

FILED

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

WAKE COUNTY

2014 FEB 20 PM 12:15 SUPERIOR COURT DIVISION

FILE NO. 13 CVS 16484

WAKE COUNTY, C.S.C.

REVEREND ROBERT RICHARDSON, III, *AKJ*
MICHAEL and DELORES GALLOWAY,
STEVEN W. SIZEMORE, THE NORTH
CAROLINA SCHOOL BOARDS
ASSOCIATION, ALAMANCE-
BURLINGTON BOARD OF EDUCATION,
ASHEBORO CITY BOARD OF
EDUCATION, CATAWBA COUNTY
BOARD OF EDUCATION, CHAPEL HILL-
CARRBORO CITY BOARD OF
EDUCATION, CHATHAM COUNTY
BOARD OF EDUCATION, CLEVELAND
COUNTY BOARD OF EDUCATION,
COLUMBUS COUNTY BOARD OF
EDUCATION, CRAVEN COUNTY BOARD
OF EDUCATION, CURRITUCK COUNTY
BOARD OF EDUCATION, DAVIDSON
COUNTY BOARD OF EDUCATION,
DURHAM PUBLIC SCHOOLS BOARD OF
EDUCATION, EDENTON-CHOWAN
BOARD OF EDUCATION, GATES
COUNTY BOARD OF EDUCATION,
GRAHAM COUNTY BOARD OF
EDUCATION, HALIFAX COUNTY BOARD
OF EDUCATION, HARNETT COUNTY
BOARD OF EDUCATION, HYDE COUNTY
BOARD OF EDUCATION, LEE COUNTY
BOARD OF EDUCATION, LENOIR
COUNTY BOARD OF EDUCATION,
LEXINGTON CITY BOARD OF
EDUCATION, MACON COUNTY BOARD
OF EDUCATION, MARTIN COUNTY
BOARD OF EDUCATION, MOUNT AIRY
CITY BOARD OF EDUCATION, NEWTON-
CONOVER CITY BOARD OF EDUCATION,
ONSLow COUNTY BOARD OF
EDUCATION, ORANGE COUNTY BOARD
OF EDUCATION, PAMLICO COUNTY
BOARD OF EDUCATION, PERSON
COUNTY BOARD OF EDUCATION, PITT
COUNTY BOARD OF EDUCATION, POLK
COUNTY BOARD OF EDUCATION,

**ORDER GRANTING PRELIMINARY
INJUNCTION**

ROCKINGHAM COUNTY BOARD OF
EDUCATION, RUTHERFORD COUNTY
BOARD OF EDUCATION, SCOTLAND
COUNTY BOARD OF EDUCATION,
STANLEY COUNTY BOARD OF
EDUCATION, SURRY COUNTY BOARD
OF EDUCATION, VANCE COUNTY
BOARD OF EDUCATION, WARREN
COUNTY BOARD OF EDUCATION,
WASHINGTON COUNTY BOARD OF
EDUCATION, WHITEVILLE CITY BOARD
OF EDUCATION, YANCEY COUNTY
BOARD OF EDUCATION, and
ALEXANDER COUNTY BOARD OF
EDUCATION, ASHEVILLE CITY BOARD
OF EDUCATION, AVERY COUNTY
BOARD OF EDUCATION, BERTIE
COUNTY BOARD OF EDUCATION,
BLADEN COUNTY BOARD OF
EDUCATION, CAMDEN COUNTY BOARD
OF EDUCATION, CASWELL COUNTY
BOARD OF EDUCATION, CHEROKEE
COUNTY BOARD OF EDUCATION,
CLINTON CITY BOARD OF EDUCATION,
CUMBERLAND COUNTY BOARD OF
EDUCATION, EDGECOMBE COUNTY
BOARD OF EDUCATION, ELIZABETH
CITY- PASQUOTANK BOARD OF
EDUCATION, GUILFORD COUNTY
BOARD OF EDUCATION, HERTFORD
COUNTY BOARD OF EDUCATION,
HICKORY CITY BOARD OF EDUCATION,
HOKE COUNTY BOARD OF EDUCATION,
JACKSON COUNTY BOARD OF
EDUCATION, KANNAPOLIS CITY BOARD
OF EDUCATION MONTGOMERY
COUNTY BOARD OF EDUCATION,
MOORE COUNTY BOARD OF
EDUCATION, MOORESVILLE BOARD OF
EDUCATION, NORTHAMPTON COUNTY
BOARD OF EDUCATION, SAMPSON
COUNTY BOARD OF EDUCATION,
THOMASVILLE CITY BOARD OF
EDUCATION, TRANSYLVANIA COUNTY
BOARD OF EDUCATION,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, THE
NORTH CAROLINA STATE BOARD OF
EDUCATION and THE NORTH CAROLINA
STATE EDUCATION ASSISTANCE
AUTHORITY,

Defendants,

and

CYNTHIA PERRY and GENNELL CURRY,

Defendant-Intervenors.

THIS CAUSE came on to be heard before the undersigned Judge Presiding in the Wake County Civil Superior Court on 21 February 2014 pursuant to Plaintiffs' Motion for Preliminary Injunction requesting the Court enjoin the implementation of legislation enacted by the General Assembly providing public funding for students to attend private schools enrolling students in kindergarten through high school.

Plaintiffs were represented at the hearing by Attorneys Edwin Speas, Robert Orr, and Carrie McMillan of Poyner Spruill. Defendants were represented by Lauren Clemmons, Special Deputy Attorney General, of the North Carolina Department of Justice. Defendant-Intervenors were represented by Attorneys Richard Komer and Renée Flaherty of the Institute for Justice, and Robert T. Numbers, II of Womble Carlyle Sandridge & Rice.

Plaintiffs submitted the affidavits of the following persons in support of their motion: Reverend Robert Richardson, III, Michael and Delores Galloway, Steven W. Sizemore, Angela Knight, Danny Holloman, Ray Spain, Dr. Derrick D. Jordan, Allison Scholar, Joseph Davis, Ronald Gregory, Tony Tipton, Wanda P. Dawson, Andrew Bryan, Lane Mills, Dr. Barry

Williams, Bruce Boyles, Terry Griffin, Ronald Singletary, Allan Smith, Alan Fulk, Travis Reeves, Chris Baldwin, Steve Mazingo, Gerri Martin, Edwin Dunlap, Jr. Greg Little, Randolph Latimore, Leanne Winner, Sean Holmes, and Joanna King. Defendants submitted the affidavits of the following persons in opposition to the motion: Linda Nelson, Gerry Cohen, Michael Fedewa, Elizabeth McDuffie, Paul Stam, and Alexis Schauss. Defendant-intervenors submitted the affidavits of Cynthia Perry and Gennell Curry.

The Court has fully considered the pleadings, briefs, and affidavits submitted by the parties, and the arguments of counsel at this hearing and the hearing on 17 February 2014. The Court has also considered the arguments of counsel for the parties in the related case, *Hart v. State*, 13-CVS-16771.

Defendants have filed a request pursuant to Rule 52(a)(2) of the Rules of Civil Procedure requesting the Court to enter findings of fact and conclusions of law supporting the Court's order. Based on the evidence presented, and for the purpose of ruling on the Motion for a Preliminary Injunction, the Court makes the following:

FINDINGS OF FACT

1. The 2013 Session of the General Assembly enacted legislation providing vouchers funded by taxpayer dollars to students to attend private elementary and secondary schools. This legislation, called the "Opportunity Scholarship Program" ("OSP"), was adopted as part of the 2013 Appropriations Act, 2013 Session Law 360, Section 8.29, and is partially codified in Part 2A of Article 39 of Chapter 115C of the General Statutes.
2. The OSP legislation appropriates \$10,000,000 to the defendant State Education Assistance Authority ("SEAA") to fund "scholarships" of up to \$4,200 for eligible North Carolina school children to use at private schools for primary and secondary education. N.C. Gen. Stat. § 115C-562.2(b).

3. The appropriation for the OSP is coupled with a corresponding reduction in the budget for the public school system in the amount of \$11,797,941. This cut from the public schools budget directly results from the OSP legislation and provides the funds for the OSP.
4. The OSP legislation directs the State Board of Education to reduce the state-funded allotments to local school administrative units in which voucher recipients reside in an amount equal to the per-pupil state allocation for those school systems multiplied by the number of voucher recipients who attended the public schools in the local school system the previous semester. N.C. Gen. Stat. § 115C-562.7(a). During the 2012-13 school year, the average per pupil allocation for public school systems ranged from \$4,870.35 to \$12,871.75. In effect, the Voucher legislation is financed through reductions in the State School Fund and the diversion of those funds to the Defendant State Education Assistance Authority to provide private school vouchers.
5. The OSP legislation requires that local school administrative units “identify to the Department of Public Instruction the reductions to State General Fund appropriations for Opportunity Scholarships by October 1 of each year.” N.C. Gen. Stat. § 115C-562.7(a). These reductions will be imposed after school districts have prepared the school year’s budget, have entered into contracts and other obligations for the school year, and have begun instructing students.
6. Pursuant to the OSP legislation, the Authority was required to make applications available for OSP scholarships for the 2014-15 school year by 1 February 2014, and is to begin selecting students for scholarships by 1 March 2014. OSP legislation § 8.29(h).

The Authority will transfer funds to private schools by means of payments that are endorsed by a student's parent or guardian. N.C. Gen. Stat. § 115C-562.6.

7. The Authority has created, disseminated, and received OSP applications. The Authority plans to review those applications to determine if they meet the OSP eligibility criteria. All applications submitted by 25 February and meeting the criteria will be entered into a lottery operated by the Authority. On 3 March 2014, the Authority plans to notify applicants selected by the lottery.
8. As of 18 February 2014, the SEAA had received 4,274 applications for vouchers. Applications were received from students residing in 89 of the State's 100 counties. The largest number of applications came from students residing in Mecklenburg, Wake, Guilford and Cumberland Counties.
9. A voucher recipient can use his voucher at any participating private school that will admit him and that meets the following requirements: (a) keeps attendance, financial, and health records; (b) administers an achievement test selected by the school to each voucher recipient enrolled in grade 3 or higher; and (c) administers a competency test selected by the school to each voucher recipient in grade 11. N.C. Gen. Stat. §§ 115C-562.1(5), 562.5, 550.
10. Private schools that receive OSP scholarship funds are (1) not required to be accredited by the State Board of Education or any other state or national institution; (2) not required to employ teachers who are licensed or have any particular credentials, degrees, experience, or expertise in education; (3) not subject to any requirements regarding the curriculum that they teach; (4) not required to demonstrate any level of student achievement; and (5) not prohibited by the OSP Legislation from discriminating against

applicants or students on the basis of race, sex, family income or wealth, disability, or religion. *See* N.C. Gen. Stat. § 115C-562.1 *et seq.*

11. As of 18 February 2014, there were approximately 700 private schools at which a voucher recipient could enroll if admitted.
12. As of 18 February 2014, more than fifty voucher applicants had requested vouchers to attend the following schools: Greensboro Islamic Academy (158 applicants); Victory Christian Center School (87 applicants); Al-Iman School (77 applicants); Fayetteville Christian School (66 applicants); Freedom Christian Academy (61 applicants); and Raleigh Christian Academy (55 applicants).
13. The Authority anticipates that it will begin disbursing funds for vouchers on 15 September 2014 and again on 15 February 2015.
14. The Authority has expended and will continue to expend taxpayer funds while developing and implementing the OSP.
15. As of this date, no scholarship recipients have been selected, no scholarship checks have been issued, and no scholarship checks have been cashed. As of this date, the number of scholarship applicants significantly exceeds the potential number of scholarships. No applicant knows whether he or she would be selected in the lottery.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has previously determined that, plaintiffs have standing for all of the claims in their Amended Complaint.
2. Plaintiffs seek a preliminary injunction of the OSP to ensure that taxpayer funds are not expended in violation of the North Carolina Constitution during the pendency of this litigation. The purpose of a preliminary injunction is to preserve the status quo pending a

- final determination on the merits. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983).
3. A preliminary injunction should be granted if plaintiffs are (1) “able to show likelihood of success on the merits” and (2) “likely to sustain irreparable loss unless the injunction is issued.” See *N.C. Baptist Hosp. v. Novant Health, Inc.*, 195 N.C. App. 721, 724, 673 S.E.2d 794, 796 (2009) (quoting *A.E.P. Indus.*, 308 N.C. at 401, 302 S.E.2d at 759-60).
 4. In applying this test, the Court will “engage in a balancing process, weighing potential harm to the plaintiff[s] if the injunction is not issued against the potential harm to the defendant[s] if injunctive relief is granted.” See *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 16, 431 S.E.2d 828, 835 (1993).
 5. In the Fifth Claim of their First Amended Complaint, plaintiffs allege that the OSP Legislation violates Article IX, Section 6 of the North Carolina Constitution because it appropriates funds to private schools that should be used exclusively for the system of free public schools and because it finances the OSP through reductions to the State School Fund.
 6. An act passed by the legislature is presumed to be constitutional. *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 63-64, 366 S.E.2d 697, 698 (1988). However, when a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits. *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997).
 7. Article I, Section 15 of the Constitution declares: “The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”

8. The means of fulfilling the duty to guard and maintain the right to education are specified in Article IX.
9. Article IX, Section 2(1) requires that the “General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools.”
10. Article IX, Section 6 sets forth how the State must fund the system of free public schools:

The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or by the terms of the grant, gift, or devise, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

N.C. Const. Art. IX, § 6 (emphasis added).

11. “It is the duty of this Court to ascertain and declare the intent of the framers of the Constitution and to reject any act in conflict therewith.” *Maready v. City of Winston-Salem*, 342 N.C. 708, 716, 467 S.E.2d 615, 620 (1996). “Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation.” *Sneed v. Greensboro City Bd. of Ed.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980).

Historical Development of Article IX, Section 6.

12. The 1868 Constitution committed the State to providing education through a “general and uniform system of Public Schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years.” 1868 Const. Art. IX, § 2. To maintain adequate funding and prevent diversion of funds, Article IX, Section 4 obligated the State to fund public schools using an “irreducible educational fund,” the income of

which “shall be faithfully appropriated for establishing and perfecting in this State a system of Free Public Schools, and for no other purposes or uses whatsoever.” 1868 Const. Art. IX, § 4. This Section 4 is the precursor to the current Section 6.

13. In 1875, Section 4 was amended to provide that state revenues expended for the “purposes of education” had to be “faithfully appropriated for establishing and maintaining in this State a system of free public schools and for no other uses or purposes whatsoever.” 1868 Const. Art. IX, § 4 (as amended in 1875).
14. Evaluating Article IX, the Supreme Court stated: “Our people regarded the subject of education as of the highest and most essential importance, and there is no provision in our Constitution which is clearer, more direct, or commanding in its terms than [A]rticle 9.” *Collie v. Commissioners of Franklin Cnty.*, 145 N.C. 170, 59 S.E. 44, 46 (1907). “Its framers, whatever else may be said of their work, seem to have been especially anxious to establish and secure beyond peradventure a system of free popular education.” *Id.* (quoting *Barksdale v. Commissioners of Franklin Cnty.*, 93 N.C. 472, 483-84 (1885)).
15. In 1955, the North Carolina General Assembly appointed the Pearsall Committee to propose a response to *Brown v. Board of Education*, 347 U.S. 483 (1954). The Pearsall Committee made two principal recommendations to avoid school integration: (1) enact a voucher program, providing taxpayer-funded grants for use in private schools to children who are assigned to an integrated public school against their wishes; and (2) authorize local governments to suspend their public schools upon a vote of the community. *Report of the North Carolina Advisory Committee on Education*, 1 Race Rel. L. Rep. 581, 585 (1956). The Committee recognized that “there must be some changes to the North Carolina Constitution” to implement this plan. *Id.*

16. The General Assembly enacted the “Pearsall Plan” in July 1956 by passing a proposed constitutional amendment and supporting statutory changes. To constitutionally authorize the issuance of private school vouchers, new Section 12 was added to Article IX, stating: “Notwithstanding any other provision of this Constitution, the General Assembly may provide for payment of education expense grants from any State or local public funds for the private education of any child for whom no public school is available or [who is] assigned against the wishes of his parent . . . to a public school attended by a child of another race.” N.C. Const. Art. IX, § 12. The amendment was approved by the State’s voters in September 1956.
17. A decade later, the Pearsall Plan, including Article IX, Section 12, was struck down as unconstitutional by a federal court. *Hawkins v. N.C. State Bd. of Educ.*, 11 Race Rel. L. Rep. 745, 746-47 (W.D.N.C. 1966).
18. In 1968, the State Constitution Study Commission was tasked with updating and revising the Constitution. Article IX, Section 12 was removed because it had been invalidated. *Report of the N.C. State Const. Study Commission*, at 42 (1968). Section 12 was not replaced with any other provision authorizing State funding of private school vouchers. *Id.* Section 4 was moved to Section 6 “without substantive change.” *Id.* Its phrasing was changed, however, from “faithfully appropriated for establishing and maintaining in this State a system of free public schools and for no other uses or purposes whatsoever” to “faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.” *Id.* at 93. These constitutional changes were enacted by the General Assembly in 1969 and approved by the voters in 1970.

Likelihood of Success on the Merits

19. Article IX, Section 6 of the Constitution specifies that State assets and revenue “for purposes of public education” “shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.” N.C. Const. Art. IX, § 6.
20. By providing public funds to private primary and secondary schools, the OSP Legislation is likely to violate the mandate of Article IX, Section 6 that those funds “shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.” N.C. Const. Art. IX, § 6. .
21. The particular method that the General Assembly used to fund the OSP is also likely to violate Section 6. Under Section 6, funds “set apart” for the purpose of public education “shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.” N.C. Const. Art. IX, § 6. Contrary to this requirement, the OSP is apparently funded with funds that have been “set apart” for the public school system.
22. First, the reduction in funding to the public schools in the amount of \$11,797,941 for fiscal year 2014-15 directly results from the OSP Legislation and provides the funds for the OSP. Had this money not been diverted to the OSP, it would have been available for use in the public schools. Therefore, the OSP Legislation redirects funds from the public schools to the OSP, in likely violation of Article IX, Section 6.
23. Second, for each student who uses an OSP scholarship to leave a public school, his or her former local public school system has its state funding reduced on a per-pupil basis during the school year. N.C. Gen. Stat. § 115C-562.7(a). This reduction, directly caused by the OSP, occurs after school districts have received their allotments of state funds for

the school year. This reduction in funding for local school districts transfers funds from the public schools to the OSP, in likely violation of Article IX, Section 6.

24. For these reasons, plaintiffs have shown a likelihood of success on the merits of their Fifth Claim.

Irreparable Harm

25. The individual Plaintiffs will be irreparably harmed if the Defendants are not enjoined from implementing the OSP. The Authority is already spending taxpayer funds to establish and implement the Program, and is poised to commit and disburse substantial funds to private schools in the coming months. The expenditure of taxpayer funds in contravention of Article IX, Section 6 would violate plaintiffs' rights as taxpayers and cause them direct injury. *Goldston v. State of North Carolina*, 361 N.C. 26, 30-33, 637 S.E.2d 876, 879-81 (2006).
26. The school board plaintiffs, and the public school students they serve, also will be irreparably injured if defendants are not enjoined from implementing the OSP as a result of the mandated \$11,000,000.00 reduction in the allocation of State funds to local boards of education for the 2014-15 school year. *Hoke County Board of Education v State*, 358 N.C. 605, 599 S.E.2d 365 (2009).
27. The purpose of a preliminary injunction is to preserve the status quo pending a final determination on the merits. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). As of this date, the status quo with respect to the implementation of the OSP is as follows: no lottery has been conducted, no scholarship recipients have been selected, no scholarship checks have been issued, and no scholarship checks have been cashed. A preliminary injunction will preserve the status quo until a final determination on the merits.

28. The Court has weighed the potential harm to the plaintiffs if the injunction is not issued against the potential harm to the defendants if injunctive relief is granted. If a preliminary injunction is not issued, the harm to the individual plaintiffs and school board plaintiffs is immediate and irreparable. In contrast, the harm forecast by the intervenors (having to remain in public school for the next year) is speculative, as neither intervenor can show that she would have been selected in the lottery. As for the State, the potential harm is a delay in implementing the OSP until the Court makes a final determination on the merits. If the OSP Legislation is found to be unconstitutional, as is likely, delaying its implementation will benefit the State and the public schools, which will avoid funding reductions in 2014-15 caused by the OSP. The balance of harms favors the plaintiffs.
29. Because plaintiffs have demonstrated that they are likely to prevail on the merits of their Fifth Claim and that they will suffer irreparable harm if the OSP is not enjoined, a preliminary injunction is proper and necessary.
30. Because plaintiffs' Fifth Claim is sufficient to support the issuance of a preliminary injunction, the Court does not address at this time plaintiffs' other claims.

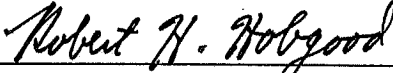
WHEREFORE, for the reasons set forth above:

1. Plaintiffs' motion for preliminary injunction is GRANTED;
2. Defendants are ENJOINED until further orders of this Court from implementing the challenged legislation, including the acceptance of additional voucher applications, the processing of voucher applications, the selection of voucher recipients, and the expenditure or disbursement of any public funds in furtherance of the challenged legislation; provided the Defendants may communicate the status of the OSP in light of this injunction to applicants, private schools and interested citizens.

3. Pursuant to Rule 65 (c), Plaintiffs shall be required to post a bond of \$200.00 with the Clerk of Court for the payment of such costs and damages as may be incurred by Defendants in the event this injunction is determined to have been wrongly entered.
4. Bond shall be posted within five days from the entry of this Order.

SO ORDERED

This the 28th day of February, 2014.



ROBERT H. HOBGOOD
Judge Presiding

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by e-mail and/or by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following persons at the following addresses which are the last addresses known to me:

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This the 28th day of February, 2014.

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