IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

INDEPENDENT SCHOOL DISTRICT NO. 5 OF TULSA COUNTY, OKLAHOMA, a/k/a JENKS PUBIC SCHOOLS, *et al.*, Plaintiffs,	Case No. CV 2011-00890
vs.	Judge Dana Lynn Kuehn
RUSSELL SPRY, STEPHANIE SPRY, *et al.*, Defendants.	

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

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RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

In support of their motion for summary judgment, the Defendants rely on arguments already considered and rejected by this Court and legal conclusions that are contrary to the controlling decisions of the Oklahoma Supreme Court. As this brief will make clear, the Defendants' motion for summary judgment is without merit and should be denied.

The Defendants are parents who are using public funds to pay the cost of sending their children to private schools pursuant 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"). Because the Defendants are utilizing the Act to divert public funds to private schools, both secular and religious, in violation of the Oklahoma Constitution, the Defendants are causing injury to every public school district in Oklahoma, including the Plaintiff School Districts. As this Court properly determined when it overruled the Defendants' motion to dismiss, the Plaintiff School Districts' request for declaratory and injunctive relief presents an actual controversy between the parties.

The Defendants contend the Act does not violate the no funding of religion clause of the Oklahoma Constitution, OKLA. CONST. art. II, § 5, citing *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, 171 P.2d 600. The Plaintiffs ignore the fact that the decision in *Murrow Indian Orphans Home* turned on the duty imposed by the Oklahoma Constitution to provide for needy children. In *Board of Ed. for Independent School District No. 52 v. Antone*, 1963 OK 165, 384 P.2d 911, the Oklahoma Supreme Court distinguished *Murrow Indian Orphans Home* from cases involving aid to private religious schools. The court made clear that aid to private religious schools is governed by *Antone* and the court's earlier decision in *Gurney v. Ferguson*, 1941 OK 397, 122 P.2d 1002.

The Defendants contend the Act does not violate OKLA. CONST. art. I, § 5, and OKLA. CONST. art. XIII, § 1, which require the state to establish and maintain a system of public schools, because the Legislature's decision as to how it will fund public education is a nonjusticiable political question. The Oklahoma Supreme Court has made clear, however, that the political question doctrine does not prevent judicial review of legislative enactments that violate the Oklahoma Constitution. *Okla. Educ. Ass'n v. State*, 2007 OK 30, 158 P.3d 1058, and *Calvey v. Daxon*, 2000 OK 17, 997 P.2d 164.

The Defendants contend the Act is not an unconstitutional gift of public funds, arguing the Act has a public purpose and consideration was received. But the appellate courts of this state have repeatedly held that merely because a legislative act may be said to serve some general public good does not mean it is for a public purpose. In order to serve a public purpose, the expenditure of public money must be controlled or supervised by the government. *Veterans of Foreign Wars v. Childers*, 1946 OK 211, 171 P.2d 618, and *Orthopedic Hospital of Okla. v. Okla. Dept. of Health*, 2005 OK CIV APP 43, 118 P.3d 216.

Under the Act, the state has absolutely no say in how private schools expend the public funds that are diverted to them. Indeed, the Act does not even require private schools that receive public funds for enrolling students with disabilities to provide any special education services for those students with disabilities. Moreover, the state receives absolutely no consideration in exchange for its gift of public funds under the Act.

The Defendants contend the Act does not violate the equal protection component of the Oklahoma Constitution. The Defendants do not dispute that the Act discriminates between similarly-situated students; they merely speculate that the legislature may have intended such discrimination. Yet even if the legislature intended to discriminate in the treatment of similarly-situated students, that intention does not make the decision rational.

Finally, the Defendants contend that following the Oklahoma Supreme Court's controlling precedents regarding the Oklahoma Constitution risks violating the United States Constitution. This is blatantly untrue. In *Locke v. Davey*, 540 U.S. 712 (2004), the United States Supreme Court considered this identical question with regard to the no-funding provision in the State of Washington's constitution. The Court in *Locke* held that states do not violate the United States Constitution merely because their constitutions draw "a more stringent line" than does the United States Constitution with regard to the public funding of religious activities. The Court concluded that the State of Washington's enforcement of its own constitution violated neither the Free Exercise Clause of the First Amendment nor the Equal Protection Clause of the Fourteenth Amendment. The same is true in this case. The Defendants' suggestion that enforcing the Oklahoma Constitution creates the risk of a conflict with the United States Constitution is rhetorical legerdemain at its best – or worst.

The Defendants' arguments repeatedly emphasize that the legislature has discretion with regard to the expenditure of public funds and urge deference to that discretion. But the legislature does not have discretion to violate the Oklahoma Constitution. As the Oklahoma Supreme Court stated in *General Motors Corp. v. Okla. County Bd. of Equalization*, 1983 OK 58, ¶ 17, 678 P.2d 233, 236, "If the Legislature has not acted within the framework of the Constitution, it has not acted. An unconstitutional statute confers no rights, creates no liability, and affords no protection." In *State ex rel. Tharel v. Bd. of Com'rs of Creek County*, 1940 OK 468, 107 P.2d 542, the court stated in the first syllabus that "an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed." The Oklahoma Supreme Court has emphasized that "[a] mandatory provision in our constitution ... is a limitation upon the power of the legislature .... We will not adopt a strict or technical construction of our constitution so as to defeat the evident object and purpose of the constitutional provision, in order to uphold a legislative enactment." *Lepak v. McClain*, 1992 OK 166, ¶ 8, 844 P.2d 852, 854.

The Defendants ask this Court to uphold a legislative enactment that plainly and unquestionably violates multiple provisions of the Oklahoma Constitution. Such an unconstitutional statute "is in reality no law" and is "wholly void." The Defendants' motion for summary judgment should be denied.

Summary Judgment Standard

"Summary judgment is proper when there is no dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Rox Petroleum, LLC v. New*

Dominion, LLC, 2008 OK 13, ¶ 2, 184 P.3d 502, 504. "Summary judgment settles only questions of law" and is appropriate where "the evidentiary materials establish each and every material fact necessary to support a judgment as a matter of law." *Id.*

Response to Defendants' Statement of Material Facts

The Plaintiff School Districts request that the Defendants' statement of material facts be disregarded because it violates Rule CV 18 of the Rules of the District Court of Tulsa County. The Defendants' statement of material facts consists of almost three and one-half pages of single-spaced text. Rule CV 18 specifically requires that all briefs comply with Rule 1.11(a) of the Oklahoma Supreme Court Rules, OKLA. STAT. tit. 12, Ch. 15, App. That rule governs the form of briefs and requires "single spaced lines of quoted matter and double spaced lines of unquoted matter." The Defendants' statement of material facts consists almost exclusively of "unquoted matter" that must be double spaced. By improperly including three and one-half pages of single-paced text in their 20 page brief, the Defendants not only violated Rule 1.11(a) but also exceeded the page limitation of Rule CV 18.

Even if the Court considers the statement of material facts in the Defendants' brief, those statements do not provide any basis for granting the Defendants' motion for summary judgment. The Defendants' statement includes inadmissible hearsay, argument, and claims that are wholly unsupported by the evidentiary materials that are attached. More important, the Defendants' statements are irrelevant to the legal issues presently before this Court. None of the so-called "facts" set forth by the Defendants establishes that the Defendants are entitled to judgment as a matter of law on any of the issues raised in this case. For that reason, the Defendants' motion should be overruled.

In specific response to the Defendants' statements, the Plaintiff School Districts state:

Paragraphs 1, 2, and 3 of the Defendants' statement of material facts are statements of law, not fact.

Paragraphs 4 through 15 contain much of the same background information set forth at pp. 5-10 of the Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss, filed November 1, 2011. However, the Defendants' statements include allegations that are not supported by the cited evidentiary materials (the final sentence of ¶ 4 and the final sentence of ¶ 13), inadmissible hearsay (¶ 4 and ¶ 9), and argument (¶ 9 and ¶ 10). To the extent the Defendants' statements include factual matters that are not objectionable, they are irrelevant to the legal issues presented by this case.

Paragraph 16 mischaracterizes the Order entered by Chief Judge Claire V. Egan in which she invited the school districts to file their own declaratory judgment action. In that order, Chief Judge Eagan stated that such an additional action would not be an inefficient use of judicial resources, as such a suit "would be a live controversy, and would be a better means of resolving the controversy between the parties." *See Kimery, et al. v. Broken Arrow Public Schools, et al.*, Case No. 11-CV-0249-CVE-PJC, Order entered on July 18, 2011 [Dkt. No. 52], p. 10, n.8 (emphasis added).

Paragraph 18 of the Defendants' statement is demonstrably false, as it ignores the fact that the Plaintiff School Districts' Petition expressly seeks a declaratory judgment declaring the Act unconstitutional. *See* Petition, unnumbered opening paragraph, ¶ 3, and ¶ 41(a).

The Defendants' statement of material facts does not address the legal issues raised in this action. For that reason, their statement does not provide a basis for granting summary judgment. The Defendants' motion for summary judgment should be denied.

Argument and Authorities

Rather than address the causes of action in the order set forth in the Petition, the Defendants elected to proceed in a different order. This is an obvious attempt to downplay the significance of the first cause of action alleged in the Plaintiff School Districts' Petition: that the Act violates the no-funding provision of OKLA. CONST. art. II, § 5. Given the weakness of the Defendants' argument addressing the no-funding question, such attempt to deflect attention away from this issue is understandable.

Although the Plaintiff School Districts' motion for summary judgment addresses the issues in the order pleaded in the Petition, for the Court's convenience, the Plaintiff School Districts will respond to the Defendants' arguments in the order presented by the Defendants.

Proposition I

The Instant Case Involves an Actual Controversy

A declaratory judgment is appropriate 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. Here, the Defendants are using an unconstitutional statute to divert public funds to private secular schools and private sectarian schools, thereby harming public education. As this Court properly determined when it denied the Defendants' motion to dismiss, this case presents an actual, justiciable controversy that this court can and should decide.

The Defendants have presented nothing in their motion for summary judgment to cause the Court to reconsider its prior ruling. For the reasons set forth in Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss at pp. 12-20, which the Plaintiff School Districts incorporate by reference, the Defendants' motion should be denied.

Proposition II

The Act Makes a Gift of Public Funds

A. The Act Does Not Serve a Public Purpose. The Defendants argue that the Act serves a public purpose because "providing for the education of every Oklahoma child is a public purpose." Defendants' Brief, p. 7. According to the Defendants' argument, the state could lawfully pay every family that home schools its children $10,000 per child, under the theory that such payment was for the public purpose of "providing for the education of every child." This is clearly not the law.

The Defendants improperly conflate the specific constitutional requirement that expenditures of public funds have a "public purpose" with the idea of actions that are for the public good. The courts of this state have repeatedly rejected arguments that seek to equate these distinct concepts.

In *Veterans of Foreign Wars v. Childers*, 1946 OK 211, 171 P.2d 618, the Oklahoma Supreme Court held that the legislature violated OKLA. CONST. art. X, § 14 by appropriating funds to the Veterans of Foreign Wars, a private corporation devoted to providing assistance to America's veterans and their dependants. The court conceded that although the organization "might operate for the good of the public ... it would nevertheless be a private organization and a private purpose in so far as concerns the state and the public monies of the state." *Id.* at ¶ 12, 171 P.2d at 621. The court cited its prior decision in *Vette v Childers*, 1924 OK 190, 228 P.145, in which the court had invalidated the legislature's appropriation of money to a private organization for construction of a warehouse to hold agricultural products, noting that in that case, the service "was a service for the public good" but was not for a "public purpose" because it was to be performed by a private organization:

> Under [OKLA. CONST. art. X, §§ 14 and 19], money in the state treasury can only be appropriated and used for public purposes, and in order to constitute a public purpose, within the meaning of this constitutional provision, such purpose must not only be affected with a public interest, but must be performed by the state in the exercise of its governmental functions, and public funds cannot be used to assist individuals in a business which is affected with a public interest ....

Veterans, ¶ 14, 171 P.2d at 621, quoting *Vette*, syllabus no. 4 (emphasis added).

The Court of Civil Appeals relied on these two decisions in its opinion in *Orthopedic Hospital of Okla. v. Okla. Dept. of Health*, 2005 OK CIV APP 43, 118 P.3d 216, in which the court held unconstitutional a statute that assessed a fee against medical facilities that did not generate a specific percentage of their fees from "uncompensated care" and distributed the funds generated by such fees to those facilities that met the standard. The statute did not establish any restrictions on how the recipient facilities were to use the funds. The State of Oklahoma argued, as do the Defendants in this case, that the statute had a public purpose: "spreading the burden of providing indigent care equally upon all facilities in the State and encouraging facilities to provide care to indigents." *Id.* at ¶ 9, 118 P.3d at 221. The Court of Civil Appeals ruled that this "purpose" was insufficient under *Veterans* and *Vette*, noting that "this is merely an argument that the public will receive an indirect benefit from the distribution of these tax proceeds." *Id.* The court held that the statute was unconstitutional because "the direct beneficiaries of public tax dollars will be private corporations who will not be controlled in any manner by the State of Oklahoma." *Id.* at ¶ 9, 118 P.3d at 221-22.

The Act suffers the same flaw. It places absolutely no restrictions on the private schools' use of public funds. Private schools that enroll students with disabilities under the Act are not obligated to provide any special education services to those students. Indeed, the Act makes clear that it is not imposing any obligations on private schools. *See* OKLA. STAT.

tit. 70, § 13-101.1(M), as amended. As in *Orthopedic Hospital*, the government exercises absolutely no control over how these private organizations use public funds.

The Defendants cites *Helm v. Childers*, 1938 OK 34, 75 P.2d 398, and *Bd. of Com'rs of Marshall County v. Shaw*, 1947 OK 181, 182 P.2d 507. Neither case helps them. *Helm* held merely that the State Travel and Tourist Bureau, an arm of the state, could lawfully employ a publicity director. *Shaw* involved the state's reimbursement to two counties for ad valorem tax assessments on land that had been purchased by the state for the purpose of establishing a prison farm but was subsequently sold to a private purchaser. The purchaser failed to pay the taxes on the land for a number of years, resulting in the state foreclosing on the land and selling it to a third party free of any liens for the unpaid ad valorem taxes. The court stated that the reimbursement to the counties was not a gift to the counties because the payment was incidental to the liquidation of a state project, the proposed a prison farm. *Shaw*, ¶ 43, 182 P.2d at 516. The court distinguished *Vette v. Childers*, *supra*, noting that in *Vette*, "we pointed out the distinction between the appropriation of money for public purposes and private purposes, and said that to constitute a public purpose, as the term was used in section 14, Art. 10 of the Constitution, such purpose must not only be affected by a public interest but must be performed by the State in the exercise of its governmental functions." *Shaw*, ¶ 42, 182 P.2d at 516 (emphasis added).

B. The State Receives No Consideration under the Act. The Defendants argue that the State of Oklahoma receives consideration under the Act because the private schools are providing education services to the students enrolled pursuant to the Act. The Defendants argue that *Childrens Home & Welfare Ass'n v. Childers*, 1946 OK 180, 171 P.2d 613, supports this argument. It does not.

Childrens Home & Welfare Ass'n is a companion case to *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, 171 P.2d 600, which was decided the same day. Both cases involved the constitutionality of the state paying private organizations to provide care for orphaned children. In *Murrow*, the organization was sectarian, and the court focused on the no funding of religion provision, OKLA. CONST. art. II, § 5. In *Childrens Home & Welfare Ass'n*, the organization was secular, and the court focused on whether the payment was a gift in violation of OKLA. CONST. art. X, § 15. Both cases ultimately turned on the same point, however: the Oklahoma Constitution imposed on the state an affirmative duty to provide for orphans. *Murrow*, ¶ 6, 171 P.2d at 602 (citing OKLA. CONST. art. XXI, § 1[1] and observing that such provision authorizes the state to provide "for the relief and care of the needy" (citation omitted)); *Childrens Home & Welfare Ass'n*, ¶ 4, 171 P.2d at 614 (acknowledging "the duty of the State of Oklahoma to care for orphan children").

The court concluded in *Childrens Home & Welfare Ass'n* that paying a private organization to provide for orphaned children was not a gift because the State of Oklahoma had a duty under the constitution to provide such care. Because the constitution does not specify how that duty is to be performed, the state has the right to use any method it chooses to satisfy that obligation, including contracting with secular or sectarian organizations to provide such services.

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[1] OKLA. CONST. art. XXI, § 1, provides:

> Educational, reformatory, and penal institutions and those for the benefit of the insane, blind, deaf, and mute, and such other institutions as the public good may require, shall be established and supported by the State in such manner as may be prescribed by law.

The same is not true of education. As to the state's obligation to provide an education to its children, the Oklahoma Constitution specifically requires that duty to be performed through a system of public schools. OKLA. CONST. art I, § 5 and OKLA. CONST. art XIII, § 1. For that reason, the Oklahoma Supreme Court stated in *Board of Ed. for Independent School District No. 52 v. Antone*, 1963 OK 165, 384 P.2d 911, that although parents have the right to choose to send their children to a private religious school rather than a public school, the state has no obligation to pay for such a private education:

> 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.

Id. at ¶ 11, 384 P.2d at 913.

The Oklahoma Constitution requires the state to perform its duty of providing education by mandating a system of free public education. This option is available to everyone. Parents who decline the public education made available by the state and choose instead to send their children to private schools must bear the cost of that choice. By relieving parents of that cost, the state makes a gift in violation of the Oklahoma Constitution. Because the state has no duty to provide a private school education, the state is receiving no consideration in exchange for paying for children to attend private schools.

As with their public purpose argument, the Defendants' "consideration" argument could be used to justify paying parents for the cost of home schooling their own children, on the theory that the state was receiving consideration by virtue of the parents' providing educational services. The Oklahoma Constitution cannot be so manipulated.

Proposition III

The Act Violates the Oklahoma Constitution's "No-Funding" Provision

The Defendants argue that the Act does not violate the no-funding provision of the Oklahoma Constitution, OKLA. CONST. art. II, § 5, because that provision applies only to sectarian institutions.[2] They point to the Oklahoma Supreme Court's decision in *Meyer v. Oklahoma City*, 1972 OK 45, 496 P.2d 789, in which the court held that Oklahoma City's maintenance of a cross on the city's fairgrounds did not violate article II, section 5. Even a cursory reading of *Meyer* makes clear that it does not support the Defendants' argument. With regard to its jurisprudence under the no-funding clause, the court in *Meyer* stated:

> Our prior decisions made it clear that whenever public money or property became operative in an effective way to be appropriated, applied, donated or used for the use, benefit or support of any sect, church, denomination, system of religion or sectarian institution as such, the proscribed practices have been enjoined.

Id. at ¶ 11, 496 P.2d at 792. The court then pointed out that maintenance of a cross in a "secular environment" and "in the midst of persons in pursuit of distinctly secular entertainment" cannot conceivably be said to operate "for the use, benefit, or support of any of the institutions or systems named in Art. 2, § 5." *Id.*[3]

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[2] The Defendants characterize OKLA. CONST., Art. II, § 5 as a "Blaine Amendment." The "Blaine Amendment" was an unsuccessful attempt in 1875 to amend the United States Constitution to prohibit the expenditure of public funds for any school run by a religious sect. Oklahoma did not become a state until 1907, over 30 years after the defeat of the Blaine Amendment. Moreover, the Enabling Act passed by Congress in 1906 to allow Oklahoma's admission to the Union required the Oklahoma Constitution to provide that public schools would be free from sectarian control. Act of June 16, 1906, ch. 3335, § 3, 34 Stat. 267, 270 (1906). There is absolutely no basis for characterizing any provision of the Oklahoma Constitution as a so-called "Blaine Amendment."

[3] The quoted comments are a sufficient response to the Defendants' petulant claim that "sectarian" is a "pejorative" term. Defendants' Brief, p. 12, n.1. Our Supreme Court's

The Defendants fail to acknowledge that the Oklahoma Supreme Court has repeatedly recognized that a private religious school is a sectarian institution within the meaning of OKLA. CONST. art. II, § 5. *Gurney v. Ferguson*, 1941 OK 397, ¶ 7, 122 P.2d 1002, 1003; *Board of Ed. for Independent School District No. 52 v. Antone*, 1963 OK 165, ¶ 10, 384 P.2d 911, 913; *Burkhardt v. City of Enid*, 1989 OK 45, ¶ 17, 771 P.2d 608, 612. Indeed, in *Burkhardt*, the court specifically approved the definition of "sectarian institution" as "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." *Id.*, quoting *Gurney*, ¶ 7, 122 P.2d at 1003.

There can be no doubt that the private religious schools that are receiving public funds under the Act are "maintained" so "that the children of parents of that particular faith would be taught in that school the religious tenets of the church." *See* Opening Brief in Support of Plaintiffs' Motion for Summary Judgment, filed November 17, 2011, pp. 7-8, Undisputed Material Facts Nos. 3-8 and attached exhibits. Accordingly, such private religious schools are "sectarian institutions" under OKLA. CONST. art. II, § 5.

The Defendants rely on *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, 171 P.2d 600. But as the Plaintiff School Districts pointed out at pp. 11-12, *supra*, *Murrow*

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comments in *Meyer* leave no doubt that the term "sectarian," as used in the Oklahoma Constitution, is merely a synonym for "religious." The United States Supreme Court has likewise repeatedly and consistently used the term "sectarian" as a synonym for "religious." *See Salazar v. Buono*, ___ U.S. ___, 130 S. Ct. 1803, 1818 (2010), *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993), *Agostini v. Felton*, 521 U.S. 203, 229 (1997). The Justices of the United States Supreme Court and the Oklahoma Supreme Court use the term "sectarian" just as the drafters of the Oklahoma Constitution intended, as a synonym for "religion" or "religious."

does not control this situation because the Oklahoma Constitution does not mandate a specific way in which the state is to fulfill its constitutional duty to provide care for orphans, whereas the constitution unequivocally does mandate that the state must fulfill its constitutional duty to provide education by establishing and maintaining a system of public schools. OKLA. CONST. art I, § 5 and OKLA. CONST. art XIII, § 1.

So as to leave no doubt that the rationale of *Murrow* could not be applied to the question of providing aid or benefits to religious schools, the Oklahoma Supreme Court distinguished both *Murrow* and *State v. Williamson*, 1959 OK 207, 347 P.2d 204 (also cited by the Defendants) in *Antone*. The court expressly held that neither case conflicted with the holding in *Gurney v. Ferguson*, in which the court held unconstitutional a statute that required public school districts to provide transportation to students attending private religious schools. *Antone*, ¶ 9, 384 P.2d at 913. The court concluded its opinion in *Antone* with the following definitive and dispositive statement:

> As we pointed out in *Gurney v. Ferguson*, *supra*, if the cost of school buses and the maintenance and operation thereof is in aid of the public schools, then it would seem to necessarily follow that when pupils of parochial schools are transported by them such service is in aid of that school. Any such aid or benefit, 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.

Antone, ¶ 12, 384 P.2d at 913-14 (emphasis added).

The Defendants' reliance on *Murrow* and *Williamson* is completely misplaced. *Gurney*, *Antone*, and *Burkhardt* establish beyond dispute that the Act violates OKLA. CONST. art. II, § 5. The Defendants' arguments are without merit and should be rejected.

Proposition IV

The Act Violates the Equal Protection Component of the Oklahoma Constitution

The Defendants argue that the Act does not violate the anti-discrimination component of the Oklahoma Constitution's due process clause, which is the "functional equivalent" of the Equal Protection Clause in the federal constitution. *Gladstone v. Bartlesville Ind. School District No. 30*, 2003 OK 30, ¶ 6, 66 P.3d 442, 446, n.15. The Defendants concede that the Act discriminates between students with disabilities who are on an individualized education plan ("IEP") under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (the "IDEA"), and students with disabilities who are on accommodation plans under the Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.[4]

The Defendants speculate that the legislature may have had some reason for discriminating between such similarly-situated students, yet they fail to identify any. Defendants' Brief, pp. 17-18. Contrary to the Defendants' assumption, students must undergo evaluations in order for school officials to determine whether they require a Section 504 accommodation plan. A Section 504 accommodation plan requires collaboration between parents and educators just as does an IEP. The legislature could not have rationally concluded that the cost of educating students on IEPs is always higher than the cost of

[4] The Defendants appear to deny that the Act discriminates between similarly-situated students without disabilities. Defendants' Brief, p. 16, n.2. Yet the Act allows a student who obtains a scholarship to have such scholarship renewed until he or she graduates from private school or reaches the age of 22, without regard to whether such student remains in need of or eligible for special education services, *See* OKLA. STAT. tit. 70, § 13-101.1(B)(2), as amended. Thus, a regular education student who was once in need of special education services but has progressed to the point that he or she no longer requires or is eligible for special education services is treated more favorably than a regular education student who was never in need of special education services. There is no rational basis for such discrimination.

educating students on Section 504 accommodation plans, because this simply is not true. All the Defendants can offer to justify the legislature's discriminatory treatment of similarly-situated students is the assertion that the legislature must have intended such discrimination.

Although the legislature is presumed to have acted within its powers, "[t]his presumption disappears when the statutory classification ... rests on grounds wholly irrelevant to the achievement of the state's objective." *Fair Sch. Fin. Council of Okla., Inc.*, 1987 OK 114, ¶¶ 34 and 62, 746 P.2d 1135, 1144 and 1150; *McDonald v. Time-DC, Inc.*, 1989 OK 76, ¶ 15, 773 P.2d 1252, 1257 n.23. A legislative enactment constitutes arbitrary, capricious, and irrational discrimination when it discriminates against less than the entire class of similarly situated persons. The Oklahoma Supreme Court has consistently held that a law that does not treat the entire class of similarly-situated persons equally constitutes an arbitrary and capricious abuse of power:

> [W]here a statute operates upon a class, the classification must not be capricious or arbitrary and must be reasonable and pertain to some peculiarity in the subject matter calling for the legislation. As between the persons and places included within the operation of the law and those omitted, there must be some distinctive characteristic upon which a different treatment may be reasonably founded and that furnish a practical and real basis for discrimination.

Burks v. Walker, 1909 OK 317, ¶ 23, 109 P. 544, 549. *See also Roberts v. Ledgerwood*, 1928 OK 723, 272 P. 448, *Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, 148 P.3d 842 *and City of Enid v. Pub. Emps. Relations Bd.*, 2006 OK 16, 133 P.3d 281 (each directly quoting *Burks* for this proposition). *Burks* makes clear that the legislature acts arbitrarily, capriciously and irrationally if its legislation does not apply equally to the whole class of similarly-situated individuals. In this case, because the Act does not affect the entire class of similarly-situated students equally, the Act is arbitrary, capricious and irrational.

Proposition V

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

The Defendants argue that the Act does not violate OKLA. CONST. art. I, § 5, and OKLA. CONST. art. XIII, § 1, which require the state to establish and maintain a system of public schools, because the legislature has discretion as to how it will provide a public school system. In effect, the Defendants ask this Court to rule that by diverting funds away from public education to a competing system of private schools, the legislature is complying with its constitutional obligation to maintain a system of public schools. This is pure Orwellian doublespeak.[5]

The Oklahoma Supreme Court has recognized that "[p]ublic education is a function of the State." *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). It is absurd to suggest that the legislature is maintaining a system of public education by diverting scarce financial resources away from public education and into a competing system of private education.

The Defendants also contend that the legislature's decision to fund private education through the Act presents a nonjusticiable "political question." They cite *Okla. Educ. Ass'n v.*

[5] In his novel *1984*, George Orwell presented "WAR IS PEACE" and "FREEDOM IS SLAVERY" as classic examples of doublespeak.

State, 2007 OK 30, 158 P.3d 1058, to support this argument. Yet that case makes clear that the political question doctrine does not allow the legislature to violate the Oklahoma Constitution. "The legislature has the exclusive authority to declare the fiscal policy of Oklahoma limited only by constitutional prohibitions." *Id.* at ¶ 25, 158 P.3d 1066 (emphasis added). Indeed, the Oklahoma Supreme Court has repeatedly emphasized this point. *See Calvey v. Daxon*, 2000 OK 17, ¶ 21, 997 P.2d 164, 171 (holding that the judiciary has the right to review fiscal legislation when "it encounters a specific constitutional prohibition").

The Defendants may not insulate the Act from judicial review by claiming the legislature's unconstitutional action is simply a "political question." The Defendants' motion for summary judgment should be denied.

Proposition VI

This Court's Enforcement of the Oklahoma Constitution Will Not Create a Conflict with the United States Constitution

In a last-ditch effort to save the Act, the Defendants falsely claim that enforcement of the Oklahoma Constitution will conflict with the United States Constitution. This is demonstrably untrue, as counsel for the Defendants well knows. The Becket Fund for Religious Liberty, the pro-voucher advocacy law firm that authored the Defendants' brief, made the same arguments in an amicus brief to the United States Supreme Court in *Locke v. Davey*, 540 U.S. 712 (2004) (*see* Becket Fund amicus brief at 2003 WL 22118852).

In *Locke*, the Supreme Court rejected the argument that the no funding of religion clause of the Washington Constitution conflicted with the Free Exercise Clause of the United States Constitution. The Court explained that although the Establishment Clause permits states to provide government funding to religious organizations in certain circumstances, the

Free Exercise Clause does not compel the states to do so. *Id.* at 719. The Court held that state constitutions do not violate the United States Constitution merely because they draw "a more stringent line" than does the United States Constitution with regard to the public funding of religious activities. *Id.* at 722.

The Court also rejected the argument that the Washington Constitution was not facially neutral with regard to religion, as required by *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).[6] The Court stated that applying the *Lukumi* line of cases to the facts of *Locke* would extend them "well beyond not only their facts but their reasoning." *Locke*, 540 U.S. at 720. The Court explained that Washington has not treated religion with disfavor. Rather, it "has merely chosen not to fund a distinct category of instruction." *Id.*

In a footnote, the Court noted that its rejection of the plaintiff's free exercise claim required the rejection of his equal protection claim as well: "Because we hold ... that the program is not a violation of the Free Exercise Clause, ... we apply rational-basis scrutiny to his equal protection claims .... For the reasons stated herein, the program passes such review." *Id.* at 721, n.3. In the same footnote, the Court also rejected the plaintiff's free speech claim, noting that the scholarship at issue "is not a forum for speech" and the Court's "cases dealing with speech forums are simply inapplicable." *Id.*

Locke v. Davey establishes that state constitutions do not violate the United States Constitution merely because they do not provide public funding for religion. The Defendants' argument to the contrary has been conclusively rejected by the Supreme Court.

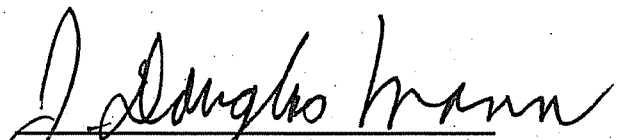
Conclusion

The Defendants' motion for summary judgment should be denied.

[6] Defendants make the identical argument in this case. Defendants' Brief, pp. 19-20.

Respectfully submitted,

ROSENSTEIN, FIST & RINGOLD

by 

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CERTIFICATE OF MAILING

I hereby certify that on the 2nd 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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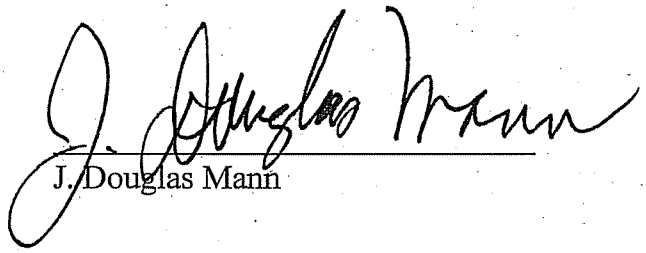

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