



IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

DISTRICT COURT
FILED

SEP - 2 2011

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

INDEPENDENT SCHOOL DISTRICT)
NO. 5 OF TULSA COUNTY, OKLAHOMA,)
a/k/a JENKS PUBLIC SCHOOLS, and)
INDEPENDENT SCHOOL DISTRICT)
NO. 9 OF TULSA COUNTY, OKLAHOMA,)
a/k/a UNION PUBLIC SCHOOLS,)

Plaintiffs,)

vs.)

RUSSELL SPRY, STEPHANIE SPRY,)
TIM TYLICKI, KIMBERLY TYLICKI,)
TIM FISHER, KRISTIN FISHER, STEFAN)
HIPSKIND, STEPHANIE HIPSKIND,)
JERRY SNEED, and SHANNA SNEED,)

Defendants.)

CV 2011-00890

Case No.

DANA LYNN RUEHN

Judge

PETITION

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"), bring this action against the Defendants, parents of students with disabilities who have obtained "scholarships" to pay the cost of tuition for their children to attend private schools pursuant to the "Lindsey Nicole Henry Scholarships for Students with Disabilities Program Act" (hereafter, "HB 3393"). The Plaintiff School Districts seek a declaratory judgment establishing that HB 3393, and the subsequent amendments to HB 3393 contained in HB 1744, are unconstitutional and invalid. The Plaintiff School Districts also seek a temporary and permanent injunction restraining the Defendants from pursuing administrative claims against the Plaintiff

School Districts before the State Department of Education ("SDE") based on the Defendants' allegations that the Plaintiff School Districts failed to comply with HB 3393 during the 2010-2011 school year. In support of their petition, the Plaintiff School Districts state:

Preliminary Statement

1. In 2010, the Oklahoma legislature enacted HB 3393, which was codified at OKLA. STAT. tit. 70 §§ 13-101.1 and 13-101.2 (2010 Supp.). As originally enacted, HB 3393 authorized certain children with disabilities who had previously attended a public school during the 2009-10 school year to receive a "scholarship" to pay tuition at a private school, including a private religious school, commencing with the 2010-2011 school year. A formula set forth in HB 3393 determined the amount of the scholarship. Local school districts (including the Plaintiff School Districts) were required to fund the scholarships by issuing general fund warrants to the private schools, but with the warrants made payable to the parents or legal guardians of the students who received the scholarships. The parent or legal guardian was required to restrictively endorse the warrant to the private school their child was attending for deposit into the private school's account. A copy of HB 3393 is attached to this petition as Exhibit A.

2. During the 2011 legislative session, the Oklahoma legislature passed HB 1744, which amended HB 3393. HB 1744 made several changes to HB 3393, including shifting responsibility for making scholarship payments from the individual school districts to the SDE. Under HB 1744, the SDE is required to calculate the total amount of scholarships granted under HB 3393 in each school year and withhold that amount from

the state aid to be distributed to all public school districts in Oklahoma. HB 1744 also authorizes the SDE to determine whether any school district failed to comply with HB 3393 during the 2010-2011 school year, and to reduce the state aid to, or require repayment of state aid from, any school district that failed to make full or partial scholarship payments for eligible students who had applied for scholarships under HB 3393. The amendments to HB 3393 contained in HB 1744 went into effect on August 26, 2011. A copy of HB 1744 is attached to this petition as Exhibit B.

3. HB 3393 and HB 1744 are unconstitutional for the following reasons:

a. HB 3393 and HB 1744 violate the Oklahoma Constitution's Bill of Rights, which prohibits the use of public funds to aid, directly or indirectly, any sectarian institution, OKLA. CONST. Art. II, § 5;

b. HB 3393 and HB 1744 violate the Oklahoma Constitution's mandate that the legislature establish and maintain a system of free public schools, OKLA. CONST., Art I, § 5 and Art XIII, § 1;

c. HB 3393 and HB 1744 violate the Oklahoma Constitution's prohibition on making a gift of public funds, OKLA. CONST., Art X, §§ 14 and 15; and

d. HB 3393 and HB 1744 violate the Oklahoma Constitution's Bill of Rights which, through the due process clause, prohibits discrimination between similarly situated persons, OKLA. CONST., Art II, § 7.

Parties, Jurisdiction and Venue

4. The Plaintiff School Districts are independent political subdivisions of the State of Oklahoma that are governed by their boards of education. Pursuant to OKLA. STAT. tit. 70, § 5-105 (2001), the Plaintiff School Districts have the authority to bring lawsuits in their own names. The administrative offices of both of the Plaintiff School Districts are located in Tulsa County.

5. 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 Stephanie Spry live within the Jenks School District, and they applied for and obtained a scholarship under HB 3393 to enable G.S. to attend Town & Country School, a private school.

6. 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 HB 3393 to enable M.T. to attend Town & Country School, a private school.

7. 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 HB 3393 to enable K.F. to attend Metro Christian Academy, a private religious school.

8. The Defendants, Stefan and Stephanie Hipkind, are the parents of L.H. and A.J.H, minor students with disabilities who previously attended the Union School District. Stefan and Stephanie Hipkind live within the Union School District, and they applied for and obtained scholarships under HB 3393 to enable L.H. and A.J.H. to attend Immanuel Christian Academy, a private religious school.

9. 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 HB 3393 to enable B.S. to attend Town & Country School, a private school.

10. 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.*

11. Venue is appropriate in Tulsa County pursuant to OKLA. STAT. tit 12, §§ 139 and 1653.

Provisions of HB 3393 and HB 1744

12. On May 26, 2010, the Oklahoma legislature enacted HB 3393, and the governor signed HB 3393 into law on June 7, 2010. HB 3393 went into effect on August 27, 2010.

13. Beginning with the 2010-2011 school year, HB 3393 allowed children 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"), to receive a "scholarship" to be used to pay

tuition to a private school. The "scholarship" will remain in force until the student returns to a public school or graduates from high school, regardless of whether the student continues to need or qualify for a special education IEP.

14. HB 3393 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 HB 3393 scholarship program if the private school satisfies certain criteria set forth in HB 3393.

15. HB 3393 contains no provision that would prohibit private religious schools from participating in its scholarship program. The SDE currently lists 31 private schools on its website as having been approved to participate in the HB 3393 scholarship program. See <http://sde.state.ok.us/Curriculum/SpecEd/Scholarship.html>. Of those 31 private schools, 30 are religious schools.

16. The amount of the HB 3393 scholarship for each student is to be determined based on a formula set forth in HB 3393. Until HB 1744 was enacted, local school districts were required to fund the scholarships by issuing general fund warrants to the private schools but with the warrants made payable to the parents or legal guardians of the students who are to receive the scholarships. The parent or legal guardian was required to restrictively endorse the warrant to the private school their child is attending for deposit into the private school's account.

17. On May 19, 2011, the Oklahoma legislature passed HB 1744, which amended HB 3393. The governor signed HB 1744 into law on May 26, 2011. HB 1744 went into effect on August 26, 2011.

18. HB 1744 makes the SDE responsible for administering scholarships under HB 3393 and issuing the tuition payments for such scholarships to participating private schools. HB 1744 provides that the SDE shall calculate the total cost of all scholarships under HB 3393 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 every school district in the state will see its state aid reduced to pay for the cost of private school scholarships under HB 3393, regardless of whether a student from that school district applies for and receives a scholarship under HB 3393.

19. HB 1744 also authorizes the SDE to enforce HB 3393 against any school district that it determines failed to comply with HB 3393 during the 2010-2011 school year. Specifically, HB 1744 authorizes the SDE to determine whether any school district failed to make full or partial scholarship payments for any student eligible for scholarship under HB 3393, and "to reduce the amount of State Aid allocated to the school district or require the school district to make repayment to the [SDE] of State Aid allocations in an amount equal to the amount of scholarship payments the school district failed to make." The SDE is authorized to make any scholarship payments that the school district failed to make.

Factual Allegations

20. After seeking advice from their attorneys, the boards of education of the Plaintiff School Districts and certain other school districts determined that HB 3393 violates several provisions of the Oklahoma Constitution. Rather than comply with a law

they believed to be unconstitutional, the boards of education of these school districts publicly announced during the first two weeks of October, 2010, that their school districts would not process scholarship applications under HB 3393. The boards of education did this in the good faith belief that one or more parents would promptly bring suit to compel the school districts to process such scholarship applications under HB 3393, thereby providing a vehicle to obtain a judicial determination of the constitutionality of HB 3393. No such lawsuits were filed, however.

21. In January of 2011, the Attorney General of the State of Oklahoma sent a letter to the superintendent of each of the school districts that had declined to process scholarship applications under HB 3393 threatening to take legal action against the school districts and the members of their boards of education. The Attorney General threatened to take action that would expose the superintendents of the school districts and the members of their boards of education "to legal liabilities, both official and personal."

22. In response to the threats made by the Attorney General, the boards of education of the Plaintiff School Districts determined to seek a declaratory judgment as to the constitutionality of HB 3393. Because the Attorney General expressly threatened to take legal action against the individual members of the school districts' boards of education and their superintendents not only in their official capacity but also in their personal capacity, the boards of education of the school districts determined to process scholarship applications under HB 3393 while seeking a determination of the constitutionality of HB 3393. Accordingly, the Plaintiff School Districts have fully complied with the provisions of HB 3393 and have made all scholarship payments

required by HB 3393 for the 2010-2011 school year. Included within these payments were all scholarship payments required by HB 3393 for the Defendants' children.

23. Before the Plaintiff School Districts filed a declaratory judgment action, the parents of some students with disabilities, including the Defendants herein, filed an action in the United States District Court for the Northern District of Oklahoma against the Plaintiff School Districts, the Broken Arrow School District, and the Tulsa School District, alleging that those school districts had failed to comply with HB 3393 and had thereby violated the rights of the parents and their children under both federal and state law. *See Kimery, et al. v. Broken Arrow Public Schools, et al.*, Case No. 11-CV-0249-CVE-PJC, Complaint [Dkt. No. 2], filed April 25, 2011. Believing the federal court action would provide an appropriate vehicle to challenge the constitutionality of HB 3393, the Plaintiff School Districts did not go forward with their own declaratory judgment action at that time. Instead, the school districts in the federal court action filed a motion to dismiss and asked the federal court to determine that HB 3393 was unconstitutional and invalid. Motion to Dismiss [Dkt. No. 37] and Opening Brief in Support of Motion to Dismiss [Dkt. No. 38], both filed on June 13 2011.

24. Rather than respond to the school districts' motion to dismiss, the parents in the federal court action filed an amended complaint [Dkt. No. 45] and a motion to stay all proceedings in the federal court action so as to enable the parents to pursue their "administrative remedies" under HB 1744. Opposed Motion to Stay All Proceedings [Dkt. No. 46], filed July 1, 2011. In spite of the vigorous objection of the school districts, the federal court granted the parents' motion and stayed all proceedings in the federal

court action by Order entered on July 18, 2011 [Dkt. No. 52]. In her order staying the federal court action, Chief Judge Claire V. Eagan invited the school districts to file their own declaratory judgment action to challenge the constitutionality of HB 3393, stating 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.” Order, p. 10, n.8.

25. Accordingly, the Plaintiff School Districts now bring this action seeking declaratory and injunctive relief.

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

The Plaintiff School Districts incorporate all of the allegations of paragraphs 1 through 25, and further state:

26. 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).

27. 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 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*, previous Attorney Generals of this State have 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.

28. Because HB 3393 and HB 1744 authorize the payment of public funds to private religious schools, HB 3393 and HB 1744 violate OKLA. CONST., Art. II, § 5.

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

The Plaintiff School Districts incorporate all of the allegations of paragraphs 1 through 28, and further state:

29. 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).

30. 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.

31. Because HB 3393 and HB 1744 authorize public funds to be diverted from public education to fund private schools, both secular and sectarian, they violate OKLA. CONST., Art I, § 5 and OKLA. CONST., Art XIII, § 1.

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

The Plaintiff School Districts incorporate all of the allegations of paragraphs 1 through 31, and further state:

32. 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).

33. 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.

34. 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 private school, the child is no longer a student of the public school district. The school district has neither the legal obligation nor the right to expend public funds to provide services to that privately schooled student. Because a school district has no legal obligation or right to educate that private school student, HB 3393 scholarships, funded by that public school district, cannot be used to pay a private school for tuition, books or other items for the benefit of that student. As a result, by mandating that the plaintiff school districts make payments of public funds to private schools without receiving anything in exchange, HB 3393 and HB 1744 make an unlawful gift of public funds to the private schools as well as to the student's parents.

35. Because HB 3393 and HB 1744 authorize the transfer of public funds to private schools for no valuable consideration in exchange for such payment, HB 3393 and HB 1744 make a gift of public funds in violation of OKLA. CONST., Art X, §§ 14 and 15.

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

The Plaintiff School Districts incorporate all of the allegations of paragraphs 1 through 35, and further state:

36. 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.

37. 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. Barilesville 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.

38. HB 3393 and HB 1744 authorize students who were on an IEP under the IDEA at the time they received a scholarship to continue to receive a scholarship when they are no longer in need of special education services, but they do not authorize students who were never on an IEP to receive a scholarship.

39. HB 3393 and HB 1744 further authorize "students with disabilities" who are on an IEP under the IDEA to receive a scholarship, but they do 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.

40. Such discrimination has no rational basis in law or fact and, as a result, HB 3393 and HB 1744 unreasonably discriminate between similarly situated students in violation of OKLA. CONST., Art II, § 7.

Prayer for Relief

41. For the reasons set forth in this petition, the Plaintiff School Districts request that the court:

(a) issue a declaratory judgment that HB 3393 and HB 1744 violate the Oklahoma Constitution and are void and of no effect; and

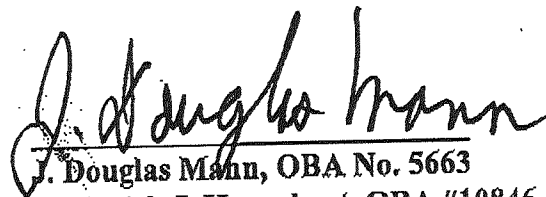
(b) issue temporary and permanent injunctive relief prohibiting the Defendants from attempting to enforce any claims they contend they have against the Plaintiff School Districts in an administrative proceeding before the SDE pursuant to the terms of HB 1744; and

(c) grant the Plaintiff School Districts all other relief to which they are entitled, including awarding them their reasonable attorney’s fees and costs.

Respectfully submitted,

ROSENSTEIN, FIST & RINGOLD

by



J. Douglas Mann, OBA No. 5663

Frederick J. Hegenbart, OBA #10846

Karen L. Long, OBA #5510

Jerry A. Richardson, OBA #10455

525 S. Main, Suite 700

Tulsa, OK 74103

(918) 585-9211

(918) 583-5617 facsimile

E-mail: dougman@rfrlaw.com

fredh@rfrlaw.com

karenl@rfrlaw.com

jerryr@rfrlaw.com

**ATTORNEYS FOR PLAINTIFFS JENKS
SCHOOL DISTRICT AND UNION
SCHOOL DISTRICT**