

NORTH CAROLINA
WAKE COUNTY

2014 AUG 28 AM 8

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 13 CVS 16771

ALICE HART, RODNEY ELLIS, JUDY
CHAMBERS, JOHN HARDING LUCAS,
MARGARET ARBUCKLE, LINDA
MOZELL, YAMILE NAZAR, ARNETTA
BEVERLY, JULIE PEEPLES, W.T. BROWN,
SARA PILAND, DONNA MANSFIELD,
GEORGE LOUCKS, WANDA KINDELL,
VALERIE JOHNSON, MICHAEL WARD, T.
ANTHONY SPEARMAN, BRITTANY
WILLIAMS, RAEANN RIVERA, ALLEN
THOMAS, JIM EDMONDS, SASHA
VRTUNSKI, PRISCILLA NDIAYE, DON
LOCKE, and SANDRA BYRD,

Plaintiffs,

v.

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

Defendants,

and

CYNTHIA PERRY, GENNELL CURRY,
THOM TILLIS, and PHIL BERGER,

Defendant-Intervenors.

**ORDER AND
FINAL JUDGMENT**

THIS CAUSE came on to be heard before the undersigned Judge Presiding in the Wake County Civil Superior Court on 19 August 2014 pursuant to the parties' cross motions for summary judgment. In this case, plaintiffs seek a declaratory judgment and an injunction of the challenged legislation. Plaintiffs were represented at the hearing by Burton Craige and Narendra K. Ghosh of Patterson Harkavy LLP, and by Christine Bischoff and Carlene McNulty of the North Carolina Justice Center. Defendants were represented by Lauren Clemmons, Special

Deputy Attorney General, of the North Carolina Department of Justice. Defendant-Intervenors Perry and Curry were represented by Richard Komer and Renee Flaherty of the Institute for Justice and Robert T. Numbers, II of Womble Carlyle Sandridge & Rice. Defendant-Intervenors Tillis and Berger were represented by Stephen D. Martin and Noah H. Huffstetler III of Nelson Mullins Riley & Scarborough, LLP.

The Court has fully considered the evidence and briefs submitted by the parties, the arguments of counsel, and defendants' motion to exclude certain evidence. Based on the admissible evidence presented, the Court finds the following are:

UNDISPUTED MATERIAL FACTS

1. In 2013, the General Assembly enacted legislation providing scholarships 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 Current Operations and Capital Improvements Appropriations Act of 2013, 2013 Session Law 360, Section 8.29, and is partially codified in Part 2A of Article 39 of Chapter 115C of the General Statutes. In 2014, the General Assembly amended the OSP in Section 8.25 of the Current Operations and Capital Improvements Appropriations Act of 2014, 2014 Session Law 100.
2. As amended, the OSP Legislation appropriates \$10,800,000 in general funds to the Board of Governors of The University of North Carolina for the 2014-15 fiscal year to award 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). Defendant State Education Assistance Authority ("SEAA") is responsible for implementing the OSP. § 115C-562.1 *et seq.* OSP scholarships cannot be used at traditional public schools or public charter schools. § 115C-562.2(a).
3. Private schools that wish to enroll scholarship recipients must register with the Division of Nonpublic Education ("DNPE") in the State Department of Administration and provide certain information and assurances to the SEAA. N.C. Gen. Stat. § 115C-562.4(a), -562.5(a). Private schools register with the DNPE either as religious schools or independent schools under Article 39 of Chapter 115C of the General Statutes.
4. Private schools that receive 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 or principals 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 provide a minimum amount of instructional time; and (5) not prohibited from discriminating against applicants or students on the basis of religion. *See* N.C. Gen. Stat. § 115C-562.1 *et seq.*
5. The SEAA has created, disseminated, and received OSP applications. 5,556 students applied for scholarships. After reviewing those applications to determine if they meet the OSP eligibility criteria, the SEAA conducted a lottery to select 2300 students for scholarships on 24

June 2014. Under the legislation, the SEAA is directed to transfer funds to private schools by means of payments that are endorsed by a student's parent or guardian to a particular private school. N.C. Gen. Stat. § 115C-562.6.

6. Of the 5,556 scholarship applicants, 3,804 applicants identified 446 private schools they planned to attend. Of those 446 schools, 322 are religious schools and 117 are independent schools. Of the 322 religious schools scholarship recipients planned to attend, 128 are accredited by some organization and 194 are not accredited by any organization. Of the 117 independent schools scholarship recipients planned to attend, 58 are accredited by some organization and 59 are not accredited by any organization.

7. In 32 of North Carolina's 100 counties, the only private schools are religious schools.

8. Some religious schools will only admit applicants of a particular religion.

9. As of 23 July 2014, the ten private schools in which the largest number of scholarship recipients planned to enroll are the following religious schools: Victory Christian Center School (Charlotte); Word of God Christian Academy (Raleigh); Greensboro Islamic Academy; Freedom Christian Academy (Fayetteville); Fayetteville Christian School; Northside Christian Academy (Charlotte); Al-Iman School (Raleigh); Concord First Assembly Academy; Tabernacle Christian School (Monroe); and Raleigh Christian Academy.

10. At least 303 scholarship applicants planned to attend schools that enrolled fewer than 25 students in 2013-14 and at least 93 scholarship applicants planned to attend schools that enrolled 10 or fewer students in 2013-14.

Based on the foregoing undisputed facts, the Court makes the following:

CONCLUSIONS OF LAW

1. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). "Summary judgment, when appropriate, may be rendered against the moving party." *Id.* In considering a motion for summary judgment, the court is to consider the evidence "in a light most favorable to the non-moving party." *McCutchen v. McCutchen*, 360 N.C. 280, 286, 624 S.E.2d 620, 625 (2006). Constitutional questions may appropriately be resolved on a motion for summary judgment. *See, e.g., Stone v. State*, 191 N.C. App. 402, 664 S.E.2d 32 (2008).

2. 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).

3. The Court concludes from the record beyond a reasonable doubt that the OSP Legislation funds private schools with taxpayer dollars as an alternative to the public school system in direct contravention of Article 1, Sections 15 and 19 (with respect to religion), Article IX, Sections 2(1), 5, and 6, and Article V, Sections 2(1) and (7) of the North Carolina Constitution. The legislation unconstitutionally

a. appropriates public funds to private primary and secondary schools in violation of Article IX, Section 6 because those funds must be used exclusively for maintaining a uniform system of free public schools;

b. appropriates public funds for education in a manner that does not accomplish a public purpose, in violation of Article V, Sections 2(1) and (7), in particular by appropriating funds to private primary and secondary schools without regard to whether these schools satisfy substantive educational standards: appropriating taxpayer funds to unaccountable schools does not accomplish a public purpose;

c. appropriates public funds to private primary and secondary schools in violation of Article IX, Section 5 because those funds should go to public schools and be supervised and administered by the State Board of Education;

d. creates a non-uniform system of education in violation of Article IX, Section 2(1) by sending public funds to private schools that should go to public schools;

e. fails to “guard and maintain” the right of the people to the privilege of education in violation of Article I, Section 15 by appropriating taxpayer funds to educational institutions that are not required to meet educational standards, including curriculum and requirements that teachers and principals be certified;

f. fails to “guard and maintain” the right of the people to the privilege of education in violation of Article I, Section 15 by expending public funds so that children can attend private schools;

g. allows funding of private schools that discriminate on the basis of religion in violation of Article I, Section 19; and

h. appropriates public funds raised by taxation to finance the operation of privately operated, managed, and controlled schools in violation of Article V, Section 2(1).

4. The General Assembly fails the children of North Carolina when they are sent with taxpayer money to private schools that have no legal obligation to teach them anything.


5. The children of North Carolina suffer no prejudice by attending public schools.

6. Apart from a permanent injunction, plaintiffs have no other adequate remedy for the legislation’s violation of their constitutional rights.

WHEREFORE, it is ORDERED that:

1. Plaintiffs' motion for summary judgment is ALLOWED. Defendants' and defendant-intervenors' motions for summary judgment are DENIED.
2. The Court DECLARES that the OSP Legislation is unconstitutional beyond a reasonable doubt.
3. Defendants are PERMANENTLY ENJOINED from implementing the OSP Legislation, including by disbursing any public funds. This injunction is effective as of 21 August 2014 at 10:23 a.m.

SO ORDERED, this the 21st day of August, 2014. Order signed and filed 28 August 2014.


The Honorable Robert H. Hobgood
Superior Court Judge Presiding