

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

FILED IN DISTRICT COURT  
OKLAHOMA COUNTY

CLARENCE G. OLIVER, JR., )  
EARL GARRISON, AMY VARGUS, )  
DAVID K. PENNINGTON, )  
RAY HICKMAN, KIRBY A. LEHMAN, )  
STACY L. ACORD, ROBERT M. PETERS, )  
RANDALL K. RABURN, MELISSA ABDO, )  
TIM GREEN, and GORDON R. MELSON, )

Plaintiffs, )

vs. )

JANET BARRESI, in her official capacity )  
as State Superintendent of Public )  
Instruction, THE OKLAHOMA STATE )  
DEPARTMENT OF EDUCATION, and )  
THE OKLAHOMA STATE )  
BOARD OF EDUCATION, )

Defendants. )

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**CV-2013-2072**

Case No. \_\_\_\_\_

Judge \_\_\_\_\_

**PETITION FOR DECLARATORY  
JUDGMENT AND PERMANENT INJUNCTION**

The Plaintiffs, taxpayers of the State of Oklahoma, bring this action seeking a declaratory judgment that the "Lindsey Nicole Henry Scholarships for Students with Disabilities Act," OKLA. STAT. tit. 70, § 13-101.1 (2011) and OKLA. STAT. tit. 70, § 13-101.2 (2012 Supp.) (the "Act"), violates the Oklahoma Constitution and is invalid. The Plaintiffs also seek a permanent injunction restraining the Defendants from expending any public funds pursuant to this unconstitutional statute. In support of their petition, the Plaintiffs state:

### **Preliminary Statement**

1. The Act authorizes certain students with disabilities who previously attended a public school in Oklahoma to receive a “scholarship” (that is, a voucher) for public funds to pay tuition at a private school, including a private religious school. The Act requires the parent or parents of a student who receives a scholarship to restrictively endorse the scholarship payment to the private school in which the student has enrolled for deposit into the account of the private school. A complete copy of the Act is attached to this petition as Exhibit A.

2. The Act requires the Defendant Oklahoma State Department of Education to calculate the total amount of scholarships granted under the Act each school year and withhold that amount from the state funding for public school districts in Oklahoma.

3. The Act is unconstitutional for the following reasons:

a. The Act violates the Oklahoma Constitution’s prohibition on the use of public funds to aid, directly or indirectly, any sectarian institution, OKLA. CONST. Art. II, § 5;

b. The Act violates the Oklahoma Constitution’s requirement that the legislature establish and maintain a system of free public schools, OKLA. CONST., Art I, § 5 and Art XIII, § 1;

c. The Act violates the Oklahoma Constitution’s prohibition on making a gift of public funds, OKLA. CONST., Art X, §§ 14 and 15; and

d. The Act violates the Oklahoma Constitution's guarantee of equal protection, which prohibits the state from discriminating between similarly situated persons, OKLA. CONST., Art II, § 7.

4. As taxpayers, the Plaintiffs have standing to challenge the unlawful expenditure of public funds. The unlawful expenditure of public funds is an invasion of a taxpayer's legal rights. A taxpayer's challenge to the constitutionality of legislation affecting the use of public funds is a matter of public right. *Fent v. Contingency Review Board*, 2007 OK 27, 162 P.3d 512.

5. In accordance with OKLA. STAT. tit. 12, § 1653(C) (2011), a copy of this pleading is served on E. Scott Pruitt, the Attorney General of the State of Oklahoma, who is entitled to be heard with regard to this challenge to the Act's constitutionality.

#### **Parties, Jurisdiction, and Venue**

6. Plaintiff Clarence G. Oliver, Jr. is a resident of Tulsa County and a taxpayer of the state of Oklahoma. He is Dean Emeritus and professor of the College of Education at Oral Roberts University, having previously been the Dean of the College of Education from 1994 to 1999. Prior to that, he served as superintendent of the Broken Arrow School District from 1974 until 1992, and he first joined the faculty of the Broken Arrow School District in 1955. Oliver was appointed to the Oklahoma State Board of Vocational-Technical Education in 1986 by Governor George Nigh, was reappointed by Governor Henry Bellmon, and served on the board until 1992, including two years under the administration of Governor David Walters. He is a member of the Oklahoma Educators' Hall of Fame, and the Oklahoma Association of School Administrators

awarded him the “Lifetime Achievement Award for Distinguished Service to Education” in 1999. The Board of Education of the Broken Arrow School District named the “Clarence G. Oliver, Jr. Middle School” in his honor, and he has twice been named the “Outstanding Citizen of the Year” by the Broken Arrow Chamber of Commerce. He is a veteran of the Korean War where he served in a front-line infantry unit, and he retired from the United States Army with the rank of major. He received a bachelor’s degree from East Central University and both a Master of Arts and Doctor of Education degree from the University of Tulsa. Oliver has been an active member of the First Baptist Church of Broken Arrow for over 50 years.

7. Plaintiff Earl Garrison is a resident of Muskogee County and a taxpayer of the state of Oklahoma. He has served as a State Senator in the Oklahoma Legislature from 2004 to the present. Garrison served as superintendent of Indian Capital Technology Center from 1997 until 2005 and as superintendent of the Fort Gibson School District from 1992 until 1997. He is a rancher and has served as a teacher and coach in the public schools, a professor at Rose State College, and a regional accreditation officer employed by the Oklahoma State Department of Education. Garrison received his Ed.D. from the University of Oklahoma in 1976, and an undergraduate degree from Northeastern State University. Garrison is a long time member of First Baptist Church of Muskogee.

8. Plaintiff Amy Vargus is a resident of Tulsa County and a taxpayer of the state of Oklahoma. She earned an undergraduate degree from the University of Tulsa in 1996 and a master’s degree from New York University in 2003. She taught for eight

years in Oklahoma's public school system. Vargus is a past president of the Oklahoma chapter of the American Association of Teachers of French and was a board member of the Oklahoma Foreign Language Teachers' Association. She received six "Who's Who Among American High School Teacher" awards. Vargus is married and is the mother of three children, one of whom is a special needs student. All three of her children currently attend the Jenks School District. Vargus has been active in Jenks' Parent Teacher Action Group since her oldest child began school, and has previously served as the group's special needs liaison. Vargus has been actively involved in the Parent Legislative Action Committee for approximately four years.

9. Plaintiff David K. Pennington is a resident of Kay County and a taxpayer of the state of Oklahoma. He has served as superintendent of the Ponca City School District from 2004 to the present, and prior to that he served as superintendent of the Blackwell School District from 1995 to 2004. Pennington is president-elect of the American Association of School Administrators ("AASA"), the national association of school superintendents, for 2013-14. He served on the governing board of the AASA from 2004 through 2010 and on the Executive Committee of the AASA from 2010 to 2013. He has served as a teacher, coach, and administrator in Oklahoma's public schools since 1977. Pennington has a Bachelor of Science, a Masters of Education, and a Doctor of Education from Oklahoma State University. Pennington is a long time active member of the First Baptist Church of Ponca City.

10. Plaintiff Ray Hickman is a resident of Tulsa County and a taxpayer of the state of Oklahoma. He is an ordained Presbyterian minister and is the Executive Director

of the Tulsa Metropolitan Ministry (“TMM”). TMM is a multi-faith ministry that promotes religious understanding, cooperation, and freedom and works to bring people of different faiths together to meet the needs of the community. Hickman received a Bachelor of Arts degree from the University of Texas Permian Basin in 1976, a Masters of Art from Presbyterian School of Christian Education in 1980 and a Masters of Divinity from Austin Presbyterian Theological Seminary in 1982. His wife has been a public school teacher for over 35 years.

11. Plaintiff Kirby A. Lehman is a resident of Tulsa County and a taxpayer of the state of Oklahoma. He served as superintendent of the Jenks School District from February 12, 1990 until June 30, 2013. Under his leadership, the Jenks School District was awarded the Malcolm Baldrige Presidential Award for Institutional Excellence, one of only six school districts in the nation ever to be so honored. Lehman was named “Oklahoma Administrator of the Year” in 2006 and received the Oklahoma Association of School Administrators’ Lifetime Achievement Award in 2013. The Board of Education of the Jenks School District renamed the Jenks High School Math and Science Building “The Kirby A. Lehman Center for the Study of Science and Mathematics” in his honor in 2013. Lehman has been a teacher, principal and superintendent in the public schools of this nation for 45 years. He earned a bachelor’s degree from Purdue University in 1968, a master’s degree from Butler University in 1971, and a doctorate from Indiana University in 1975.

12. Plaintiff Stacy L. Acord is a resident of Tulsa County and taxpayer of the state of Oklahoma. She is an attorney and a partner in the law firm of McDaniel Acord,

PLLC, in Tulsa. Acord received a bachelor's degree from Oklahoma State University in 1996 and a law degree from the University of Oklahoma in 2000. She is a member of the Oklahoma Bar and the Arkansas Bar, and she was named a "Rising Star" by the SuperLawyers publication in 2011, 2012, and 2013. Acord's husband has been a public school teacher for 15 years. She is the mother of two children who attend the Bristow School District, where her husband is currently a teacher and a coach. Acord is an active member of LifeChurch.tv.

13. Plaintiff Robert M. Peters is a resident of Washington County and a taxpayer of the state of Oklahoma. He is a retired speech therapist who was employed by the Bartlesville School District from 1967 until 1987. Peters is a member of the Washington County Retired Educators Association and a life member of the American Speech-Language-Hearing Association. He has both a bachelor's and a master's degree in speech therapy from Wichita State University. He is a long standing member of First Presbyterian Church of Bartlesville.

14. Plaintiff Randall K. Raburn is a resident of Oklahoma County and taxpayer of the state of Oklahoma. He is a professor of Education Leadership and Policy Studies at the University of Oklahoma. He served as Executive Director of the Cooperative Council of Oklahoma School Administration from 1995 to 2008. Prior to that, he served as superintendent of the Edmond School District, the Mid-Del School District, and the Sapulpa School District. Raburn began his career in education as a classroom teacher in 1964. He was twice named the "Oklahoma Administrator of the Year" by the Oklahoma Association of School Administrators, and was inducted into the Oklahoma Educators'

Hall of Fame in 2006. Raburn earned his bachelor's and master's degrees from North Texas State University, and he received a doctorate of education from Oklahoma State University in 1978. Raburn has been a member of his church community for over 20 years.

15. Plaintiff Melissa Abdo is a resident of Tulsa County and taxpayer of the state of Oklahoma. She has been actively involved in the Tulsa Area Parent Legislative Action Committee, a parent led advocacy group supporting public education, and has served as the group's coordinator for the past three years. Under Abdo's leadership the organization has grown substantially and now includes groups of concerned parents throughout the state. She has been active in her local Parent Teacher Association, and she was recently elected to serve on the Board of Education of the Jenks School District, where her 2 children attend school. Abdo received a bachelor's degree from Texas State University at San Marcos in 1990. She is a lifelong Catholic and is active in her church community.

16. Plaintiff Tim Green is a resident of Washington County and a taxpayer of the state of Oklahoma. Green has 37 years experience in public education as a superintendent, business manager, teacher, and coach, including 13 years as the Executive Director of Financial Services of Bartlesville Public Schools. He retired from Bartlesville in 2013 and has recently worked as an adjunct college instructor and an independent speaker regarding school finance. Green has served as a member of the Oklahoma Department of Vocational and Technical Education Advisory Board and as a member of the Oklahoma State Ethics Committee for Superintendents. He has received



the Award of Excellence from the American Association for Career Education and been recognized by the Oklahoma Association of School Business Officials. Green has worked with the Bartlesville City Council to promote economic growth and has written and evaluated numerous grants. Green earned his bachelor's degree from John Brown University 1976 and a master's degree in education from East Central University 1982.

17. Plaintiff Gordon R. Melson is a resident of Seminole County and taxpayer of the State of Oklahoma. He is an attorney practicing in Ada and Seminole and a retired District Judge of the 22<sup>nd</sup> Judicial District. Judge Melson has served as presiding judge of both the South Central Administrative District and the Oklahoma Court of Tax Review. He also served as District Attorney for the 22<sup>nd</sup> Judicial District. Judge Melson is a past president of the Oklahoma Judicial Conference and past chairman of the Oklahoma Assembly of Presiding Judges. He has also served as chairman of the Administration of Justice Committee of the Oklahoma Bar Association. He received the "Award for Judicial Excellence" from the Oklahoma Bar Association and the "Whinery Distinguished Service Award" from the University of Oklahoma College of Law for outstanding contributions to Oklahoma evidence law. Judge Melson received his bachelor's degree in 1961 and his law degree in 1963, both from the University of Oklahoma. He has previously served as a member of the Executive Board of Perkins School of Theology at Southern Methodist University and has been an active member of First Methodist Church in Seminole for over 30 years.

18. Defendant Janet Barresi is the duly-elected State Superintendent of Public Instruction, which is the state official who has control over and is responsible for

directing the Oklahoma State Department of Education. OKLA. STAT. tit. 70, §§ 3-107 and 3-108 (2011). Barresi is sued in her official capacity only.

19. Defendant Oklahoma State Department of Education (the “SDE”) is the state agency responsible for directing the administration and supervision of the public school system of this state. OKLA. STAT. tit. 70, § 1-105 (2011). The SDE is responsible for implementing and enforcing the Act.

20. Defendant Oklahoma State Board of Education is an agency of the SDE and is the governing board of the public school system of this state. OKLA. STAT. tit. 70, § 1-105 (2011).

21. This court has jurisdiction to issue declaratory and injunctive relief pursuant to OKLA. STAT. tit. 12, §§ 1381 *et seq.* and OKLA. STAT. tit. 12, §§ 1651 *et seq.*

22. Pursuant to OKLA. STAT. tit 12, § 133 (2011), the venue of an action against a public officer for an act done under the color of office lies in the county of the officer’s official residence. *Oklahoma Ordinance Works Authority v. Dist. Ct. of Wagoner County*, 1980 OK 100, 613 P.2d 746. Oklahoma County is the official residence of Barresi, the SDE, and the State Board of Education.

#### **Provisions of the Act**

23. The Act went into effect on August 27, 2010. The Act provides that students who attended a public school during the prior school year and were on an individualized education program (“IEP”) under the federal Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (the “IDEA”), may receive a scholarship from the state of Oklahoma to be used to pay tuition to a private school. The scholarship will

remain in force from year to year until the student graduates from high school, regardless of whether the student continues to need or qualify for a special education IEP.

24. The Act requires a private school that desires to participate in its scholarship program to notify the SDE of its intention to participate. The SDE is required to approve a private school to participate in the scholarship program if the private school satisfies certain criteria set forth in the Act.

25. The Act contains no provision that would prohibit private religious schools from participating in its scholarship program. The SDE currently lists 49 private schools as having been approved to participate in the Act's scholarship program. At least 43 of those private schools are religious schools. Upon information and belief, the Plaintiffs allege that some or all of the private religious schools that receive state funding under the Act require their students to receive religious instruction for the purpose of inculcating specific religious beliefs in their students.

26. The IDEA grants significant protections to students with disabilities (and the parents of such students) who attend the public schools of this nation. The IDEA requires public schools to provide all students with disabilities a free appropriate public education in the least restrictive environment and provides detailed procedural safeguards that enable parents to challenge the individualized education program being provided to their child. Students who attend private schools are not entitled to the protections of the IDEA, and the Act specifically provides that parents who accept a scholarship under the Act are deemed to have renounced their right to the protections and services guaranteed by the IDEA.

27. On information and belief, the Plaintiffs assert that only six of the 49 private schools that have been approved by the SDE to participate in the Act's scholarship program provide comprehensive special education services to their enrolled students and none provide the full panoply of special education services provided by the public schools of this state.

28. The amount of the scholarship for each student is determined based on a formula set forth in the Act. The Act makes the SDE responsible for administering scholarships and issuing the tuition payments for such scholarships to participating private schools. The Act provides that the SDE shall calculate the total cost of all scholarships under the Act and "shall 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." **This means that the state funding available to every school district in Oklahoma each year is reduced by the total amount of private school scholarships paid under the Act.**

29. Upon information and belief, the Plaintiffs state that for the 2012-13 school year, 220 students were granted scholarships under the Act, and approximately \$1.6 million in public funds was diverted by the state of Oklahoma to private schools in the form of scholarship payments.

30. Upon information and belief, the Plaintiffs state that as of the filing of this lawsuit, the SDE has approved approximately 250 scholarship applications for the 2013-

14 school year. Upon information and belief, the Plaintiffs assert that the SDE will approve approximately 300 scholarship applications by December 1, 2013.

**First Cause of Action – Violation of OKLA. CONST. Art. II, § 5**

The Plaintiffs incorporate all of the allegations of paragraphs 1 through 30, and further state:

31. 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:

**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 (emphasis added).

32. The Oklahoma Supreme Court has held that a private religious school is a “sectarian institution” within the meaning of OKLA. CONST., Art. II, § 5. *Gurney v. Ferguson*, 1941 OK 397, 122 P.2d 1002. In *Gurney* and in *Board of Ed. for Independent School District No. 52 v. Antone*, 1963 OK 165, 384 P.2d 911, the Oklahoma Supreme Court held that allowing students who attended a private religious school to travel to their private school on school buses owned and operated by a public school violated the Oklahoma Constitution. The court specifically rejected the contention that allowing students who attended a private religious school to ride to school on buses owned and operated by a public school was a matter of general public welfare. The court held that

providing aid to a private, religious school violated Article II, Section 5 of the Oklahoma Constitution. In so holding, the court stated as follows:

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 913 (emphasis added). Consistent with the Oklahoma Supreme Court's holdings in *Gurney* and *Antone*, a previous Attorney General of this State has opined that the Oklahoma Constitution expressly forbids the use of public funds to aid religious schools. In 1979 OK AG 132, Attorney General Jan Eric Cartwright stated as follows:

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. **[Article II, Section 5 of the Oklahoma] Constitution 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** (emphasis added).

*See, also*, 1980 OK AG 196.

33. Because the Act authorizes the payment of public funds to private religious schools, the Act violates OKLA. CONST., Art. II, § 5 both facially and as applied.

**Second Cause of Action – Violation of OKLA. CONST. Art I, § 5 and Art XIII, § 1**

The Plaintiffs incorporate all of the allegations of paragraphs 1 through 33, and further state:

34. 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 (emphasis added).

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 (emphasis added).

35. The Oklahoma Supreme Court has stated that 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.” *Tyron Dependent School District No. 125 of Lincoln County v. Carrier*, 1970 OK 153, 474 P.2d 131, 133 (emphasis added). The Oklahoma Supreme Court has recognized that if a parent chooses to send his or her children to a private school, that parent must assume “the financial burden which that choice entails.” *Board of Ed. for Independent School District No. 52 v. Antone*, 1963 OK 165, 384 P.2d 911. As a result, the Oklahoma Constitution only authorizes the legislature to fund “**a system of free public schools wherein all the children of the State may be educated**” (emphasis added). The Oklahoma Constitution specifically prohibits public funds from being diverted to fund private schools.

36. Because the Act authorizes public funds to be diverted from **public education** to fund **private schools**, both secular and sectarian, which are **not** schools

“wherein all the children of the State may be educated,” the Act violates OKLA. CONST., Art I, § 5 and OKLA. CONST., Art XIII, § 1 both facially and as applied.

**Third Cause of Action – Violation of OKLA. CONST. Art. X, §§ 14 and 15**

The Plaintiffs incorporate all of the allegations of paragraphs 1 through 36, and further state:

37. 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 (emphasis added).

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 (emphasis added).

38. 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. The court has further held that in order to avoid being labeled an unconstitutional gift the state must receive valuable consideration in the form of property or service in exchange for the payment. *Veterans of Foreign Wars v. Childers*, 1946 OK 211, 171 P.2d 618.



39. The Oklahoma Constitution mandates that the state has an obligation to provide an education for the children of this state by the creation of a system of **public schools**. *See* OKLA. CONST., Art I, § 5 and OKLA. CONST., Art XIII, § 1. When a parent elects to send his or her child to a private school, the child is no longer a student of the public school system. The state of Oklahoma has neither the legal obligation nor the right to expend public funds to provide an education to a student attending a private school. Because the state has no legal obligation or right to educate a student attending a private school, the state cannot pay a private school for tuition, books or other items for the benefit of that student. By mandating that the state make payments of **public funds** to **private schools** without receiving anything in exchange, the Act makes an unlawful gift of public funds to the private schools as well as to any enrolled student's parents.

40. Because the Act authorizes the transfer of public funds to private schools for no valuable consideration in exchange for such payment, the Act makes a gift of public funds in violation of OKLA. CONST., Art X, §§ 14 and 15, both facially and as applied.

#### **Fourth Cause of Action – Violation of OKLA. CONST. Art. II, § 7**

The Plaintiffs incorporate all of the allegations of paragraphs 1 through 40, and further state:

41. Article II of the Oklahoma Constitution sets forth the Constitution's Bill of Rights. Article II, Section 7 of the Bill of Rights prohibits the state from treating one class of persons more favorably than another class:

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

OKLA. CONST., Art II, § 7.

42. The Oklahoma Supreme Court has ruled 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, 66 P.3d 442. The Oklahoma Constitution protects citizens against unreasonable classifications that serve no important governmental interest. *Barnes v. Barnes*, 2005 OK 1, 107 P.3d 560. 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, 740 P.2d 141.

43. The Act allows students who were on an IEP under the IDEA at the time they initially received a scholarship to continue to receive a scholarship when they are no longer in need of special education services, but the Act does not authorize students who were never on an IEP to receive a scholarship.

44. The Act also allows “students with disabilities” who are on an IEP under the IDEA to receive a scholarship, but the Act 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.

45. Such discrimination has no rational basis in law or fact and, as a result, the Act unreasonably discriminates between similarly situated students in violation of OKLA. CONST., Art II, § 7, both facially and as applied.

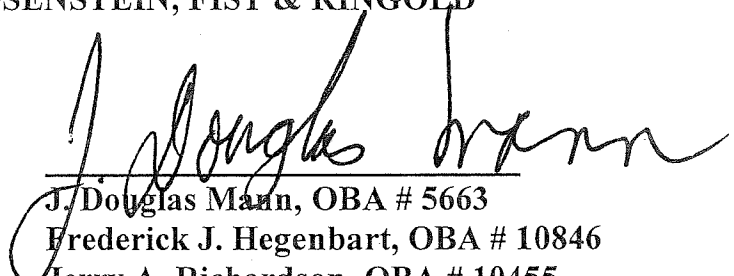
**Prayer for Relief**

46. For the reasons set forth in this petition, the Plaintiffs request that the court:
- a. Issue a declaratory judgment that the Act violates the Oklahoma Constitution and is void and of no legal effect; and
  - b. Issue a permanent injunction prohibiting the Defendants from expending any public funds under the Act; and
  - c. Grant the Plaintiffs all other relief to which they are entitled, including awarding them their reasonable attorney's fees and costs.

Respectfully submitted,

**ROSENSTEIN, FIST & RINGOLD**

by



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**ATTORNEYS FOR PLAINTIFFS**

Oklahoma Statutes Annotated  
Title 70. Schools (Refs & Annos)  
Division I. School Code of 1971  
Chapter 1. School Code of 1971  
Article XIII. Special Services for Children with Disabilities (Refs & Annos)

70 Okl.St.Ann. § 13-101.1

§ 13-101.1. Short title

Currentness

This act shall be known and may be cited as the “Lindsey Nicole Henry Scholarships for Students with Disabilities Program Act”.

**Credits**

Laws 2010, c. 381, § 1.

**Articles I to XVI appear in this volume**

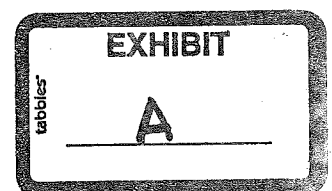
70 Okl. St. Ann. § 13-101.1, OK ST T. 70 § 13-101.1

Current with chapters of the First Regular Session of the 54th Legislature (2013) effective July 1, 2013.

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Oklahoma Statutes Annotated  
Title 70. Schools (Refs & Annos)  
Division I. School Code of 1971  
Chapter 1. School Code of 1971  
Article XIII. Special Services for Children with Disabilities (Refs & Annos)

70 Okl.St. Ann. § 13-101.2

§ 13-101.2. Purpose of act--Scholarship factors--Eligibility

Currentness

A. There is hereby created the Lindsey Nicole Henry Scholarships for Students with Disabilities Program. The Lindsey Nicole Henry Scholarships for Students with Disabilities Program is established to provide a scholarship to a private school of choice for students with disabilities for whom an individualized education program (IEP) in accordance with the Individuals with Disabilities Education Act (IDEA) has been developed at any time prior to notifying the State Department of Education of the intent to participate in the Program and the IEP is in effect at the time the request for a scholarship is received by the State Department of Education. Scholarships shall be awarded beginning with the 2010-2011 school year.

B. The parent or legal guardian of a public school student with a disability may exercise their parental option and request to have a Lindsey Nicole Henry Scholarship awarded for the child to enroll in and attend a private school in accordance with this section and the scholarship shall be awarded if:

1. The student has spent the prior school year in attendance at a public school in this state. For purposes of this section, "prior school year in attendance" means that the student was enrolled in and reported by a school district for funding purposes during the preceding school year regardless of whether or not the student had an IEP at the time the student was counted for funding purposes. A student who is a child of a member of the United States Armed Forces who transfers to a school in this state from out of state or from a foreign country pursuant to a permanent change of station orders of the parent shall be exempt from the requirements of this paragraph but shall be required to meet all other eligibility requirements to participate as provided for in this section; and

2. The parent or legal guardian has obtained acceptance for admission of the student to a private school that is eligible for the program as provided in subsection H of this section and has notified the State Department of Education of the request for a scholarship no later than December 1 of the school year during which the scholarship is requested. The request shall be through a communication directly to the Department in a manner that creates a written or electronic record of the request and the date of receipt of the request. The Department shall notify the school district upon receipt of the request. 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. At any time, the parent or legal guardian of the student may remove the student from the private school and place the student in another private school that is eligible for the program as provided in subsection H of this section or place the student in a public school.

C. A student shall be eligible for a scholarship if the parent or legal guardian of the student made a request for a scholarship for the 2010-2011 school year and the student transferred to an eligible private school but was subsequently denied a scholarship because the student did not have an IEP in effect on October 1, 2009, but did meet all other eligibility requirements as set forth in the Lindsey Nicole Henry Scholarships for Students with Disabilities Program Act.

D. A student shall not be eligible for a Lindsey Nicole Henry Scholarship if the student is not having regular and direct contact with the private school teachers at the physical location of the private school.

E. School districts shall notify the parent or legal guardian of a public school student with a disability of all options available pursuant to this section and inform the parent or legal guardian of the availability of information about the program from the State Department of Education through the toll-free telephone number or website. The notification shall be provided with or included in the copy of the "Parents Rights in Special Education: Notice of Procedural Safeguards" document given to parents at least annually or as otherwise required by law.

F. 1. Acceptance of a Lindsey Nicole Henry Scholarship shall have the same effect as a parental revocation of consent to service pursuant to 20 U.S.C., Sections 1414(a)(1)(D) and 1414(C) of the IDEA.

2. Upon acceptance of a Lindsey Nicole Henry Scholarship, the parent or legal guardian shall assume full financial responsibility for the education of the student, including but not limited to transportation to and from the private school.

G. If the parent or legal guardian requests a Lindsey Nicole Henry Scholarship and the student is accepted by the private school pending the availability of a space for the student, the parent or legal guardian of the student shall notify the State Department of Education before entering the private school and before December 1 in order to be eligible for the scholarship during the school year when a space becomes available for the student in the private school. If notification is made after December 1, payment of the scholarship shall not begin until the next school year.

H. To be eligible to participate in the Lindsey Nicole Henry Scholarships for Students with Disabilities Program, a private school shall notify the State Department of Education of its intent to participate. The notice shall specify the grade levels and services that the private school has available for students with disabilities who are participating in the scholarship program. The State Department of Education shall approve a private school as eligible to participate in the scholarship program upon determination that the private school:

1. Meets the accreditation requirements set by the State Board of Education or another accrediting association approved by the State Board of Education;

2. Demonstrates fiscal soundness by having been in operation for one (1) school year or providing the State Department of Education with a statement by a certified public accountant confirming that the private school desiring to participate is insured and the owner or owners have sufficient capital or credit to operate the school for the upcoming year by serving the number of students anticipated with expected revenues from tuition and other sources that may be reasonably expected. In lieu of a statement, a surety bond or letter of credit for the amount equal to the scholarship funds for any quarter may be filed with the Department;

3. Complies with the antidiscrimination provisions of 42 U.S.C., Section 2000d;

4. Meets state and local health and safety laws and codes;

5. Will be academically accountable to the parent or legal guardian for meeting the educational needs of the student;

6. Employs or contracts with teachers who hold baccalaureate or higher degrees, or have at least three (3) years of teaching

experience in public or private schools, or have special skills, knowledge, or expertise that qualifies them to provide instruction in subjects taught;

7. Complies with all state laws relating to general regulation of private schools; and

8. Adheres to the tenets of its published disciplinary procedures prior to the expulsion of a scholarship student.

I. 1. Lindsey Nicole Henry Scholarship Program participants shall comply with the following:

a. the parent or legal guardian shall select the private school from the schools approved for eligibility pursuant to subsection H of this section and apply for the admission of the child,

b. the parent or legal guardian shall request the scholarship no later than December 1 of the school year during which the scholarship is requested,

c. any student participating in the scholarship program shall attend throughout the school year, unless excused by the school for illness or other good cause, and shall comply fully with the code of conduct for the school,

d. the parent or legal guardian shall fully comply with the parental involvement requirements of the private school, unless excused by the school for illness or other good cause, and

e. upon issuance of a scholarship warrant, the parent or legal guardian to whom the warrant is made shall restrictively endorse the warrant to the private school for deposit into the account of the private school. The parent or legal guardian may not designate any entity or individual associated with the private school as the attorney in fact for the parent or legal guardian to endorse a warrant. A parent or legal guardian who fails to comply with this subparagraph shall forfeit the scholarship.

2. A participant who fails to comply with this subsection forfeits the scholarship.

J. Provisions governing payment of a Lindsey Nicole Henry Scholarship shall be as follows:

1. 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;

2. The maximum scholarship granted for an eligible student with disabilities shall be a calculated amount equivalent to the total State Aid factors for the applicable school year multiplied by the grade and disability weights generated by that student for the applicable school year. 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. The maximum scholarship amount shall be calculated by the State Board of Education for each year the student is participating in the scholarship program;

3. The amount of the scholarship shall be the amount calculated in paragraph 2 of this subsection or the amount of tuition and fees for the private school, whichever is less, minus up to two and one-half percent (2 1/2%) of the scholarship amount which may be retained by the State Department of Education as a fee for administrative services rendered. The amount of any assessment fee required by the private school and the amount associated with providing services and therapies to address the disabilities of the student may be paid from the total amount of the scholarship. The amount of the scholarship shall be prorated to reflect the number of days remaining in the current school year, if the scholarship request is granted after the beginning of the school year;

4. The State Department of Education shall notify the private school of the amount of the scholarship within ten (10) days after receiving the request for a scholarship, when the total State Aid factors have been determined for the current fiscal year. The initial payment shall be made after the Department verifies admission acceptance and enrollment. Quarterly payments shall be made upon verification of continued enrollment and attendance at the private school. Payment shall be made by the Department with an individual warrant made payable to the parent or legal guardian of the student and mailed by the Department to the private school that the parent or legal guardian chooses. The parent or legal guardian shall restrictively endorse the warrant to the private school for deposit into the account of the private school;

5. The State Department of Education shall not be responsible for any additional costs associated with special education and related services incurred by the private school for the student including the cost of teachers, equipment, material, and special costs associated with the special education class;

6. The State Department of Education shall establish a toll-free telephone number or website that provides parents or legal guardians and private schools with information about the program;

7. The State Department of Education shall require an annual, notarized, sworn compliance statement by participating private schools certifying compliance with state laws and shall retain all records received from a participating private school; and

8. The State Department of Education shall cross-check the list of participating scholarship students with the public school enrollments prior to each scholarship payment to avoid duplication.

K. 1. The State Superintendent of Public Instruction shall deny, suspend, or revoke the participation of a private school in the scholarship program if it is determined that the private school has failed to comply with the provisions of this section. However, in instances in which the noncompliance is correctable within a reasonable amount of time and in which the health, safety, or welfare of the students is not threatened, the Superintendent may issue a notice of noncompliance which shall provide the private school with a time frame within which to provide evidence of compliance prior to taking action to suspend or revoke participation in the scholarship program.

2. If the Superintendent intends to deny, suspend, or revoke the participation of a private school in the scholarship program, the Department shall notify the private school of the proposed action in writing by certified mail and regular mail to the private school's address of record with the Department. The Department shall also notify any parents or legal guardians of scholarship students attending the private school. The notification shall include the reasons for the proposed action and notice of the timelines and procedures set forth in this subsection.

3. The private school that is adversely affected by the proposed action shall have fifteen (15) days from receipt of the notice of proposed action to file with the Department a request for an administrative hearing proceeding pursuant to the Administrative Procedures Act.



4. Upon receipt of a request for a hearing, the State Board of Education shall commence a hearing within sixty (60) days after the receipt of the formal written request and enter an order within thirty (30) days after the hearing.

5. The Board may immediately suspend payment of scholarship funds if it is determined that there is probable cause to believe that there is an imminent threat to the health, safety, or welfare of the students or fraudulent activity on the part of the private school.

L. No liability shall arise on the part of the state, the State Board of Education, the State Department of Education or a school district based on the award or use of any scholarship provided through the Lindsey Nicole Henry Scholarships for Students with Disabilities Program.

M. The inclusion of private schools within options available to public school students in Oklahoma shall not expand the regulatory authority of the state or any school district to impose any additional regulation of private schools beyond those reasonably necessary to enforce the requirements expressly set forth in this section.

N. If the State Department of Education determines that a school district prior to the effective date of this act has failed to comply with the provisions of the Lindsey Nicole Henry Scholarships for Students with Disabilities Program Act and has failed to make full or partial scholarship payments for eligible students, the Department shall have authority to reduce the amount of State Aid allocated to the school district or require the school district to make repayment to the Department of State Aid allocations in an amount equal to the amount of scholarship payments the school district failed to make. The Department shall make payment to the parent or legal guardian in the amount the school district failed to make in the manner as provided for in subsection J of this section.

#### **Credits**

Laws 2010, c. 381, § 2; Laws 2011, c. 356, § 1; Laws 2012, c. 322, § 1.

#### **Articles I to XVI appear in this volume**

70 Okl. St. Ann. § 13-101.2, OK ST T. 70 § 13-101.2

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