

January 31, 2023

Via email and U.S. mail

Dr. Rebecca L. Wilkinson, Executive Director, Oklahoma Statewide Virtual Charter School Board

Members of the Oklahoma Statewide Virtual Charter School Board:

Dr. Robert Franklin, Chairman

Barry Beauchamp, Clerk

Nellie Tayloe Sanders

Ryan Walters, State Superintendent of Public Instruction, Secretary of Education, and ex-officio member

M.C. Connors Building

2501 N. Lincoln Blvd., Suite 301

Oklahoma City, OK 73105

Re: Attorney General Opinion 2022-7

Dear Dr. Wilkinson and Members of the Statewide Virtual Charter School Board:

We write to urge you to disregard Attorney General Opinion 2022-7 on religious charter schools and deny any applications you may receive to operate a charter school that provides religious education. The Opinion, which says that Oklahoma must allow charter schools that teach religion, is wrong and a radical departure from well-established law. Enclosed with this letter is a memorandum that provides a detailed analysis of the Opinion.

Oklahoma charter schools are public schools. Thus the U.S. Constitution requires that they remain neutral on issues of religion and prohibits them from teaching religion. This fundamental safeguard is critical to protecting religious freedom and is part of the rich history and tradition of this country. We live in a religiously diverse nation and our public schools must be open and welcoming to all. Students and their families—not school officials—should get to make their own decisions about religion. And these protections also ensure that the government does not tax any of us to fund the teaching of religion.

But even if Oklahoma charter schools were not considered to be public schools, they are state actors under the law and thus are still obligated to follow the U.S. Constitution. Indeed, the Court of Appeals for the Tenth Circuit (which has jurisdiction over Oklahoma) and numerous other courts have concluded that charter schools are state actors. Far from violating the U.S. Constitution, the requirement in state law that Oklahoma charter schools provide nonsectarian education is mandated by the Constitution.

Oklahoma charter schools are public schools and government entities, so they cannot teach religion.

Reclassifying charter schools as private actors would be a sea change in the law that would upend the entire educational landscape in Oklahoma. It has always been the understanding of lawmakers,¹ the government,² and charter schools³ themselves that they are public schools and subject to the U.S. Constitution. By statute, Oklahoma charter schools are defined as public schools.⁴ They shoulder numerous responsibilities and requirements of traditional public schools—for example, charter schools must be equally free and open to all, may not charge tuition, must comply with the same reporting and audit requirements as school districts, and more.⁵ Charters reap the

¹ Former State Representative Odilia Dank, who sponsored the 1999 bill that eventually created Oklahoma’s charter program, called her charter proposal “true public school reform.” [Keating Signs Education Bill, Changes Focus of Public Schools](#), *The Journal Rec.* (June 8, 1999).

² A 2007 Attorney General opinion declares that, as “part of the public school system,” charter schools “are under the control of the Legislature” and further the Legislature’s “mandate of establishing and maintaining a system of free public education.” Hon. Al McAffrey, Okla. Op. Att’y Gen. No. 07-23, 2007 WL 2569195, at *7 (2007). And the Statewide Virtual Charter School Board’s website explains that “[v]irtual charter schools are Oklahoma public schools” and thus “have the same rights and responsibilities of other public schools.” Okla. Statewide Virtual Charter Sch. Bd., [Frequently Asked Questions](#) (last visited Jan. 29, 2023).

³ The Oklahoma Public Charter School Association writes on its website, “Public charter schools are an important piece of the Oklahoma public school system.” Okla. Pub. Charter Sch. Assoc., [Our Story](#) (last visited Jan. 29, 2023).

⁴ The Oklahoma Charter Schools Act expressly states that “charter school” means a *public school* established by contract with a board of education of a school district” or with certain other government entities. Okla. Stat. tit. 70 § 3-132(D) (emphasis added).

⁵ Okla. Stat. tit. 70 §§ 3-135(A)(9)–(10), 3-136(A)(6), 3-145.3(E). See Section I.A.1 of the enclosed memo for a complete list of the characteristics that confirm that Oklahoma charter schools are public schools and government entities.

benefits of being government entities, too—for instance, they are eligible to receive government lease rates for property, and their employees may participate in retirement and insurance benefit programs for government workers.⁶

As government entities, Oklahoma charter schools do not have rights under the Free Exercise Clause of the First Amendment to provide religious programming: First Amendment rights are rights *against* the government, not rights of government.⁷ To the contrary, Oklahoma charter schools are prohibited by the First Amendment’s Establishment Clause from teaching religion, sponsoring prayer, discriminating based on religion, or otherwise promoting religion or coercing students to take part in religious activities.⁸

Oklahoma charter schools are state actors.

Even if charter schools could somehow be classified as private entities rather than government entities (they cannot), charter schools are still state actors under Supreme Court precedent.⁹ Numerous courts have applied this precedent and held as such.¹⁰ And as state actors, charter schools must comply with the U.S. Constitution, including the First Amendment’s Establishment Clause.¹¹

Ignoring this clear precedent, the Opinion relies principally on the Supreme Court’s decision in *Rendell-Baker v. Kohn*¹² to assert that Oklahoma charter schools are not state actors. But unlike the private school at issue in *Rendell-*

⁶ See Okla. Stat. tit. 70 §§ 3-136(A)(14)–(15), 3-142(E); [Okla. Teachers’ Ret. Sys. Member Handbook](#) 6 (2022).

⁷ See Section I.B of the enclosed memo.

⁸ *Id.*

⁹ Oklahoma charter schools meet the symbiotic-relationship/entwinement test for state action because of the “pervasive entwinement of public institutions and officials in [their] composition and workings.” See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 298 (2001). They also satisfy the public-function test because they perform a traditionally exclusive public function—public education—that Oklahoma’s Constitution requires the State to provide. While provision of education is not solely a public function, provision of *public* education is. For more detail, see Section I.A.2 of the enclosed memo.

¹⁰ See Section I.A.4 of the enclosed memo for a full accounting of rulings by federal appeals courts and district courts that charter schools are state actors for purposes of their conduct toward students.

¹¹ See Section I.B of the enclosed memo.

¹² 457 U.S. 830 (1982).

Baker, Oklahoma charter schools are public schools, are created through government action, and perform the traditionally exclusive public function of public education. Moreover, *Rendell-Baker* held only that the private school there was not a state actor with respect to its employment decisions, which the state did not substantially regulate, but the educational functions of Oklahoma charter schools are heavily regulated. The Opinion’s reliance on *Rendell-Baker* is off the mark and does not affect the clear conclusion that Oklahoma charter schools are government entities and that they are state actors for the purposes of their educational functions.¹³

The Establishment Clause prohibits Oklahoma from funding religious education at charter schools.

Even if Oklahoma charter schools were not state actors (they are), the Establishment Clause would still bar Oklahoma from funding religious education at a charter school. A decades-long line of cases has held that the Establishment Clause prohibits government bodies from *directly* providing public funds to private institutions to support religious instruction or activities.¹⁴ There’s one narrow “*indirect aid*” exception to this rule: the rule does not apply when a religiously neutral government aid program gives aid to a broad class of citizens, who in turn choose to send it to religious institutions wholly as a result of their “genuine and independent private choice.”¹⁵ But Oklahoma does not provide funds or vouchers to parents or students who attend public charter schools; rather, the money flows directly from the government to charter schools under a complex funding formula, and no “genuine and independent private choice” to direct the money is made by parents or students.¹⁶ Funding for public charter schools is in no way “indirect aid,” and thus the Establishment Clause prohibits that funding from being used for religious education.

Conclusion

In sum, because Oklahoma charter schools are public entities and state actors, the U.S. Constitution provides them no right to inculcate religion in their students and indeed bars them from doing so. In addition, even if they were not state actors, the Establishment Clause still prohibits Oklahoma

¹³ See Section I.A.4 of the enclosed memo.

¹⁴ See Section II of the enclosed memo.

¹⁵ *Id.*

¹⁶ *Id.*

from funding religious education at charter schools. The Charter School Act's prohibition on charter schools that provide religious education thus not only is consistent with the Constitution but also is mandated by it.

Ignoring that prohibition and approving a charter school that teaches religion would be contrary to your oath of office, which requires you to uphold the U.S. Constitution and Oklahoma law.¹⁷ It would also go against the views of Oklahomans, who in 2016 rejected by a 57% to 43% vote a ballot initiative that would have promoted the use of public funds for religious purposes.¹⁸

We therefore urge you to disregard Opinion 2022-7 and deny any applications you may receive to operate a charter school that provides religious education. This would uphold the Constitution and state law and protect the religious freedom of students, families, and all Oklahomans. We would be happy to discuss the enclosed legal analysis, and you should feel free to contact us.

Very truly yours,



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Cc: The Hon. Gentner Drummond, Oklahoma Attorney General

¹⁷ "I do solemnly swear (or affirm) that I will support the Constitution and the laws of the United States of America and the Constitution and the laws of the State of Oklahoma." See Okla. Stat. tit. 51 §§ 36.1, 36.2A.

¹⁸ See [Oklahoma Public Money for Religious Purposes, State Question 790 \(2016\)](#), Ballotpedia (last visited Jan. 29, 2023).