

IN THE DISTRICT COURT OF CARTER COUNTY  
STATE OF OKLAHOMA

KOLTON DEWAYNE ELLIS	)	
	)	
Plaintiff,	)	Case No. CJ-2020-247
	)	
vs.	)	
	)	
INDEPENDENT SCHOOL DISTRICT NO. 32	)	
OF CARTER COUNTY, OKLAHOMA,	)	
a/k/a Lone Grove Public Schools; <i>et al.</i> ,	)	
	)	
Defendants.	)	

**DEFENDANTS’ REPLY IN SUPPORT OF MOTION TO DISMISS**

The School District Defendants submit the following brief in support of their Combined Brief in Opposition to Plaintiffs’ Motion for Injunctive Relief and In Support of Defendants’ Motion to Dismiss (the “Motion”).<sup>1</sup>

**I. The Court Should Disregard Kolton’s Misleading Arguments Regarding the Requirements for High School Graduation under Oklahoma Law.**

Plaintiff Kolton Ellis (“Kolton”) spends the bulk of his Response to Defendants’ Combined Brief in Opposition to Plaintiff’s Motion for Injunctive Relief and in Support of Defendants’ Motion to Dismiss (the “Response”) asserting various arguments to support his contention that even if a student has (a) completed the requisite number of high school credits in areas approved by the Oklahoma State Board of Education (the

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<sup>1</sup> In the Motion, the School District Defendants asserted both arguments in favor of dismissal of Kolton’s claims asserted in the Petition and in opposition to Kolton’s Motion for a Temporary Restraining order and Temporary Injunction. The Court has already denied Kolton’s Motion for a Temporary Restraining Order and Temporary Injunction.

“State Board”) and Oklahoma State Department of Education (“OSDE”), and (b) met the criteria set by the School District’s Board of Education for graduation, there also exists a requirement that the student attain a vaguely defined level of mastery of the courses covered by the required high school curriculum and/or state end-of-instruction tests in order to graduate. These arguments rely on interpretations of various Oklahoma statutory and regulatory authorities that range from strained to deliberately misleading, and should be disregarded by the Court.

Kolton first discusses OKLA. STAT. tit. 70, § 1210.541, which he contends sets a series of standards for which students have achieved a sufficient level of mastery of the state-required curriculum to graduate high school. Response, at 2. In fact, that statute is one of a series of statutes establishing the Oklahoma Educational Indicators Program (“OEIP”), “a system of measures” established by the OSDE “whereby the performance of public schools and school districts is assessed and reported[.]” OKLA. STAT. tit. 70, § 1210.531(A). Section 1210.541 authorizes the Commission for Educational Quality and Accountability to establish a series of student performance levels which are used to monitor and report **aggregate-level student performance outcomes for each school site** within a school district. OKLA. STAT. tit. 70, § §1210-541(D-E). Section 1210.541, and the OEIP in general, do not relate in any way to the legal requirements for Oklahoma public school students to graduate from high school, provide no support for Kolton’s claims, and are completely irrelevant to the subject matter of this action.

Kolton then claims that “[s]chools in Oklahoma are required to provide students with remediation or intervention and the opportunity to complete the curriculum units or

sets of competencies to obtain a standard diploma.” Response, at 3. However, the only authority cited in support of this argument, OKLA. STAT. tit. 70, § 103.6(Q), actually states that only “[s]tudents who have been denied a standard diploma by the school district in which the student is or was enrolled for failing to meet the requirements of this section may re-enroll in the school district that denied the student a standard diploma following the denial of a standard diploma.” OKLA. STAT. tit. 70, § 103.6(Q) (emphasis added). Kolton’s grievances arise out of the fact that he **was awarded a standard diploma**, not that he was wrongfully denied a standard diploma, thus rendering this provision wholly inapplicable to Kolton’s claims.

Next, Kolton argues that while OKLA. ADMIN. CODE tit. 210, § 35-25-2 requires that students must “demonstrate competency in or successfully compete at least [23] units of credit which must include the state-mandated curriculum and meet all other state and local mandates to be eligible for graduation[,]” Kolton “did not and could not demonstrate competency” in the required areas. Response, at 3. However, Kolton offers no authority to suggest what would constitute “competency” for purposes of this regulation, or evidence that he failed to meet that standard. In fact, that regulation states that “[t]he local board of education shall . . . **determine the local graduation requirements for students,**” as long as those requirements satisfy the minimum standards set forth in subsections 1-6 of that regulation. OKLA. ADMIN CODE tit. 210, § 35-25-2 (emphasis added). As described in detail in its Motion, the School District’s Board of Education is solely vested with the authority determine the applicable criteria for graduation consistent with the requirements of Section 35-25-2, which it has done;

therefore, in order to graduate, Kolton was required to meet the criteria established by the School District by completing more than 26 units of credit by attaining passing grades in the required classes—which he has done.

Finally, Kolton cites a 2012 opinion of the Oklahoma Attorney General, 2012 OK AG 14, for the proposition that “local boards of education do not have the power to grant a standard diploma who have failed to meet [state requirements for graduation].” Response, at 8 (alterations in the original). What Kolton neglects to inform the Court of is that the act examined in that opinion, the Achieving Classroom Excellence Act of 2005 (the “ACE Act”) was **repealed in its entirety** in 2016. *See* 2016, HB 3218, c. 360, § 12, *emerg. eff.* July 1, 2016. By virtue of this repeal, the Attorney General’s opinion is now moot, and Kolton’s discussion of the School District’s supposed inability to contravene graduation requirements previously imposed by the ACE Act is irrelevant. Furthermore, the fact that the ACE Act was repealed in its entirety and was not replaced by a similar statute demonstrates the legislature’s intent not to interfere with school districts’ authority to determine when a student has earned sufficient credits for graduation.

As described in detail in the Motion, nowhere within the Oklahoma statutes or applicable administrative regulations does there exist a requirement that a student achieve some undefined level of successful mastery of topics covered in state-mandated courses and/or end-of instruction testing in order to graduate. Because Kolton’s claims for relief in this matter rely on the existence of such a nonexistent requirement, Kolton’s claims fail as a matter of law.

**II. All Credits Earned by Kolton While Attending the School District Are Valid and Counted Towards His Required Credits for Graduation.**

Kolton also contests the validity of certain of the credits he earned while attending the School District, namely credits related to “credit recovery” courses he completed for the second semester of English II, the first semester of Biology I, Math of Finance, and World History. Response, at 3-4. Kolton complains that he should not have been awarded credit for these courses because he received less than the 120 hours of instruction necessary to be considered a “Carnegie Unit” of instruction pursuant to OKLA. ADMIN. CODE tit. 210, § 35-27-2(a)(2). This argument is likewise premised on a flawed interpretation of applicable law.

The credits Kolton earned through completion of supplemental online courses were for classes offered by the School District pursuant to the Oklahoma Supplemental Online Course Program (“OSOCP”). The OSOCP is “[a]n online program that allows students who are enrolled in a public school to supplement their education by enrolling part time in online courses that are educationally appropriate for the student, which are equal to the equivalent of classroom instruction time required for student attendance and participation by the district.” OKLA. ADMIN. CODE tit. 210, § 15-34-1(c)(1). Such online courses are commonly used by students to recover credit for a class which the student has failed, thereby enabling a student like Kolton to earn the necessary credits to graduate on time.

This type of supplemental online course is explicitly authorized by statute, *see* OKLA. STAT. tit. 70, § 1-111(C), and governed by OSDE regulations which prescribe

detailed standards for how such courses are to be conducted. *See* OKLA. ADMIN. CODE tit. 210, §§ 15-34-1 through 15-34-16. The statute authorizing the implementation of the OSOCP program specifically states that completion of online courses is to be measured based on “[m]astery of competencies . . . rather than Carnegie units.” OKLA. STAT. tit. 70, § 1-111(C)(6). Nowhere do the OSOCP regulations state that a specific number of hours of instruction is required to successfully complete a supplemental online course. Furthermore, the regulation setting the minimum standards by which a student may earn course credit towards graduation specifically provides:

Students demonstrating competency in a curriculum subject shall receive credit. **Credit can also be given for the successful completion of a Carnegie Unit.** A Carnegie Unit is defined as a course that meets 40 minutes a day, five days per week for at least 36 weeks, or the equivalent of 120 clock hours within the school year, or the equivalent in block scheduling. **Educational options such as correspondence courses, independent study and certain internet instruction will also be considered appropriate methods for earning credit [ . . . ].**

OKLA. ADMIN. CODE tit. 210, § 35-25-2(5) (emphasis added). Completing a Carnegie Unit and completing an approved internet instruction course are *alternative* methods by which student might receive a credit for a given course. Therefore, a class completed through internet instruction does not necessarily require the completion of a Carnegie Unit. *See id.* Kolton’s argument that he did not earn valid course credit by completing the supplemental online courses because the courses did not involve 120 hours of instruction is simply unsupported by applicable law.

Furthermore, the only reason that Kolton completed these credits via supplemental online courses was that he had previously taken the same or similar classes in a

conventional in-person format, which would have featured 120 hours or more of classroom instruction, but did not pass the class. *See* Transcript of Kolton Ellis, which is attached to the Motion as Exhibit 1. This required him to receive additional instruction in the required areas in the supplemental online courses before taking the online exams in each of those classes to receive credit, which Kolton’s high school transcript reflects that he did. Therefore, to the extent that the issue of whether Kolton received 120 hours of instruction in these subjects is relevant at all, it is clear that he did, and in fact received **more** instruction in those subjects than his peers who took those classes in a conventional format and passed on their first attempt. This negates any contention that Kolton has not received adequate instruction in the areas required to earn the credits necessary to graduate from high school.

**III. Kolton Is Not a Resident of the School District and Has Not Sought an Open or Emergency Transfer for the 2020-2021 School Year.**

It is undisputed that Kolton attended the School District on a transfer, as his home school district is Plainview. Absent a valid transfer, Kolton has no legal right to attend the School District for the 2020-2021 school year assuming he is successful in overturning his graduation. This in and of itself is an independently sufficient basis for the Court to conclude that Kolton is not entitled to the relief requested herein—reenrollment at the School District—and dismissal of this litigation.

In an attempt to circumvent this issue, Kolton claims that he “would be eligible to enroll at Lone Grove Public Schools pursuant to the emergency transfer provisions of OKLA. STAT. tit. 70, § 8-104. Response, at 5. In order for an emergency transfer to be

granted, Kolton would need (a) one of the qualifying reasons [Section 8-104(A)(1)-(4), (6)-(8)] or the concurrence of the sending (Plainview) and receiving (Lone Grove) districts [Section 8-104(A)(5)], and (b) approval of the State Board of Education [Section 8-104(A)]. Kolton does not allege in the Petition or his Response that he has requested an emergency transfer by filing a request with the superintendent of the School District as required by OKLA. STAT. tit. 70, § 8-104(A). Moreover, the School District would not concur with such a transfer because, as described in detail in the Motion and this Reply, it is the position of the School District that Kolton has already graduated.

For these reasons, even if Kolton's claims that he was not qualified to graduate from the School District at the end of the 2019-2020 school year were correct, he still would not be entitled to the relief requested herein—enrollment at the Lone Grove School District.

#### **IV. The School District's Board of Education Lacks the Capacity to be Sued.**

In their Motion, the Defendants argued that the School District's Board of Education (the "Board") should be dismissed as a party to this case because the Board is not an independent entity capable of being sued. *See Motion*, at 15-16. In response, Kolton claims that the primary case cited by the Defendants in this regard, *Primeaux v. Independent School District No. 5 of Tulsa County, Oklahoma*, 954 F.Supp.2d 1292 (N.D. Okla. 2012), was wrongly decided. However, he does not cite a single case which holds that an Oklahoma public school district's board of education has the capacity to be sued. *See Response*, at 7. The overwhelming weight of authority on this issue reinforces



the conclusion that a board of education does **not** have the capacity to be sued because it is not a separate legal entity and has not been granted the authority to sue or be sued under its own name by state law. *See, e.g. Team Sys. Int'l, LLC v. Haozous*, 2015 WL 2131479, \*2 (W.D. Okla., May 7, 2015); *Rubio v. Turner Unified Sch. Dist. No. 202*, 453 F.Supp.2d 1295, 1300 (D. Kan. 2006).

Kolton also claims that OKLA. STAT. tit. 70, § 5-113.2, which allows for a board member who has sued the school district or the board of education itself to be excluded from an executive session held for the purposes of discussing that litigation, evinces an understanding by the legislature that a board could be sued by one of its own board members. Response, at 7-8. Contrary to Kolton's position, the statute simply provides for the exclusion of an individual board member when the individual board member's interests are adverse to a school district, a decision of its governing body, or a member of the governing body—thereby preventing gamesmanship to eliminate a board of education's ability to conduct confidential communications during an executive session or make decisions related to a legal action. It does not make a school district's board of education a body corporate with the ability to sue and be sued in its own name—as the Oklahoma School Code explicitly does with regard to school districts. *See* OKLA. STAT. tit. 70, §§ 5-105, 5-106.

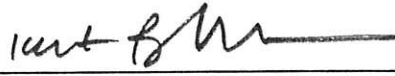
Therefore, the Court should dismiss all claims as to the Board.

### **Conclusion**

The School District Defendants request that their Motion be granted, and that they be awarded such other further relief to which they may be entitled.

Respectfully submitted,

ROSENSTEIN, FIST & RINGOLD

By:   
Kent B. Rainey, OBA. No. 14619  
525 S. Main St., Ste. 700  
Tulsa, OK 74103  
(918) 585-9211 – telephone  
(918) 583-5617 – facsimile  
borainey@rfrlaw.com

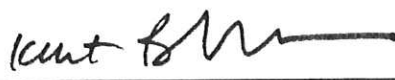
Attorney for School District Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18th day of February, 2021 a true, correct and exact copy of the above and foregoing document was sent via Certified Mail, return receipt requested to:

Mr. Ryan Owens  
Mr. James Richard Martin, Jr.  
Mr. Christopher W. Cotner  
Mr. Joseph C. Schubert  
Mr. Robert R. Redwine  
The Bethany Law Center, LLP  
6666 NW 39<sup>th</sup> Expressway  
Bethany, OK 73008

Attorneys for Plaintiff

  
Kent B. Rainey