IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

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,	)	
v.	)	Case No. CV 2011-00890
Russell Spry, Stephanie Spry, Tim Tylicki, Kimberly Tylicki, Tim Fisher, Kristin Fisher, Stephan Hipskind, Stephanie Hipskind, Jerry Sneed, and Shanna Sneed,	)	Judge Dana Lynn Kuehn
Defendants.	)	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

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The Defendants, five families of children with disabilities, move this Court for summary judgment against the Plaintiffs, Jenks and Union school districts, as there are no material facts in dispute in the case. Therefore, pursuant to Rule 13, summary judgment should be entered in favor of Defendants and against Plaintiffs as more particularly set forth below.

INTRODUCTION

This lawsuit is both moot and meritless. It is moot because the only relief Plaintiffs could have sought against these Defendants is now impossible to grant against them, because "[the] act sought to be enjoined has been already performed." *Saxon* v. *Macy*, 1990 OK 60, ¶5, 795 P.2d 101, 102. The declaratory relief Plaintiffs seek is not justiciable because there is no "active controversy" between Plaintiffs and these parents. Plaintiffs should be suing the State in Oklahoma County District Court, not parents of disabled children in Tulsa.

The lawsuit is meritless because the undisputed facts in this case do not support any of Plaintiffs' claims. None of Plaintiffs' grab-bag of state constitutional claims can be sustained because Oklahoma is well within its rights to contract with outside providers to fulfill its constitutional duty of educating disabled children. The Oklahoma Supreme Court has shown little patience with challenges like Plaintiffs' that attack the State's policy decisions to expend funds in exchange for valuable consideration. An exchange of goods and services is not a gift. Indeed, it is Plaintiffs' bizarre interpretation of the Henry Scholarship Act and the Oklahoma Constitution that would raise real constitutional problems by creating entirely avoidable conflicts with the Oklahoma and federal Constitutions.

This Court does not need to reach the merits because the case is moot. But if it does, it should grant summary judgment against Plaintiffs on all of their claims.

STATEMENT OF MATERIAL FACTS TO WHICH THERE IS NO GENUINE ISSUE

The following are material and uncontroverted facts for the purpose of this motion for summary judgment.

1. In 2010, Oklahoma enacted the Lindsey Nicole Henry Scholarship for Students with Disabilities Program Act ("Henry Scholarship Act" or "the Act") (**Exhibit A**, 2010 Okla. Sess. Laws Serv. Ch. 381 (H.B. 3393)).

2. The Henry Scholarship Act gives Oklahoma parents of students with disabilities the right to a scholarship to help pay the tuition at the qualifying private school of their choice. (**Exhibit A** §2(A)). Henry Scholarships may be used to attend any accredited private school that, among other things, complies with federal antidiscrimination law, demonstrates fiscal soundness, and will be academically accountable to the parent or legal guardian for meeting the educational needs of the student. (**Exhibit A** at §2(H)).

3. Under the law, Oklahoma school districts were supposed to start issuing Henry Scholarships with the 2010-2011 school year. (**Exhibit A** at §2(A)). Under the initial Henry Scholarship Act, school districts were required to make an initial scholarship payment "after the school district verifies admission acceptance and enrollment" at the chosen qualifying private school, and make quarterly payments thereafter. (**Exhibit A** at §2(F)(4)). School districts were required to make payments payable to Henry Scholarship recipients' parents or guardians, who were required to restrictively endorse payments to the private school. (**Exhibit A** at §2(F)(4)).

4. In October 2010, Plaintiff school districts announced that they were refusing to follow the Henry Scholarship Act. (**Exhibit B**, position statement of Jenks School District with regard to HB 3393). In Plaintiffs' schools, Defendants feared that their children would encounter dangerous situations, including severe bullying, without the care and attention that a private school could provide. (**Exhibit C**, Andrea Eger & Kim Archer, *Bullying is the Biggest Threat to Tulsa County Students*, Tulsa World (August 27, 2011)).

5. Plaintiffs continued to defy the law until January 2011, when the superintendent of each Plaintiff school district received a letter from Oklahoma Attorney General Scott Pruitt. The Attorney General's letter told the superintendents that state officials are not allowed to ignore duly enacted laws, and informed them that Plaintiffs' decision to defy the Henry Scholarship Act exposed the superintendents and members of Plaintiffs' Boards of Education to legal liability, both official and personal. (**Exhibit D**, Attorney General Pruitt's letter to Plaintiff Union, Petition ¶ 21).

6. Plaintiffs responded by changing their position. They pledged to start following the law, but simultaneously promised to bring a declaratory judgment action against the Attorney General to challenge the constitutionality of the Henry Scholarship Act.

(**Exhibit E**, Letter from Union Superintendent Cathy Burden to Attorney General Pruitt and enclosed FAQs, (Jan. 24, 2011); **Exhibit F**, Jenks Press Conference regarding HB 3393, (Jan. 24, 2011); **Exhibit G**, Union Press Conference regarding HB 3393, (Jan. 24, 2011)).

7. Three months later, Plaintiffs had not carried out their threat to bring a declaratory judgment action against the Attorney General. Defendants, along with other Oklahoma parents of children with disabilities, filed a complaint in federal court on April 25, 2011, to protect their right to receive Henry Scholarships, both for the 2010-11 school year and for years to come. (Complaint, *Kimery* v. *Broken Arrow*, Case No. 11-CV-0249-CVE-PJC, N.D. Okla, Dkt. 2, Petition ¶ 23).

8. The federal complaint asked the Court for a permanent injunction requiring the defendant school districts to comply with state law and issue Henry Scholarships. It also asked for damages for scholarship payments unlawfully withheld by the defendant school districts. (Complaint at 2, *Kimery*, Case No. 11-CV-0249-CVE-PJC; First Amended Complaint at 71, *Kimery*, Case No. 11-CV-0249-CVE-PJC, N.D. Okla., Dkt. 45).

9. The State of Oklahoma responded to the actions of Plaintiffs and other school districts by amending the Henry Scholarship Act ("the Amendments"). The Amendments were passed by the Oklahoma Legislature on May 19, 2011, and signed into law a week later. They went into effect on August 26, 2011. (**Exhibit A**, 2011 Okla. Sess. Law Serv. Ch. 356 (H.B. 1744); codified as amended at 70 O.S. 13-101.2 (OSCN 2011)). State Representative Jason Nelson stated, "Last year, several school districts failed to provide scholarships to eligible special needs students, flagrantly violating the law . . . . Thanks to the modifications in this bill, the State Department of Education will administer the program rather than local school districts. This will provide consistency and certainty for students and parents who choose to participate in the program." (**Exhibit H**, *Governor Signs Special Needs Scholarship Legislation*, Edmond Sun, May 27, 2011).

10. The Amendments responded to the refusing school districts in two primary ways. First, the Amendments denied Plaintiffs and other school districts the opportunity to interfere with Henry Scholarships by transferring responsibility for administering the program from local school districts to the State Department of Education ("OSDE"). (**Exhibit A**, §1(G), (J). Second, the Amendments authorized the OSDE to determine whether Plaintiffs and other school districts had "failed to make full or partial scholarship payments" for the 2010-11 school year, and reimburse parents for any Henry Scholarship money they were unlawfully denied. (**Exhibit A**, § 1(N)).

11. On August 3, 2011, the OSDE published a memorandum pursuant to the Amendments, explaining how parents could apply for reimbursement, and how applications for reimbursement would be processed. The memorandum stated that the "LHN Scholarship Reimbursement application will be made available on the OSDE Website," and that "[t]he application deadline for reimbursement is **October 1,**

2011." The OSDE memorandum also explained in detail its procedures for evaluating applications for reimbursement. The parents' only role in the process was to "complete and return the application for LNH Scholarship Reimbursement." From that point forward, all actions would be taken either by the OSDE (steps 4 and 5) or the school district (steps 6 and 7). Applicants were not offered the opportunity to participate in a potential hearing before the State Board of Education. (**Exhibit I**, Memorandum from Anita Eccard, Associate State Director, OSDE (Aug. 3, 2011) at 1).

12. Only one of the Defendant families from Jenks (the Fishers), and none of the Defendant families from Union sought reimbursement. (**Exhibit J**, Fisher Application for reimbursement). The OSDE denied the Fishers' application for a reimbursement of up to $6948.03. (**Exhibit K**, letter from OSDE to Fishers denying reimbursement).

13. In their application for reimbursement, the Fishers alleged that Jenks School District knowingly mischaracterized their child's disorder. They stated that in their attempts to correct the mischaracterization, they were met with "condescending and hateful" behavior from the director of student programs at Jenks. The school, though not disputing the mischaracterization, refused to change its application to the state. (**Exhibit J** at 4).

14. Shortly after the Amendments were signed into law, Defendants and the other plaintiffs in the federal case asked the court to issue a stay in light of the recently passed Amendments. (Motion for a Stay at 4, *Kimery* v. *Broken Arrow*, Case No. 11-CV-0249-CVE-PJC, N.D. Okla., Dkt. 46).

15. On July 18, 2011, Chief Judge Eagan of the Northern District of Oklahoma entered an order staying the federal lawsuit. (Opinion and Order, *Kimery* v. *Broken Arrow*, Case No. 11-CV-0249-CVE-PJC, N.D. Okla., Dkt. 52).

16. On July 18, 2011, Chief Judge Eagan of the Northern District of Oklahoma entered an order staying the federal lawsuit. (Petition ¶ 24, citing Opinion and Order, *Kimery*, Case No. 11-CV-0249-CVE-PJC). The Court entered a stay because it found that "Plaintiffs' claims for injunctive and declaratory relief appear likely to become moot once the amendments to the Act take effect on August 26, 2011, as the school districts will no longer be implementing the scholarship program." (Opinion and Order at 7-8, *Kimery*, Case No. 11-CV-0249-CVE-PJC). The Court noted that the Amendments set up an administrative means "by which plaintiffs may be made whole for funds allegedly owed to them for the 2010-11 school year that form the basis of plaintiffs' damages claim." (*Id.* at 8). Thus, if the OSDE's reimbursement program was successful, "[plaintiffs] claims before the Court will be moot, and the Court will lack jurisdiction." (*Id.*). Based on these observations, the federal court found that a stay "furthers the Court's interest in judicial economy and avoidance of advisory opinions" and granted the parents' motion. (*Id.* at 10-11).

17. On September 6, Union and Jenks filed the present declaratory judgment action, seeking to have the Henry Scholarship Act, as amended, declared unconstitutional. Dkt. 1. However, instead of filing the action against the Attorney General, as they had pledged back in January, they sued the same families whose scholarships they had denied.

18. Plaintiffs' only grounds for suing the parents is that they "seek a temporary and permanent injunction restraining the Defendants from pursuing administrative claims against the Plaintiff School Districts before the State Department of Education [ ] based on the Defendants' allegations that the Plaintiff School Districts failed to comply with HB 3393 during the 2010-2011 school year." (Petition at 1-2; see also ¶ 41(b) (prayer for relief)).

19. On November 2, 2011, Defendants filed a voluntary dismissal of their claims in federal court. On Thursday, November 3, 2011, the federal court terminated the case. (Notice of Dismissal, *Kimery* v. *Broken Arrow*, Case No. 11-CV-0249-CVE-PJC, N.D. Okla., Dkt. 60).

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. 12 O.S. § 2056. Summary judgment is based on "evidentiary materials [that] as a whole (a) show undisputed facts on some or all material issues and (b) . . . support but a single inference in favor of a successful movant's quest for relief." *Gray* v. *Holman*, 1995 OK 118, ¶ 11, 909 P.2d 776, 781.

ARGUMENT

The Court should grant summary judgment for Defendants because the case is moot, and because Plaintiffs' claims cannot be sustained on the merits.

I. The Court lacks subject matter jurisdiction because Plaintiffs have failed to demonstrate an actual live controversy between themselves and the Defendant parents.

As set forth in greater detail in Defendants' motion to dismiss, Plaintiffs' claims are moot because there is no longer any actual controversy between Plaintiffs and Defendants. The sole relief Plaintiffs seek in their petition is to enjoin Defendants from "pursuing administrative claims against the Plaintiff School Districts before the State Department of Education [ ]

based on the Defendants' allegations that the Plaintiff School Districts failed to comply with HB 3393 during the 2010-2011 school year." (Petition at 1-2). Since Defendants are not pursuing and cannot pursue administrative claims against the Plaintiffs regarding Plaintiffs' compliance with the Henry Scholarship Act during the 2010-2011 school year, there is nothing left for the Court to enjoin, nor any rights for the Court to declare.

Defendants hereby incorporate by reference and re-urge the arguments made in their previously-filed motion to dismiss. For the reasons stated in that motion and the reasons stated here, Defendants request that the Court grant summary judgment to Defendants on the question of whether the Court has subject matter jurisdiction to hear this case.

II. The undisputed summary judgment evidence demonstrates that the Henry Scholarship Law is constitutional.

Even if the Court reaches the merits of Plaintiffs' claims, it should grant summary judgment to Defendants. The Henry Scholarship Act has a public purpose (Art. 10, § 14), gives consideration for public funds (Art. 10, § 15), does not give aid to religious institutions (Art. 2, § 5), and does not violate either equal protection or Oklahoma's duty to provide a system of public schools (Art. 2, § 7; Art. 13, § 1; Art. 1, § 5). In fact, Plaintiffs' strained interpretations of the law and the Oklahoma Constitution would result in more constitutional difficulties, not fewer. The Court should avoid these constitutional problems and construe the relevant provisions in accordance with their plain meaning.

A. The Henry Scholarship Act complies with Article 10, Section 14 of the Oklahoma Constitution because it serves a public purpose.

The Henry Scholarship Act serves many valid public purposes. While all funds appropriated by the Legislature must be used for a public purpose, Okla. Const. Art. 10, § 14, the Legislature is given great deference in determining the presence and scope of a public purpose. In *Helm* v. *Childers*, 1938 OK 34, 75 P.2d 398, the Court found the State Travel and

Tourist Bureau served a proper government purpose. The Court said:

> The meaning of "public purposes" for which governmental exaction of money may be had is not within a narrow and restricted sense. At any rate, the **courts cannot interfere to arrest legislative action** where the line of distinction between that allowable and that which is not is faint and shadowy. In such instances **the decision of the Legislature is accepted as final**.

Id., at ¶ 5, 75 P.2d at 399 (emphasis added).

Similarly, in *Board of Commissioners* v. *Shaw*, 1947 OK 181, 182 P.2d 507, the Court determined that a joint resolution reimbursing two counties for taxes lost on land taken for a State project served a public purpose:

> public use requires that the work shall be essentially public and for the general good of all the inhabitants of the taxing body. This does not mean, however, that a tax is not for a public purpose unless the benefits from the funds to be raised are to be spread equally over the whole community or a large portion thereof. A use may be public although it is of benefit primarily to the inhabitants of a small and restricted locality.

Id., at ¶ 36, 182 P.2d at 515. The Court acknowledged that the joint resolution conveyed a benefit to the individuals who subsequently purchased the land from the State because they purchased the land free of delinquent taxes, but found that its primary purpose was public because it was meant to aid the State in liquidating a land project. *Id.*, at ¶ 44, 182 P.2d at 516. Having earlier noted that "a statute enacted by the Legislature is presumed to be constitutional, and that the burden of showing that it is unconstitutional rests upon the party asserting it," *id.*, at ¶ 12, 182 P.2d at 511, and having found a public purpose, the Court ruled it could not hold the joint resolution unconstitutional by virtue of the benefit conveyed to the individuals. *Id.*, at ¶ 44, 182 P.2d at 516.

It is beyond doubt that providing for the education of every Oklahoma child is a public purpose. The work of education is essentially public, and it is for the general good of the State residents. *See, e.g.*, Okla. Const. Art. 1, § 5 (provision to be made for the establishment

of a school system); Okla. Const. Art. 13, § 1 (Legislature shall establish and maintain a system of free public schools); Okla. Const. Art. 13, § 5 (the supervision of instruction shall be vested in the Board of Education).

It is also beyond doubt that providing for the education of students with disabilities is essentially public. In furtherance of its obligation to provide for the education of Oklahoma children, the Legislature in the Oklahoma School Code authorized the provision of special education and related services for children with disabilities. 70 O.S. §§ 13-101, *et seq.* Pursuant to the School Code, Oklahoma has the duty to "provide special education and related services for all children with disabilities as herein defined who reside in that school district in accordance with the Individuals with Disabilities Education Act…." 70 O.S. § 13-101.

In adopting the Henry Scholarship Act, the Legislature has determined that the use of those funds helps meet the State's public work and obligation of educating students with special needs. A legislative finding of a public purpose "should be reversed only upon a clear showing that it was manifestly arbitrary, capricious, or unreasonable." *State ex rel. Brown* v. *City of Warr Acres*, 1997 OK 117, ¶ 18, 946 P.2d 1140, 1144. Because the Legislature's determination is not arbitrary, capricious, or unreasonable, it must stand.

B. The Henry Scholarship Act complies with Article 10, Section 15 because consideration is given for the public funds.

The State of Oklahoma may purchase services from private individuals and entities. Nothing in the state Constitution prohibits it from doing so. Of course, what it cannot do is make a ***gift*** of public funds.

> Except as otherwise 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. 10, § 15.

Whereas Article 10, Section 14 demands a public purpose, Section 15 is satisfied with simple consideration. In *Childrens Home & Welfare Ass'n.* v. *Childers*, 1946 OK 180, 171 P.2d 613, a non-religious, non-profit corporation, provided for the care of orphan children under contract with the State Board of Public Affairs, pursuant to specific legislation. The State Auditor refused to compensate Association for its services, claiming that the payment would violate Section 15. The Court, however, found that the payment complied with Section 15 because there was adequate consideration for the public funds to be paid:

> where the State receives property or service in return for the payment of its money, even though such payment by the State be voluntary in the sense that the contract whereunder the money was paid was voluntarily entered into, it is not to be treated as a gift. [Citation omitted]. It is not necessary to enter into an extended discussion of the service that is rendered to the State of Oklahoma by Association in taking and keeping and caring for the orphan children involved in this contract, but to the extent that Association renders this service to the State of Oklahoma it is furnishing the State a valuable consideration sufficient to support the payment to Association by the State of the State's money raised by public taxes.

Id., at ¶ 5, 171 P.2d at 614.

In *Burkhardt* v. *City of Enid*, 1989 OK 45, 771 P.2d 608, the Court held that transfer of city property to a private university was in consideration, *inter alia*, of potential economic development and lease payments. The Court reiterated that the traditional principle of consideration was applicable to the transfer of public funds and found "consideration may be measured by benefit to one party or by forbearance, detriment, loss or responsibility assumed by the other party." *Id*., at ¶ 13, 771 P.2d at 611.

Consideration can also be provided by the requirements and related terms of the authorizing statute itself. In *Way* v. *Grand Lake Ass'n, Inc.*, 1981 OK 70, 635 P.2d 1010, the Court found that an appropriation to a private entity complied with Section 15, because it was sup-

ported by services and the detailed requirements, qualifications, governmental controls, and safeguards which the statute provided. *Id.*, at ¶ 40, 635 P.2d at 1018. In evaluating the public purpose and consideration of the contract, the Court held:

> When the validity of a statute is drawn in question the Court approaches the subject as one involving the gravest responsibility, and to be considered with the greatest caution. The general assembly is presumed to have been as careful to observe the requirements of the Constitution in enacting the statute as a Court in applying it. **Every presumption is to be indulged in favor of the validity of the act and that presumption is to continue until its invalidity is made to appear beyond a doubt. It is the duty of the Courts to uphold legislative acts unless it plainly and clearly violates the Constitution**, and, if its language is susceptible to a meaning that will remove the objections to its validity, such interpretation should be adopted.

Id., at ¶ 39, 635 P.2d at 1017 (emphasis added).

By virtue of the Henry Scholarship Act, the Legislature has determined Oklahoma may meet its obligation to educate students with disabilities in alternate ways. Oklahoma may pay for the educational needs of the students by providing services directly through the public school system, or, at the election of the parents, Oklahoma may pay for these educational needs through scholarships to approved private schools.

When public funds are paid out in the form of a scholarship, the State receives consideration in the form of assumption of financial responsibility by the parent or guardian. In addition, the State receives consideration from the educator(s) in the form of educational services, and through compliance with certain requirements, qualifications, governmental controls, and safeguards which are set out in the statute.

In return for the scholarship funds, the parents or guardians of the child "assume **full financial responsibility for the education of the student**." 70 O.S. § 13-101.2(F)(2) (emphasis added). When the student is removed from the public system under the Act, the corresponding cost of providing services for the student is assumed by the parent or guardian of the

child. Moreover, the actual cost to the State of educating a particular child is limited to the value of the scholarship as calculated annually by the State Department of Education by application of a simple formula related to the disabilities and grade level of the recipient. *See* 70 O.S. § 13-101.2(J)(2) and (3). Accordingly, the actual cost of educating the recipient becomes determined, known, limited and not subject to potential fluctuation.

In addition, the State receives as consideration the services of the private educators. The private educators, absent acceptance of the scholarship funds, have no obligation to provide the educational services to the subject student. By accepting the funds, the educators subject themselves to certain requirements, qualifications, controls and safeguards from which they would otherwise be free. In addition to providing educational services to the student, the private school must:

> 1. Meet the accreditation standards of the State;
> 2. Demonstrate fiscal soundness;
> 3. Comply with federal antidiscrimination laws;
> 4. Meet state and local health and safety laws;
> 5. Be academically accountable to the parent or legal guardian for meeting educational needs of the student;
> 6. Employ teachers who hold certain educational and experience standards;
> 7. Comply with all state laws relating to general regulation of private schools; [and]
> 8. Adhere to the tenets of its published disciplinary procedures prior to expulsion of a student.

70 O.S. § 13-101.2(H).

There is no legitimate question that the State of Oklahoma receives adequate consideration for the Henry Scholarships. Any argument to the contrary is without merit.

C. The Henry Scholarship Act complies with Oklahoma's constitutional restrictions on using public funds for "sectarian" purposes.

The Oklahoma Constitution does not prohibit every transfer of public money or property

to religious institutions. Oklahoma's Blaine Amendment states:

> 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. 2, § 5 (emphasis added).

By its own, clear terms, the Blaine Amendment prohibits only those transfers that are made *for the* ***use, benefit or support*** of the recipients ***as*** "sectarian" institutions.[1] In *Meyer* v. *Oklahoma City*, 1972 OK 45, 496 P.2d 789, the Court found that a municipality's use of public funds to maintain a cross on public property did not violate the Constitutional prohibition of expenditure of public funds for sectarian purposes. The Court reasoned that maintenance of the cross "cannot conceivably be said to operate for the use, benefit or support of any" sectarian institution. *Id.*, at ¶ 11, 496 P.2d at 792. Therefore, the use of public funds did not violate the Constitution.

Even where public funds are actually paid to religious institutions, Oklahoma courts have long recognized that many such transfers are allowed. In *Murrow Indian Orphans Home* v. *Childers*, 1946 OK 187, 171 P.2d 600, the Court found that the payment of public funds to a private religious home for orphaned children did not violate Article 2, Section 5, because the payment was for a **public purpose** and for **adequate consideration**. *Id.*, at ¶ 9, 171 P.2d at 603. After noting that the State has the duty to care for needy children, the Court ruled the way in which the State meets its duty is generally left to the Legislature, which may "have a discretion in this matter, and may care for needy children through any scheme that seems ap-

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[1] The Tenth Circuit has found that the word "sectarian" is pejorative. *Colorado Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1258 n.5 (10th Cir. 2008). It is a term that no religious entity uses to describe itself.

propriate to them, omitting, of course, to offend other constitutional provisions." *Id.*, at ¶ 6, 171 P.2d at 602. In finding that payment of public funds to religious children's homes comports with Section 5, the Court stated:

> The State is fulfilling a duty to needy children. The institution can render a service that goes far toward the fulfillment of this duty, and for a compensation that is a matter of contract and public record. The matter of the wisdom of the terms of these contracts is for the Legislature and the agency upon which it thrusts the performance commands, and so long as they 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, there is no constitutional provision offended.

Id., at ¶ 6, 171 P.2d at 603.

Adequate consideration is at the core of the matter. When there is adequate consideration, the use of public funds is constitutionally sound. *See State* v. *Williamson*, 1959 OK 207, 347 P.2d 204 (upholding use of public trust funds to build a chapel on the property of a State-owned children's home); *Sharp* v. *City of Guthrie*, 1915 OK 768, 152 P. 403 (approving sale of public lands to a religious institution for $1.00 and other consideration). In *Sharp*, the Court stated:

> The city having the right to sell the property, and the consideration being adequate, it would make no difference whether the grantee be a sectarian institution or not, for a sale upon a sufficient consideration would not be within the prohibition of Section 5, art. 2 of the Constitution.

Id., at ¶ 30, 152 P. at 408.

On the other hand, when adequate consideration for transfer of public funds to religious institutions is absent, the underlying statutory measures run the risk of violating Section 5. In *Gurney* v. *Ferguson*, 1941 OK 397, 122 P.2d 1002, and in *Board of Education for Independent School District 52* v. *Antone*, 1963 OK 165, 384 P.2d 911, the Court struck down statutes that required school systems to allow private and parochial students to utilize public school buses. No consideration was paid by the private schools for use of the buses, and the

Court found that the transfer was for the benefit of the parochial schools in violation of Section 5.

Through the Henry Scholarship Act, the State is fulfilling its public purpose of providing education to children with disabilities. As stated above, in exchange for the scholarship it pays out, the State receives parental assumption of all of the financial responsibility of educating the child, the educational services of the school, and the school's compliance with statutory requirements it could otherwise ignore. All of this consideration benefits the public at large. That the service may at times be bought and paid for from a religious entity is irrelevant.

D. The Henry Scholarship Act is consistent with both the equal protection provisions of Oklahoma's due process clause and the constitutional requirement that the Legislature provide a public school system.

1. Equal Protection.

The Henry Scholarship Act complies with the equal protection component of Oklahoma's due process clause, which provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Okla. Const. Art. 2, § 7. This Court must presume this to be true because "[a] legislative act is presumed constitutional and will be upheld unless shown to the contrary." *Fraternal Order of Police Lodge No. 165* v. *City of Choctaw*, 1966 OK 78, ¶ 14, 933 P.2d 261, 266.

In *Fair School Finance Council of Oklahoma, Inc.* v. *State*, 1987 OK 114, 746 P.2d 1135, the plaintiff sought a judicial declaration that, *inter alia,* Oklahoma's system of funding education violated the state constitutional equal protection provisions because it failed to provide "equal educational opportunities" for all Oklahoma children. *Id.*, at ¶ 20, 746 P.2d at 1141. In upholding the funding mechanism, the Court ruled that education is not a fundamental right protected by the Oklahoma Constitution, and applied the rational basis standard. The Court

held:

> We find no authority to support the plaintiffs' contention that the school finance system should be subjected to strict judicial scrutiny. We previously have held that **our constitution places few restrictions on the Legislature's power to provide a school system for the state** and **the methods employed by the Legislature in doing so are largely within its discretion**. When these methods are challenged, **the only justiciable question is whether the Legislature acted within its powers.** Where the constitutionality of an act of the Legislature is in question, **all reasonable doubt will be resolved in favor of its validity and the act will be declared constitutional unless it can be clearly demonstrated that the Legislature acted arbitrarily and capriciously.**

Id., at ¶ 62, 746 P.2d at 1150 (emphasis added).

Courts have stated the deference accorded to legislative bodies under the rational basis standard in many ways. *See, e.g.*, *Barnes* v. *Barnes*, 2005 OK 1, 107 P.3d 560 (legislation must be upheld if the basis for the difference is neither arbitrary nor capricious, and it bears a reasonable relationship to a legitimate governmental aim); *Nelson* v. *Nelson*, 1998 OK 10, ¶12, 954 P.2d 1219, 1224 ("A statute will be upheld unless it is clearly, palpably and plainly inconsistent with fundamental law"); *Oklahoma Ry. Co.* v. *St. Joseph's Parochial Sch.*, 1912 OK 697, 127 P. 1087 (discrimination is not to be presumed); *Ross* v. *Peters*, 1993 OK 8, ¶ 20, 846 P.2d 1107, 1117 ("Where a legitimate state purpose is achieved via a statutory means that does not violate the relatively relaxed standard of minimal rationality, the classification scheme passes constitutional muster").

The Court clearly stated the standard in *Gladstone* v. *Bartlesville Independent School District No. 30*, 2003 OK 30, 66 P.3d 442, when it held:

> Rational-basis scrutiny is a highly deferential standard that proscribes only that which clearly lies beyond the outer limit of a legislature's power. A statutory classification is constitutional under rational-basis scrutiny so long as there is **any reasonably conceivable state of facts that could provide a rational basis for the classification.** The rational-basis review in equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. For these reasons, legislative bodies are generally **presumed to**

> **have acted within their constitutional power despite the fact that, in practice, their laws result in some inequity.**

Id., at ¶ 12, 66 P.3d 442 at 447 (emphasis added).

The actual class distinction set out on the face of the Henry Scholarship Act is between students with disabilities who are subject to Individual Educational Programs ("IEP"s), and all other students.[2] But "[m]aking classifications is at the heart of the legislative function. In the economic sphere, *it is only the invidious discrimination* – the purely arbitrary act that cannot stand in harmony with the federal and state equal rights guarantee – which will doom legislation." *Gladstone*, at ¶ 18, 66 P.3d 442 at 449 (emphasis in original).

The rational basis test does not require the Legislature to "actually articulate the purpose or rationale that supports its classification," and absent such a statement, "[a] court will hypothesize reasons for the law's enactment." *Id.*, at ¶15, 66 P.3d at 448. A lengthy discussion of all possible reasons for different treatment of classes in the Henry Scholarship Act is unnecessary. Several are obvious. The Legislature may have determined that only students with disabilities who have completed the process required to be placed on an IEP have undergone sufficient evaluation to determine that participation in a private program at state expense would be beneficial. It may have reasoned that placement in a private program with public funds is appropriate only after completion of collaboration between parents and educators that the IEP process provides. It may have determined that the cost of funding the scholarship

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[2] Plaintiffs argue that, in application, the Act draws two improper class distinctions. First, Plaintiffs argue the Act distinguishes between students with disabilities who are on IEPs, as the first class, and students with disabilities who are on accommodation plans, as the second class. Second, Plaintiffs argue that allowing students who were formerly on IEPs to continue receiving scholarship funds after removal from the IEP program discriminates against students who were never on IEPs. No such distinction appears on the face of the Act, and no plaintiff supposedly harmed by such an alleged distinction appears in this case. Nonetheless, such theoretical distinctions would be supported by rational bases.

is only warranted in IEP cases because the cost of educating students within the public school system is higher when the students are on IEPs. Perhaps the Legislature knew that cost of funding scholarships for all students with disabilities was beyond the capacity of the State's coffers. The State may have determined that the best interests of educating its children warranted limiting the program to a specified class of students in order to evaluate whether the program works over time before making it available to a larger student population.

Each of these bases for class distinction is reasonably conceivable. None is invidious. All bear a reasonable relation to the State's purpose of educating children. None is arbitrary or capricious. Their wisdom, fairness, and logic are outside judicial review. *Gladstone*, at ¶ 12, 66 P.3d at 447. The task of placing people in classes for governmental purposes "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, judgment." *Id.*, at ¶ 18, 66 P.3d at 450. Moreover, a system of class distinction "may not be struck down simply because other methods may involve lesser disparities. The relative desirability of a system, as compared to alternative methods, is not constitutionally relevant as long as there is some rational basis for it." *Fair Sch.*, at ¶ 48, 746 P.2d at 1147.

2. Provision of a free public school system.

As in equal protection cases, the Courts have shown great deference to the Legislature with regard to the manner in which the State provides a public school system. "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. 13, § 1. Public schools must be free from "sectarian control." Okla. Const. Art. 1, § 5.

In *Oklahoma Education Ass'n.* v. *State*, 2007 OK 30, 158 P.3d 1058 ("*OEA*"), several

Oklahoma school districts—including Plaintiff Jenks Public Schools—joined the association in seeking declaratory judgment that the Legislature failed to adequately fund a free system of public education in violation of Article 13, § 1, and Article 1, § 5. In affirming the district court's dismissal, the Court found that neither the school districts nor the association had standing to bring the action, *OEA,* at ¶ 26, 158 P.3d at 1066, and that the matter was a non-justiciable political question. *Id.,* at ¶ 18, 158 P.3d at 1065. The Court held that "[e]xcept for the reservation of the power of initiative and referendum, the state's policy-making power is vested exclusively in the Legislature. The Legislature's policy-making power specifically includes both education and fiscal policy" *Id.,* at ¶ 20, 158 P.3d at 1065. The Court ruled:

> The legislature has the exclusive authority to declare the fiscal policy of Oklahoma limited only by constitutional prohibitions. The plaintiffs have failed to provide us with any applicable limitations. The plaintiffs are attempting to circumvent the legislative process by having this Court interfere with and control the Legislature's domain of making fiscal-policy decisions and of setting educational policy by imposing mandates on the Legislature and by continuing to monitor and oversee the Legislature. **To do as the plaintiffs ask would require this Court to invade the Legislature's power to determine policy. This we are constitutionally prohibited from doing.**

Id., at ¶ 25, 158 P.3d at 1066 (emphasis added).

OEA is directly applicable here. To aver that the Oklahoma Legislature is not providing a free system of public education would be an absurdity. No credible argument can be made that the Henry Scholarship Act, in any way, eliminates the public school system. Plaintiff's argument is reduced to this: the Henry Scholarship Act takes money out of the public school system that Plaintiff believes should be spent within the public school system. But that is simply a question of public policy, and is beyond the reach of this Court.

E. The Court must construe the Henry Scholarship Act to avoid a conflict with the Oklahoma Constitution and to avoid a conflict with the United States Constitution.

The Court must construe the Henry Scholarship Act so that it does not violate either the

Oklahoma Constitution or the United States Constitution:

> A heavy burden is cast on those challenging a legislative enactment to show its unconstitutionality and every presumption is to be indulged in favor of the constitutionality of a statute. . . . A court is bound to accept an interpretation that avoids constitutional doubt as to the legality of a legislative enactment.

Edmondson v. *Pearce*, 2004 OK 23 ¶ 17, 91 P.3d 605, 615. Moreover,

> While courts will not refuse to pass on the constitutionality of statutes in any proceeding in which such a determination is necessarily involved, needless consideration of attacks on their validity and unnecessary decisions striking down statutes will be avoided.

In re Mayes-Rogers Counties Conservancy Dist. Formation, 1963 OK 206, 386 P.2d 150, 151 (quotation omitted).

Plaintiffs' arguments in this case all run straight into these prohibitions. Not only is it unnecessary to reach Plaintiffs' constitutional claims—since the case is moot—their strained interpretations of both the Henry Scholarship Act and the Oklahoma Constitution are an attempt to create a conflict where there is none. The Court should avoid this unnecessary conflict between an Oklahoma statute and the Oklahoma Constitution.

Plaintiffs' interpretation of the application of the Oklahoma Constitution to the Henry Scholarship Act would also put the Oklahoma Constitution into several unnecessary conflicts with the United States Constitution. First, the Free Exercise Clause forbids governments from applying laws that "disapprove of . . . religion in general." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532, 542 (1993). Plaintiffs' "blacklist" interpretation of the Oklahoma Constitution—that religious institutions are forbidden from contracting with the State to provide services such as education for disabled children—would treat religious institutions as especially suspect and thus run afoul of the federal Free Exercise Clause. Indeed, such state constitutional provisions violate the federal constitution where they "extend

to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support" or are not geared to achieving "substantial state interest[s]." *Weaver*, 534 F.3d at 1255 (citing *Locke* v. *Davey*, 540 U.S 712, 725 (2004)) (alteration in original).

Second, state laws that target religion for disfavor violate the Free Exercise Clause. *Lukumi*, 508 U.S. at 533. The references in the Oklahoma Constitution to "sectarian" institutions render those state constitutional provisions suspect, because at the time those provisions were enacted the words "sect" and "sectarian" were "code for 'Catholic.'" *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality op.); *see also Weaver*, 534 F.3d at 1258 n.5. Such a "targeting" provision cannot be constitutionally applied against its "targets."

Third, Plaintiffs' interpretation of the Oklahoma Constitution would also put it into conflict with the federal Equal Protection Clause, because religion is a suspect classification. *See Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1322 n.10 (10th Cir. 2010). When a law distinguishes between two classes on the basis of a suspect classification, the law is subjected to strict scrutiny under federal Equal Protection. *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 357 (1978); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976).

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The Court need not, and indeed should not, enter this constitutional thicket. Because the case is moot as to these Defendants, it should not reach the merits. However, if it does reach the merits, it should reject Plaintiffs' claims and enter summary judgment for Defendants.

CONCLUSION

For all the above reasons, Defendants' motion for summary judgment should be granted.

Respectfully submitted,

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November 15, 2011

CERTIFICATE OF MAILING

I hereby certify that on November 15, 2011, I served a true and correct copy of the above instrument, by first class mail and facsimile, to all known counsel of record, listed below.

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