



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

GENTNER DRUMMOND, Attorney
General for the State of Oklahoma, ex rel.
STATE OF OKLAHOMA,

Petitioner,

v.

OKLAHOMA STATEWIDE VIRTUAL
CHARTER SCHOOL BOARD; ROBERT
FRANKLIN, Chairman of the Oklahoma
Statewide Virtual Charter School Board for
the First Congressional District; WILLIAM
PEARSON, Member of the Oklahoma
Statewide Charter School Board for the
Second Congressional District; NELLIE
TAYLOE SANDERS, Member of the
Oklahoma Statewide Charter School Board
for the Third Congressional District;
BRIAN BOBEK, Member of the Oklahoma
Statewide Charter School Board for the
Fourth Congressional District; and SCOTT
STRAWN, Member of the Oklahoma
Statewide Charter School Board for the
Fifth Congressional District,

Respondents,

and

OKLAHOMA STATE DEPARTMENT OF
EDUCATION; and RYAN WALTERS, in
his official capacity as STATE
SUPERINTENDENT OF PUBLIC
INSTRUCTION,

Intervenor-Respondents.

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SUPREME COURT
STATE OF OKLAHOMA

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Case No. MA-121694

INTERVENOR-RESPONDENTS MOTION TO INTERVENE

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Intervenor-Respondent Oklahoma State Department of Education and Ryan Walters, in his official capacity as State Superintendent of Public Instruction (collectively, “the Department”), by and through undersigned counsel, respectfully move this Court to grant the Intervenor-Respondents Motion to Intervene as Respondents in this action. *See* 12 O.S. § 2024.

INTRODUCTION

The Oklahoma State Department of Education is responsible for the funding of Oklahoma schools through distribution of state aid. And yet, when the Petitioner sought to challenge the potential distribution of state aid to St. Isidore—a statewide virtual charter school that will be operated by the Oklahoma Catholic Conference—it noticeably declined to include the Department as a Respondent in this action. The Department’s interest in lawfully distributing state aid is threatened by the Petitioner’s suit alleging that any funding provided to St. Isidore will violate the Oklahoma Charter School Act and the Oklahoma Constitution. Without the inclusion of the Department as a party to this case, any ruling of this Court on state aid would be little more than a prohibited advisory opinion. *Scott v. Peterson*, 2005 OK 84, ¶ 27, 126 P.3d 1232, 1239. For that reason, the Department requests intervention as of right, or at minimum permissive intervention, to defend any potential distribution to St. Isidore as lawful under the United States Constitution.

BACKGROUND

The Oklahoma State Department of Education is the “department of the state government . . . charged with the responsibility of determining the policies and directing the administration and supervision of the public school system of the state.” 70 O.S. § 1-105(A). The Department, through the Office of State Aid, allocates state aid funds calculated in accordance with the statutory state aid formula to charter schools, both brick-and-mortar and virtual. Charter schools are funded through the Department’s state aid allocation and federal

funding. State aid is a public obligation the Department administers for all charter schools in the State.

Hoping to participate in the public benefits created by the Oklahoma Charter School Act, St. Isidore of Seville Virtual Charter School (“St. Isidore”), applied for sponsorship with the Oklahoma Statewide Virtual Charter School Board (“the Board”). On October 16, 2023, St. Isidore and the Board executed a contract for sponsorship as a statewide virtual charter school. *See* Pet. App. Vol. I at 2-22. In July 2023, nine Oklahoma taxpayers and a not-for-profit corporation brought a lawsuit in Oklahoma County against the Board, the Department, and St. Isidore to challenge the Board’s sponsorship and the Department’s potential funding of St. Isidore. *See* Compl., *OKPLAC, Inc, et al. v. Statewide Virtual Charter School Board, et al.*, No. CV-2023-1857 (Okla. Cnty. July 31, 2023) (“private litigation”). The Department, the Board, and St. Isidore all filed motions to dismiss on September 20, 2023.

Seeking to reverse the actions of the Board in sponsorship and prevent the distribution of any state aid to St. Isidore, the Petitioner filed this action, asking this Court to assume original jurisdiction, issue a writ of mandamus undoing the contract between the Board and St. Isidore, and pronounce a declaratory judgment regarding the legality of sponsorship and funding of St. Isidore. Despite acknowledging that “a sponsored statewide virtual charter school receives State Aid” and that claiming that “St. Isidore will begin receiving public money imminently,” the Petitioner declined to name the agency that distributes State Aid, the Department, as a Respondent. Pet. Br. at 4. To date, no response to the application has been filed. The Department therefore seeks to intervene in this lawsuit as the state agency responsible for the administration of state aid and the party proper to opine on the lawfulness of state aid distribution.

ARGUMENT AND AUTHORITIES

Intervention may be granted in matters of original jurisdiction before the Oklahoma Supreme Court. *See Fent v. Henry*, 2011 OK 10, ¶ 6, 257 P.3d 984, 990. Once a court allows intervenors to enter, “from that point forward, in the proceeding intervenors [are] a party to the action.” *Tulsa Rock Co. v. Williams*, 1982 OK 10, ¶ 5, 640 P.2d 530, 532. “It is fundamental that once an intervenor is let in to participate in litigation, his rights are just as much entitled to protection as those of the original parties.” *Id.* Intervention is governed by 12 O.S. § 2024, which articulates the relevant pathways to intervention: intervention as of right and permissive intervention.

I. The Department is entitled to intervention as of right.

Under 12 O.S. § 2024(A), “[u]pon timely application anyone shall be permitted to intervene in an action: . . . When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; . . .” Oklahoma courts employ four requirements for intervention by right: “(1) the motion to intervene must be timely; (2) the intervenor must claim a significant, protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the [movant’s] ability to protect its interest; and (4) the existing parties may not adequately represent the [movant’s] interest.” *Brown v. Patel*, 2007 OK 16, ¶ 17, 157 P.3d 117.

A. The Department’s application is timely.

The “timeliness for intervention is determined ‘in light of all the circumstances,’ and non-exclusive factors considered include the length of time since the movant knew of its interests in the case; prejudice to the existing parties; prejudice to the movant; and the existence

of any unusual circumstances.” *Tulsa Indus. Auth. v. City of Tulsa*, 2011 OK 57, ¶ 31, 270 P.3d 113, 128 (quoting *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir. 2010)). The Petitioner filed the application Friday, October 20, 2023, meaning only eighteen days have passed since initiation of this action. On Tuesday, October 24, this Court directed the Board to respond to Petitioner’s application by November 21, 2023—a deadline which remains approximately two weeks away. Not only has the Department moved quickly to intervene in this lawsuit, but ample time also remains for them to fully prepare a defense to the Petitioner’s application. Granting this motion presents no prejudice to the existing parties or the movant, as a manageable briefing and argument schedule has already been set. Finally, no unusual circumstances exist that cut against the Department’s timely intervention.

B. The Department has significantly protectable interest related to the lawful administration of state aid that the outcome of this litigation will impair or impede.

“An intervenor’s interest must be ‘significantly protectable’ or ‘direct, substantial, [and] legally protectable.’” *Brown*, 2007 OK 16, ¶ 19 (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)). An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule for intervention as of right.” *Id.*

Consistent with the Rule’s requirement, the Department has an interest relating to the transaction—distribution of state aid to St. Isidore—which is the subject of the Petitioner’s application. This interest is far from remote because the Petitioner’s application makes multiple direct references to it. *See* Pet Br. at 1, 2, 4, 5, 6, 7, 8, 9, 10, 14, 15. As the agency that is solely responsible for any potential state aid issued to St. Isidore, the Department has a significant interest ensuring that state aid is distributed lawfully under Oklahoma statutes, the Oklahoma Constitution, and the United States Constitution. Accordingly, it should be afforded the

opportunity to participate in this action, which according to the Petitioner, will determine whether the Department, and not any of the current parties, “will be faced with the unprecedented quandary of processing requests to directly fund all petitioning sectarian groups.” Pet. Br. at 1.

Because of the Department’s role in administering state aid, the disposition of this action in favor of the Petitioner will, as a practical matter, impair the Department’s to ability issue any funding to St. Isidore. The Department believes distribution of state aid to St. Isidore—once proper administrative steps are complete—is not only lawful, but required by the United States Constitution under the Free Exercise trilogy, and it seeks to defend that position. *See Trinity Lutheran Church v. Comer*, 582 U.S. 449 (2017), *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020), *Carson v. Makin*, 142 S. Ct. 1987 (2022). Additionally, the outcome of this action will create precedent on the issues presented in the private litigation that will bind the Oklahoma County District Court and impair the Department’s defenses in that case.

C. The Board’s participation is inadequate to represent the Department’s Interests.

“Generally, intervention as of a right will be denied when a party to a controversy adequately represents the interest of the intervenor.” *Brown*, 2007 OK 16, ¶ 18. “The Tenth Circuit has explained that it has ‘held that representation is adequate when the objective of the applicant for intervention is identical to that of one of the parties.’” *Id.* (quoting *City of Stilwell v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996)).

The Board, as the sponsor of St. Isidore, and the Department, as the potential funder of St. Isidore, have different interests in this action. Indeed, both will make similar arguments regarding the constitutionality of their actions toward St. Isidore, but their ultimate roles in the

existence of the school are different. The Board is specifically responsible for overseeing operations of statewide virtual charter schools in Oklahoma. *See* 70 O.S. 3-145.1 (A): ("There is hereby created the Statewide Virtual Charter School Board. The Board shall have the sole authority to authorize and sponsor statewide virtual charter schools in this state."). Unlike the Department, which includes the Office of State Aid, the Board is not concerned with state aid. And yet, the distribution of state aid is the Petitioner's focus in the application. *See* Pet. Br. at 1, 2, 4, 5, 6, 7, 8, 9, 10, 14, 15. In fact, the "pressing concern[]" in this action, according to the Petitioner, is the "imminent redistribution of public funding to a religious sect based on an unlawful State board action and inter-governmental legal claims." Pet. Br. at 4-5. Though this concern *names* the Board, it *challenges* the responsibility and action—distribution of state aid—of the Department. In fact, there is no case or controversy regarding the distribution of state aid with the current parties in this action because state aid is the responsibility of the Department to fund St. Isidore. The absence of the Department from this action, as well as any subsequent ruling from the Court, would lead to either an impermissible advisory ruling, *Scott v. Peterson*, 2005 OK 84, ¶ 27, 126 P.3d 1232, 1239, or the necessity to deny the original jurisdiction with a recommendation to refile in district court before a finder of fact to determine who is necessary for this matter. Mere approval of St. Isidore's contract by the Board does not, in and of itself, trigger the alleged violation of the Oklahoma Constitution or statutes according to the Petitioner. Rather, for the Petitioner, "issues relating to the accounting and expenditure of public State Aid funds [are] a matter of public interest" sufficient for this court to assume original jurisdiction, "even more so when appropriated public money will directly support a sectarian institution." Pet. Br. At 5. Therefore, the Board, having no responsibility for

administering state aid, cannot adequately represent the Department on issues related to the lawfulness of distribution of state aid.

Moreover, the Board's existence itself is time limited. In June 2023, the Oklahoma State Legislature voted to dissolve the Board. *See* 70 O.S. § 3-132(I) ("Effective July 1, 2024, the Statewide Virtual Charter School Board shall be abolished"). Appointments to Oklahoma's replacement Statewide Charter School Board are set to be made before this action is fully briefed and heard by this Court, and the Board is to be dissolved by July 1, 2024. *See id.* § 3-132.1(B) ("Initial appointments shall be made by October 31, 2023"). Given the sunset status of the current Board, the Department cannot be sure that its interest in providing lawful state aid to St. Isidore is adequately protected by the Board's solitary participation in this action.

Additionally, the Board itself is a small state agency with very few staff. Presently, as the only Respondent in this action, the Board lacks the resources and expertise necessary to adequately defend a complicated education issue before the Oklahoma Supreme Court. In contract, the Department has not only the institutional knowledge regarding state aid necessary for this action, but it is also a fully staffed state agency with its own legal and financial teams familiar with defending complex issues before this Court.

In summary, the Department's participation in this lawsuit satisfies all the requirements necessary to intervene as of right, and this Court should grant the Department's motion to intervene.

II. Alternatively, the Department should be granted permissive intervention.

If this Court has any doubt whether the Department may proceed as intervenor as of right, then it should instead permit the Department to intervene under 12 O.S. § 2024(B)'s "less stringent" requirements. *Sinclair v. Hembree & Hodgson Constr.*, No. CIV-18-938-D,

2019 WL 1179419, at *1 (W.D. Okla. Mar. 13, 2019), *on reconsideration*, 2019 WL 3755502 (W.D. Okla. Aug. 8, 2019).¹ Under that rule, “anyone may be permitted to intervene in an action . . . when an applicant’s claim or defense and the main action have a question of law or fact in common” provided the application is timely. 12 O.S. § 2024(B). The court has discretion to allow permissive intervention, “based upon the nature of the controversy and the facts and circumstances of each case.” *Tulsa Rock Co.*, 1982 OK 10, ¶ 5. Permissive intervention is based upon the “principle of manifest justice” and the idea that “[f]undamental in any framework of justice is the right to notice and an opportunity to be heard.” *Id.* (quoting *Sizemore v. Dill*, 1923 OK 938, 220 P. 352, 354).

The fundamental rights of notice and opportunity to be heard through permissive intervention extend to state agencies.

When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

12 O.S. § 2024(B).

Here, the Department’s defense will have questions of law in common with the action because Petitioner challenges distribution of state aid, which the Department solely handles. Namely, the Petitioner’s application asks this Court to interpret the Oklahoma Charter School Act and the Oklahoma Constitution to determine whether St. Isidore can receive public funding

¹ “The Oklahoma statute regarding intervention, 12 O.S. Supp.2004, § 2024, is basically identical to the federal counterpart, Rule 24 of the Federal Rules of Civil Procedure. Thus, this Court may look to the decisions of the federal court for guidance.” *In re Adoption of D.D.B.*, 2005 OK CIV APP 112, ¶ 11, 127 P.3d 638, 640.

– a question directly relevant to the Department, as the agency responsible for distributing state aid. *See* Pet. Br. at 6-10. The Department has an even greater interest in this question of law than the Board because the Department, not the Board, is the agency primarily affected by that issue.

Not only do these common questions exist in this litigation, but they are also at issue in the private litigation. This Court can examine the Department and the Board’s motions to dismiss that litigation to see that common questions of law exist in the defense of sponsorship and funding of St. Isidore. *See* Def. Okla. State Dep’t of Educ. and Def. State Superintendent of Public Instruction Ryan Walters’ Mot. to Dismiss, *OKPLAC, Inc, et al. v. Statewide Virtual Charter School Board, et al.*, No. CV-2023-1857 (Okla. Cnty. Sept. 20, 2023); The Board Defs.’ Mot. to Dismiss for Lack of Subject-Matter Jurisdiction and Failure to State a Claim, *OKPLAC, Inc, et al. v. Statewide Virtual Charter School Board, et al.*, No. CV-2023-1857 (Okla. Cnty. Sept. 20, 2023).

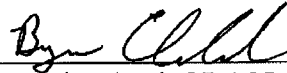
The Department should also be granted permissive intervention as the state agency tasked with directing the policies and administration of Oklahoma schools. Both the Petitioner’s claims and the Board’s defenses will rely upon the Oklahoma Charter School Act and the Oklahoma Constitution’s requirements for education in Oklahoma – a responsibility that ultimately rests with the Department. And, as discussed above, the Department’s application is timely filed before any response, *see* Part I.A, *supra*, and it will not unduly delay the litigation or prejudice the rights of the original parties. As the agency responsible for potentially distributing state aid to St. Isidore, the Department would assist the Court in understanding the obligations of funding education in Oklahoma.

Finally, allowing the Department in this litigation now promotes the judicial economy of this Court and Oklahoma's public resources. *See Brown*, 2007 OK 16, ¶ 28 (agreeing with the intervenor that "courts favor intervention and joinder of party defendants as a convenient or pragmatic method of settling controversies relating to the same subject matter"). At present, the Petitioner takes issue with the Board's sponsorship of St. Isidore, and yet, repeatedly mentions the distribution of state aid without naming the Department as Respondent. Should the Department issue state aid to St. Isidore in the future, the Petitioner may be inclined to file a similar action to halt distribution using the same arguments. Allowing the Department's intervention now prevents such duplicitous litigation and preserves the resources of the Office of the Oklahoma Attorney General, Oklahoma State Department of Education, and this Court. The Department should therefore be permitted to permissively intervene in this action.

CONCLUSION

For the reasons mentioned above, this Court should grant the Department's request to intervene as of right or permissively as Respondents in this action.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was mailed this 7th day of November, 2023, by depositing it in the US Mail, postage prepaid, to:

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