

2016 OK 15

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

Plaintiffs/Appellees,)

v.)

No. 113,267

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

Defendants/Appellants.)

FILED
SUPREME COURT
STATE OF OKLAHOMA

FEB 16 2016

MICHAEL S. RICHIE
CLERK OF
THE APPELLATE COURTS

FOR OFFICIAL PUBLICATION

TAYLOR, J., concurring:

I agree that two provisions of the Lindsey Nicole Henry Scholarships for Students with Disabilities Act (the Act), 70 O.S.2011, § 13-101.1 & 70 O.S.Supp. 2012, § 13-101.2, do not run afoul of Article II, Section 5 of the Oklahoma Constitution.

This Court has spoken directly on the issue now before it in *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, 171 P.2d 600. *Murrow* did not hinge on whether the payment was made directly or indirectly to the religious institution. The plaintiffs in *Murrow* questioned payments made to a Baptist supported orphanage

for the housing and care of dependent children of this state. *Id.* ¶¶ 2, 5. The care of these needy children was mandated by this State's Constitution. *Id.* ¶ 6. The orphanage's yearly cost per child was \$225 to \$250, and the state's payment to the orphanage per child was \$70 under a contract with the orphanage. *Id.* ¶ 2. This Court determined that "so long as [the payments] involve the element of substantial return to the state and do not amount to a gift, donation, or appropriation to the institution having no relevancy to the affairs of the state," they do not violate Article II, Section 5 of Oklahoma's Constitution. In *Murrow*, the orphanage did not benefit in that it expended more on a child's care than it received from the state coffers. We reiterated in *Burkhardt v. City of Enid*, 1989 OK 45, ¶ 15, 771 P.2d 608, 612, that the key factor in determining an Article II, Section 5 violation was where the governmental entity making a payment to a religious institution receive a substantial benefit in return.

Here, the services for special needs children is mandated by the federal government. The Act is religion neutral—it treats religious private schools the same as non-religious private schools. The Plaintiffs had the burden to show that the religious schools benefitted and that the state did not receive a substantial benefit, and they failed to present any evidence. The facts here are no different than the state making payments to a private institution, although religious, to care for needy, state-dependent children when those payments fail to cover the full cost of their care.

The facts here are no different than the State sending inmates of a state prison to a church-affiliated hospital for medical care. The facts here are no different than a state Medicaid recipient being treated at a church-affiliated clinic. The facts are no different than a church-owned construction company building a road or a bridge for the State. None of these examples have anything to do with religion. They all are simple contract situations. A fee for service in which the State contracts required services to a non-governmental entity. It has nothing to do with religion. It has everything to do with fee for service and a mutual benefit contract.

Under the Lindsey Nicole Henry Scholarships, the State is simply contracting with private schools to perform a service (education of children with special needs) for a fee. The State receives great benefit from this arrangement that has nothing to do with religion. It has to do with education and caring for children with special needs, whose education is the responsibility of the State.

It should be noted that the two private schools who are the largest recipients of these scholarship dollars have no religious affiliation. Andrea Eger, *Public Money to Private Schools: Legal Limbo Persists for Scholarship Students with Disabilities*, Tulsa World, Oct. 18, 2015, available at http://www.tulsaworld.com/news/education/public-money-to-private-schools-legal-limbo-persists-for-scholarship/article_ac864254-5dbb-5206-b9dc-1f2407797352.html. The Tulsa World article also reported that these scholarships do not cover the full cost of the private school tuition—further evidence of benefit to the state. *Id.*

The fact that the scholarship payments are made to the parents and then passed on by endorsing funds over to the private schools is irrelevant. It is still a fee-for-service arrangement that benefits the student, parents, and the State. The State has determined that it is economically efficient to contract its responsibility to these children with special needs to private schools.

There is a presumption that statutes are constitutional and that those challenging a statute as unconstitutional have a heavy burden. *Liddell v. Heavner*, 2008 OK 6, ¶ 16, 180 P.3d 1191, 1199–1200. The Plaintiffs failed to put forth evidence that the state did not receive a substantial benefit from the scholarship, the only factor this Court has articulated in scrutinizing legislation as violative of Article II, Section 5.

The Lindsey Nicole Henry Scholarships are simply fee-for-service contracts for a very narrowly defined group of children with disabilities. There is nothing unconstitutional about this under Article II, Section 5. The benefit of the arrangement is primarily to the State. There is clearly substantial benefit to the State of Oklahoma. *Burkhardt*, 1989 OK 45, ¶ 15, 771 P.2d at 612.