



**GENTNER DRUMMOND
ATTORNEY GENERAL**

October 12, 2023

Via Email

Oklahoma Tax Commission
Oklahoma City, OK 73194
Attn: Lisa Haws
parentalchoice@tax.ok.gov

Re: PROPOSED RULE: 710:50-15-118. Parental Choice Tax Credit

To Whom it May Concern:

In my official capacity as the Attorney General of Oklahoma, I offer the following comments on the proposed emergency rule implementing House Bill 1934 (HB 1934) and the Oklahoma Parental Choice Tax Credit Act. Of course, as the State of Oklahoma's chief law officer, my office is always available to provide guidance on these issues or to answer follow-up questions.

My primary concern is with several items in the proposed emergency rule that do not appear in HB 1934 and do not appear to be expressly authorized by that Act. As has long been the case in Oklahoma, "[a]dministrative rules and regulations, to be valid, must be within the authority conferred upon the administrative agency." *WS. Dickey Clay Mfg. Co. v. Ferguson Inv. Co.*, 1963 OK 298, ¶ 12, 388 P.2d 300, 303. "The statute which is being administered may not be altered or added to by the exercise of a power to make regulations thereunder," and a "rule which is broader than the statute empowering the making of rules cannot be sustained." *Id.*; see also *Ritter v. State*, 2022 OK 73, ¶ 20, 520 P.3d 370, 381 ("Any rulemaking authority is subordinate to the statute itself, which must both establish policy and provide definite standards for the delegated exercise of rulemaking power.").

To begin, the definition of "[a]nother accrediting association" in subsection (b)(1) of the proposed rule is problematic. HB 1934 indicates that an eligible private school student is one who "attends a private school accredited by the State Board of Education or another accrediting association." Similarly, it defines "[q]ualified expense" as meaning "tuition and fees at a private school accredited by the State Board of Education or another accrediting association." The proposed emergency rule, in turn, defines "[a]nother accrediting association" as "an accrediting association approved by the State Board of Education." But approval by the State Board of Education for "[a]nother accrediting association" isn't what the text of HB 1934 actually requires. If the Legislature had wanted to put our Board of Education in charge of approving other accrediting associations for this Act, then it could have easily done so, much as it did with

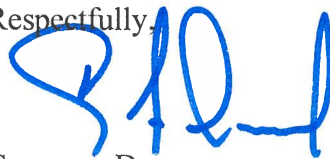
the Lindsey Nicole Henry Scholarship. *See* 70 O.S. 13-101.2(H)(1)(a) (“The State Department of Education shall approve a private school as eligible to participate in the scholarship program upon determination that the private school ... meets the accreditation requirements set by the State Board of Education or another accrediting association approved by the State Board of Education.” (emphasis added)). The proposed rule appears to go beyond what the Legislature authorized, and it bestows a duty (upon the Board) that the Legislature seemingly decided was unnecessary or unwise. HB 1934 gives the Commission the authority to “promulgate rules to implement the provisions of the Oklahoma Parental Choice Tax Credit Act,” not to create new provisions absent from the Act.

I also find troubling several provisions that could undermine HB 1934’s goal that “parents, legal guardians, custodians, and others with legal authority over children in this state be able to choose educational services that meet the needs of their individual children.” For example, the rule requires private schools, among other things, to register with the Tax Commission and annually submit “[d]ocumentation of the school’s compliance with all relevant state and local regulations.” This instruction is not found in HB 1934, and it could conceivably place burdens that would cause private schools to avoid participating. Mechanisms must exist, of course, to determine whether a private school qualifies, but the Commission should be extremely reticent to regulate private entities in ways the Legislature did not command and in ways that could hamper the Legislature’s purpose.

Finally, the rule appears to indicate that evaluation of the tax credit will occur based on the tax year in question, rather than the school year. This is potentially worrisome, given that it could result in a child having access to the tax credit for half of a school year but not the other half, which could be disruptive.

As Oklahoma’s chief law officer, I remain willing to further discuss these issues with the Commission. As such, please do not hesitate to reach out.

Respectfully,



GENTNER DRUMMOND

Oklahoma Attorney General