



GENTNER DRUMMOND
ATTORNEY GENERAL

February 23, 2023

Rebecca L. Wilkinson, Ed.D.
Executive Director
Statewide Virtual Charter School Board
2501 N. Lincoln Blvd., Suite 301
Oklahoma City, OK 73105

RE: Attorney General Opinion 2022-7

Dear Executive Director Wilkinson,

This letter is to notify you that I am withdrawing Attorney General Opinion 2022-7 issued by former Attorney General John O'Connor. As a preliminary matter, your prior request should have been rejected because it was not "accompanied by affirmation that such request was approved by vote of the governing board" of the Statewide Virtual Charter School Board. *See* STATEMENT OF POLICY OF THE ATTORNEY GENERAL REGARDING ISSUING FORMAL OPINIONS, ¶ 4. Therefore, Attorney General Opinion 2022-7 should not have been issued by my predecessor, and this office is not in receipt of a request for Opinion from an authorized requestor. *Id.*

Even if the prior request were procedurally proper, this office would still withdraw Attorney General Opinion 2022-7. The cases identified in your request: *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020), and *Carson v. Makin*, 142 S. Ct. 1987 (2022), involve private schools, not charter schools. This office has previously recognized that charter schools "are public schools established by contract." 2012 OK AG 12, ¶ 1, *see also* 70 O.S. § 3-132(D) (defining a "charter school" as "a public school established by contract"). Consequently, the cases cited in your request concerning private schools have little precedential value as it relates to charter schools.

This office recognizes that the law is currently unsettled as to whether charter schools are state actors. I am hopeful that the U.S. Supreme Court will definitively rule on this unsettled issue next term. *See Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022), *petition for cert. filed*, Sept. 14, 2022 (No. 22-238). Unfortunately, presently, there is no binding precedent applicable to Oklahoma discussing whether charter schools are state actors. At most, the Tenth Circuit Court of Appeals has previously assumed, without analysis, that charter schools are state actors. *See Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1188 (10th Cir. 2010) ("That is, because the Academy is a local governmental entity, it cannot be held liable for the acts of its employees on a theory of *respondeat superior*."); and *Coleman v. Utah State Charter Sch. Bd.*, 673 F. App'x 822, 830 (10th Cir. 2016) (unpublished) (stating "charter schools are public schools using public funds to educate school children" and "charter schools are not free-floating entities unmoored from state governmental oversight and control").

Without binding precedent definitively addressing whether charter schools are state actors, this office is not currently comfortable advising your board members to violate the Oklahoma Constitution's clear directive: "Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and *free from sectarian control . . .*" OKLA. CONST. art. I, § 5 (emphasis added). Likewise, without clear precedent, this office is not comfortable advising you to violate the Legislature's clear directive that "[a] charter school shall be *nonsectarian* in its programs, admission policies, employment practices, and all other operations." 70 O.S. § 3-136(A)(2) (emphasis added). Therefore, even if your prior request were procedurally proper, this office would still be compelled to withdraw Attorney General Opinion 2022-7.

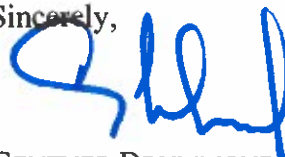
I am aware that your request to this office was made in anticipation of the St. Isidore of Seville Catholic Virtual School ("SISCVS") application currently before the Statewide Virtual Charter School Board. As it relates to this specific application, the executive director of the Catholic Conference of Oklahoma has said that the SISCVS intends to "be a fully Catholic school — Catholic in every way: Catholic in teaching, Catholic in employment . . ." ¹ Assuming a charter school is a state actor, it would clearly violate the First Amendment and Oklahoma Constitution for a public school (i.e., a state actor) to be "Catholic in every way." *Id.*

This previous point relates to a much broader aspect of the issue at hand. As a strong supporter of religious liberty, I am obliged to note that the Opinion does nothing to advance that worthy cause. Religious liberty is one of our most fundamental freedoms. It allows us to worship according to our faith, and to be free from any duty that may conflict with our faith. The Opinion, as issued by my predecessor, misuses the concept of religious liberty by employing it as a means to justify state-funded religion. If allowed to remain in force, I fear the Opinion will be used as a basis for taxpayer-funded religious schools, which is precisely what SISCVS seeks to become.

Further, this office is obliged to point out that the approval of the SISCVS application will create a slippery slope. While many Oklahomans undoubtedly support charter schools sponsored by various Christian faiths, the precedent created by approval of the SISCVS application will compel approval of similar applications by all faiths. I doubt most Oklahomans would want their tax dollars to fund a religious school whose tenets are diametrically opposed to their own faith. Unfortunately, the approval of a charter school by one faith will compel the approval of charter schools by all faiths, even those most Oklahomans would consider reprehensible and unworthy of public funding. Consequently, I urge your board members to use caution in reviewing the SISCVS application.

Please feel free to contact the Office if you any further questions.

Sincerely,



GENTNER DRUMMOND
ATTORNEY GENERAL OF OKLAHOMA

¹ https://tulsaworld.com/news/local/catholic-church-in-oklahoma-seeking-government-sanctioning-taxpayer-funding-for-first-religious-charter-school-in/article_1141db0a-a98e-11ed-b87c-f7ae31ee167e.html?utm_medium=social&utm_source=email&utm_campaign=user-share