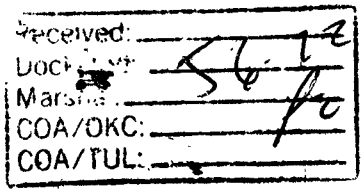
ORIGINAL

No. 120,131

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAY - 6 2022
JOHN D. HADDEN
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIAN AND JANELLE SHELLEM, *Husband and Wife, Individually, and on behalf of their Minor Children, C.S. and M.S.*, et al.,



Plaintiffs/Appellees,

v.

ANGELA GRUNEWELD, *in her official capacity as* SUPERINTENDENT OF EDMOND PUBLIC SCHOOLS, et al.,

Defendants/Appellants.

AMICUS BRIEF OF THE ATTORNEY GENERAL

On Appeal from the District Court
in and for Oklahoma County
Case No. CJ-2021-3883
Judge Andrews

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Interest of *Amicus Curiae*[1]

The Attorney General is interested in defending the proper interpretation of the state statute at issue in this case, 70 O.S. § 1210.189. The Attorney General is concerned that Edmond officials are improperly violating state law by enacting policies that discriminate on the basis of COVID vaccination status. Because the district court found that Edmond did not violate the statute before enjoining Edmond officials on other grounds, the Attorney General is interested in this Court correcting the district court's interpretation of state law.

[1] All parties have consented to the filing of this amicus.

Argument

The district court properly enjoined Edmond Public Schools, but it improperly interpreted, and therefore bypassed, state law when issuing that injunction. This Court should affirm the injunction on the alternative ground that Edmond officials violated state law, and this Court need not explore the record further as a result.

"The cardinal rule of statutory interpretation is to ascertain and give effect to legislative intent and purpose as expressed by the statutory language." *Odom v. Penske Truck Leasing Co.*, 2018 OK 23, ¶ 17. Statutory interpretation should therefore begin with the statute's text and presume the Legislature's intent is "what it so expressed." *Id.* Only where the statute is ambiguous, or its meaning uncertain, should a court employ additional rules of statutory interpretation. *Id.* ¶ 18. Even then, the statute "is to be given a reasonable construction, one that will avoid absurd consequences if this can be done without violating legislative intent." *Id.*

The relevant state statute prohibits a board of education of a public school district, or their subordinate agents and officials, from "Requir[ing] a vaccination against Coronavirus disease 2019 (COVID-19) as a condition of admittance to or attendance of the school or institution[.]" 70 O.S. § 1210.189(A)(1)(emerg. eff. July 1, 2021). The statute discusses two events which cannot be conditioned on COVID vaccination: (1) admittance and (2) attendance. *See id.*

Rather than adopting the plain and ordinary understanding of "attendance"—to be present—the district court below read "attendance" to mean the administrative process of *counting* a student present for the day. Order at p. 6; *see also* ATTEND, Merriam-Webster, https://www.merriam-webster.com/dictionary/attend (last visited Apr. 28, 2022). Under the court's interpretation, attendance consists of anything that provides instruction, regardless of whether actual, physical attendance in class occurs. Order at 6-7. This interpretation renders the prohibition on vaccine discrimination in attendance virtually meaningless. The district court would

permit Edmond officials to treat unvaccinated students as second-class citizens that can be relegated to permanent distance learning so long as children received credit for their remote instruction. *See id.* at 6. Such a reading of the statute inappropriately construes a statute that prohibits attendance discrimination based on COVID vaccination status to allow attendance discrimination based on COVID vaccination status, rendering it void of any real effect. The district court narrowed the statute to the point of irrelevance. *See Odom*, 2018 OK 23, ¶ 18.

While the district court correctly noted the bill does not address the school district's authority to impose quarantines, the district court incorrectly surmised that a proper reading of the term "attendance" would prevent schools from placing an unvaccinated student with visible COVID symptoms in quarantine. Order at 6. To the contrary, the school district is free to implement any number of protective actions to keep students and staff safe, including quarantines. It just cannot implement those policies in a way that discriminates against unvaccinated students.

To be sure, if a school district chose to remove only unvaccinated children with visible symptoms, that would violate the discrimination statute. But the solution is obvious: adopt and implement a non-discriminatory policy for isolating all children with visible symptoms, regardless of vaccination status. Indeed, nothing in statute prevents a school district from imposing a distance learning or quarantine policy that is generally applicable. State law even expressly provides for removing children with visible symptoms of a contagious disease. 70 O.S. § 1210.194. The only limit is that such policies cannot discriminate based on vaccination status. *See id.* § 1210.189. By surmising otherwise, the district court erred in interpreting state law.

The district court also incorrectly suggested that distance learning policies have eviscerated § 1210.189. Order at 6. To be sure, the State Department of Education authorizes distance learning and clarifies school districts may count distance learning toward their "legal average daily attendance" as described in 70 O.S. § 10-103.1. *See* O.A.C. 210:35-21-2. But the State Department

of Education also distinguishes between "actual attendance" and other forms of instruction that may be counted toward legal average daily attendance even though they are not actual attendance. *See* O.A.C. 210:10-1-5(f). Contrary to the district court's reasoning below, the State Department of Education has never asserted that its authority over acceptable substitutes in attendance statistics allows it to redefine attendance for all purposes in any statute. The State Department of Education recognizes that actual attendance is in-person attendance. *See id.* By concluding that the Legislature did not use the same common-sense meaning for the same term in education statutes, the district court erred.

Finally, the district court's requirement for more particularized use of the word quarantine by the Legislature is puzzling. Order at 7. The district court claims that the term attendance is not ambiguous, *id.*, but then never says what the word means. If the district court meant that attendance unambiguously *never* means in-person attendance, then it plainly erred: the Department of Education has stated a difference between actual attendance and activities counted as attendance, and the district court entirely failed to acknowledge that view. If the district court meant that the statutory text unambiguously indicates an intent to reject the common understanding of attendance, it did not point to any relevant text to reach that conclusion. Nor could it: nothing in § 1210.189 indicates that there are multiple types of attendance and that unvaccinated students can be treated as second-class citizens with access only to lesser forms of attendance. No law requires the Legislature to use the word "quarantine" in particular to make that essential point about non-discrimination in attendance.

The district court ultimately misunderstood that enforcing the statute does not prohibit Edmond from using distance learning or quarantines. Edmond may adopt policies on both issues so long as their policies are for the vaccinated and the unvaccinated alike. Because they asserted

the authority to condition actual attendance on the basis of COVID vaccination status, they were properly enjoined. This Court should affirm on that alternative basis.

DATED: May 6, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Attorney General's Amicus Brief was transmitted by first class mail, postage prepaid, to the following:

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