitution prohibits the state from making “a gift of state funds, and the Legislature may not create a gift by naming it something else.” *State ex rel. Wright v. Oklahoma Corp. Com’n*, 2007 OK 73, ¶ 23, 170 P.3d 1024, 1033, n.14. “A ‘gift’ includes all appropriations for which there is no authority or enforceable claim against the State.” *Orthopedic Hosp. of Oklahoma v. Oklahoma State Dept. of Health*, 2005 OK CIV APP 43, ¶ 10, 118 P.3d 216, 222; see *Childrens Home & Welfare Ass’n v. Childers*, 1946 OK 180, 171 P.2d 613 (gifts are gratuitous transfers of state property without consideration).

In order for a transfer of funds or property to avoid being an unconstitutional gift, the state must receive property or service in exchange for such payment. The state receives no service in exchange for paying students’ private school tuition expenses under the Act. Once a student enrolls in a private school, that student is no longer a student of the public school district in which he or she resides, and the state has neither the obligation nor the right to expend public funds to educate that student. Because the state has no obligation to educate that student, the state is not paying the private school to provide services the state is required to provide. As the Oklahoma Supreme Court made clear in *Board of Ed. for Independent School District No. 52 v. Antone, supra*, when parents choose to forego the public education provided by the state and exercise their right to send their children to private school, the parents are “faced with the necessity of assuming the financial burden which that choice entails.” *Antone*, at ¶ 11, 384 P.2d at 914 (emphasis added). By providing funding to enable

parents to send their children to private schools; the Act makes an unconstitutional gift of public funds.

The Plaintiff School Districts request that the Court enter judgment declaring the Act unconstitutional under Article X, Sections 14 and 15 of the Oklahoma Constitution and enjoining the Defendant parents from utilizing the Act to make a gift of public funds to private schools.

Proposition IV

The Act Violates the Equal Protection Component of the Oklahoma Constitution's Due Process Clause

Article II, Section 7 of the Oklahoma Constitution guarantees due process of law:

No person shall be deprived of life, liberty, or property, without due process of law.

OKLA. CONST., Art II, § 7.

The Oklahoma Supreme Court has stated that the anti-discrimination component of Article II, Section 7 is the “functional equivalent” of the equal protection clause found in the federal constitution. *Gladstone v. Bartlesville Independent School District No. 30*, 2003 OK 30, ¶ 6, 66 P.3d 442, 446, n.15. The Oklahoma Constitution protects citizens against unreasonable classifications that serve no important governmental interest. *Barnes v. Barnes*, 2005 OK 1, ¶ 4, 107 P.3d 560, 563. Classifications that result in arbitrary discrimination, which is defined as “a failure to treat all persons equally where no reasonable distinction can be found between those favored and those unfavored,” are prohibited. *Terry v. Gassett*, 1987 OK 60, ¶ 7, 740 P.2d 141, 144.

The Act discriminates between similarly situated students. The Act authorizes “students with disabilities” who are on an IEP under the IDEA to receive a scholarship, but it

does not authorize “students with disabilities” who are on accommodation plans under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, to receive a scholarship. There is no rational basis for discriminating between such similarly situated students.

Moreover, there is no mechanism in the Act for discontinuing the scholarship of a student who was on an IEP at the time he or she first received a scholarship, but is subsequently determined to no longer be in need of special education services under the IDEA. Students who were placed on an IEP after being identified as developmentally delayed, learning disabled, other health impaired, or emotionally disturbed can and do progress to the extent that they no longer require an IEP.⁶ The same can be true for students identified with certain other disabilities. By allowing students who were previously on an IEP but who are no longer in need of an IEP to continue to receive a scholarship, the Act discriminates against students who have never been identified as in need of an IEP.

Because the Act discriminates between similarly situated students, it violates the anti-discrimination component of Article II, Section 7 of the Oklahoma Constitution. This Court should therefore enter a declaratory judgment declaring the Act unconstitutional under Article II, Section 7 and enjoining the Defendant parents from benefitting from an unconstitutional statute.

Conclusion

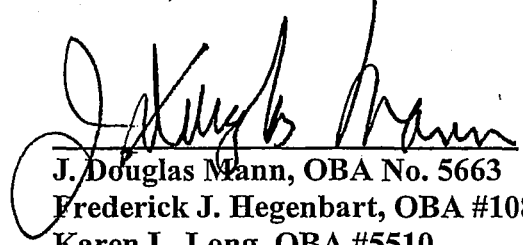
Based on the arguments and authorities set forth in this brief, the Plaintiff School Districts respectfully request that they be granted summary judgment and granted the declaratory and injunctive relief they seek.

⁶ At least three (3) of the students of the Defendant parents could progress to the point that the students no longer require special education services.

Respectfully submitted,

ROSENSTEIN, FIST & RINGOLD

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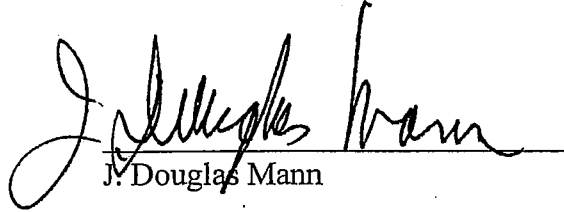
CERTIFICATE OF MAILING

I hereby certify that on the 17th day of November, 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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