NO. TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

HART, ET AL.

Plaintiffs-Appellees,

v.

STATE OF NORTH CAROLINA, ET AL.

Defendants-Appellants

PERRY, ET AL.

Intervenor-Defendants-Appellants

From Wake County
No. 13-CVS-16771
COA P14-210

RICHARDSON, ET AL.

Plaintiffs-Appellees,

v.

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PETITION FOR WRIT OF SUPERSEDEAS AND TEMPORARY STAY

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PETITION FOR WRIT OF SUPERSEDEAS AND TEMPORARY STAY

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Intervenor-Defendants Cynthia Perry and Gennell Curry (hereinafter "Parents") respectfully petition this Court to issue a temporary stay and a writ of supersedeas staying enforcement of the February 28, 2014 Orders of the Honorable Robert Hobgood, Judge Presiding, Superior Court, Wake County, pending review by this Court of the Orders, which granted preliminary injunctions halting implementation of North Carolina's Opportunity Scholarship Program (hereinafter "the Program"). On March 3, 2014, Parents moved that Judge Hobgood stay the injunction pending an appeal to the North Carolina Court of Appeals, which motion he denied on March 11, 2014. On March 17, 2014, Parents petitioned the North Carolina Court of Appeals for a Writ of Supersedeas and Temporary Stay. The Court of Appeals denied the temporary stay on March 19, 2014 and the petition on April 2, 2014.

If this Court does not act quickly to stay the Superior Court's preliminary injunction, the Parents and thousands of similarly-situated families will lose their opportunity to use the Program's scholarships to transfer their children to schools they believe will better serve them. The Superior Court's Orders potentially affect even more parents whose children are already in private schools, because the court's mistaken reading of the Constitution also puts North Carolina's scholarship

program for students with disabilities in jeopardy.[1] For decades, North Carolina's public schools have poorly served low-income families, and this has continued despite massive increases in spending on the public schools in recent years, much of it directed towards low-income students. Even if the preliminary injunction is lifted on appeal, as Parents fully expect, a minimum of one and possibly two years' benefit from the Program will have been lost in the meantime, because the implementation of the Program has been halted. As every parent knows, educational opportunities, once lost, can never be regained.

Moreover, the injunction was granted based on obvious misinterpretations of the North Carolina Constitution, misinterpretations so plain that neither group of Plaintiffs could cite any North Carolina precedents on point. These misinterpretations violate both the plain language of the constitutional provisions in question and the elementary principles that this Court has established for interpreting the Constitution. Thus, the Plaintiffs have no likelihood of ultimately succeeding on the merits of their claims. Absent action by this Court, therefore, the families will have lost vital educational opportunities for nothing.

Parents respectfully request that this Court temporarily stay the Superior Court's preliminary injunction and issue a writ of supersedeas to the Superior Court.

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[1] *See* pages 39-40 *infra*.

INTRODUCTION

The Program was enacted by the 2013 session of the General Assembly to provide 2,400 low-income families, like those headed by Parents, with scholarships of up to $4,200 if they chose to transfer their children to participating private schools. The Program was signed into law on July 26, 2013. Because the Plaintiffs in these two cases delayed until December 11 and 16, 2013, to file their challenges to the constitutionality of the Program, and delayed another month before moving for a preliminary injunction, the preliminary injunction granted by the Superior Court will effectively deprive Parents and all similarly-situated applicants of the benefits of the Program for at least the 2014-15 school year and possibly beyond. The injunction has prevented the North Carolina State Education Assistance Authority (hereinafter "the SEAA") from conducting the lottery called for in the challenged legislation when the number of applicants exceeds the number of available scholarships. In a demonstration of the powerful demand for the Program, the SEAA received over 5,500 applications from low-income families for the 2,400 scholarships to be made available by the Program. Approximately three-quarters (74%) of the applications were received from minority students. The injunction has also halted the processing of applications from private schools willing to participate in the Program, which precludes Parents, and any other families that would have received scholarships, from

applying to participating schools and thereby contracting for their children's education for the 2014-15 school year. Nor was there any immediate need for the Superior Court to enjoin the Program to prevent irreparable harm to the Plaintiffs: no disbursement of scholarship funds would have occurred until September 15, 2014, at the earliest. Instead of preventing irreparable harm, the injunction will cause irreparable harm to Parents and all similarly-situated families, who will be forced by their financial circumstances to keep their children in the public schools and will be denied the opportunity to find a school that better fits their children's educational needs.

This Petition will provide a brief overview of the Program and its history, the procedural posture of these cases, and the Superior Court's preliminary injunction. The Petition will then discuss four reasons why this Court should issue a writ of supersedeas and temporary stay: (1) The Orders granting the preliminary injunction implicate a substantial right of Parents that will be permanently lost absent issuance of a writ and stay; (2) Parents' underlying appeal is meritorious; (3) there was no urgent need for the Superior Court to grant the preliminary injunction; and (4) the Superior Court failed to consider the Plaintiffs' delay in bringing this lawsuit in evaluating whether to grant the extraordinary relief of a preliminary injunction.

Parents respectfully request that this Court issue a writ of supersedeas to the Superior Court, staying enforcement of the Orders entered on February 28, 2014, pending issuance of the mandate to this Court, following its review and determination upon the appeal which will be timely perfected; and that Parents shall have such other relief as to the Court may seem proper. Parents also request that this Court temporarily stay enforcement of the Orders entered on February 28, 2014, until such time as this Court can rule on Parents' Petition for Writ of Supersedeas.

FACTS

1. The Program and Its History

The Program is quite simple conceptually. It uses $10 million of general revenue to provide scholarships to low-income families, defined for the initial year of the Program as families eligible for the federal free and reduced-price lunch program, who want to transfer their children to participating private schools. Scholarships are capped at tuition and fees or $4,200, whichever is lower, and the payment mechanism ensures that the funds will be used to pay for the children's education. Only children previously attending public schools are eligible; students already attending private schools, no matter how poor their families are, are not eligible. Because the Program involves the awarding of scholarships, it is administered by the State Education Assistance Agency, which administers North

Carolina's higher education scholarship programs. Because the SEAA is funded through the University of North Carolina ("UNC") category in the state budget, the $10 million appropriation for the Program is found in the UNC category of the budget and not in the K-12 public schools category. Because the General Assembly anticipated that the new Program would reduce the number of students attending the local districts' public schools, the local districts were told to notify the State of any students who transferred as a result of the Program so that their allocation of state funds could be adjusted accordingly for the students the districts would not be educating.

The Program was passed by the General Assembly as section 8.29 of the 2013 Appropriations Act, 2013 Sessions Law 360, after years of failed attempts to enact scholarship legislation to provide low-income North Carolina families with increased access to educational opportunities outside of the traditional general and uniform system of public schools. The Program is designed to provide these opportunities to children who desperately need them. The Department of Public Instruction's statistics show that only one in six economically disadvantaged students passed both the reading and math end-of-grade tests, as compared to half of their non-economically disadvantaged peers.[2]

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[2] *See* http://www.ncreportcards.org/src/, a website maintained by the North Carolina Department of Public Instruction called "NC School Report Cards." The DPI website indicates that in 2012-13, only 17.4% of economically disadvantaged students passed both of the state end-of-grade reading and math tests, as compared to 49.8% of their non-economically disadvantaged peers. For end-of-course tests, the figures were 28.4% for

Despite statements by the Plaintiffs' attorneys at the February 17 hearing on the State Defendants' motions to dismiss both of these cases for failure to state a claim (which the Superior Court denied at the conclusion of that hearing), in which the Plaintiffs claimed that the Program was not considered or debated in Committee or on the floor but just slipped into the budget, the Program had in fact gone through an extensive process of consideration in the General Assembly. Originating as HB 944, the "Opportunity Scholarship Act," the House Education Committee conducted hearings on the bill on two separate days: May 21 and May 28, 2013. During the first day's hearing, Chris Hill, director of the Education and Law Project at the North Carolina Justice Center, testified against the bill. The North Carolina Justice Center represents the plaintiffs in the *Hart* case that is the subject of the instant Petition. During the second day's hearing, Rodney Ellis, Sr., a plaintiff in the *Hart* litigation and President of the North Carolina Association of Educators, which also represents the *Hart* Plaintiffs, testified against the bill. Also testifying against the bill on the first day's hearing were Charles Brown, Chairman of the Scotland County Board of Education, and Minnie Forte-Brown, Vice Chair

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economically disadvantaged students compared to 58.8% for non-economically disadvantaged students. Remembering that 74% of all applicants for the scholarships are minority, one notes that on the end-of-grade tests, only 14.2% of Black students and 19.3% of Hispanic students passed both of the reading and math tests, compared to 43.5% of White students. On the end-of-course tests, only 24.5% of Black and 33.5% of Hispanic students passed the tests, compared to 55.8% of White students. The trial judge found in his Orders granting the preliminary injunction that the largest number of applicants came from Mecklenburg, Wake, Guilford, and Cumberland Counties. *Hart* Order at Findings of Fact ¶ 8; *Richardson* Order at Findings of Fact ¶ 8. The district-level statistics for these four districts show the same huge disparities between economically disadvantaged and non-economically disadvantaged students and between White, Black, and Hispanic students as the state-level statistics.

of the Durham County School Board, both of whom are on the board of directors of the North Carolina School Boards Association, a plaintiff in the *Richardson* case that is also the subject of the instant Petition, which includes 65 local school boards as plaintiffs, including the Durham School Board.

After the public hearings, HB 944 was hotly debated in the House Education Committee before receiving a favorable vote. It was then hotly debated in the House Education Subcommittee on Appropriations before being included in the House Committee Substitute for the Appropriations Bill, SB 402. On June 7, 2013, the House Appropriations Committee's Subcommittee on Education debated the inclusion of HB 944 and rejected an amendment from Representative Glazier to strip out the Program. Rep. Glazier had previously opposed the bill in the House Education Committee and its Subcommittee on Appropriations. Then, on June 11, 2013, Representative Whitmire proposed an amendment in the full House Appropriations Committee to delete the Program, which after a lengthy debate failed to pass. The budget bill containing the Program then moved to the floor of the House, where Representative Hanes proposed an amendment deleting the Program from the budget bill, which failed after another extended debate. In each of these debates, Rep. Glazier played a prominent role in opposing the Program. No witness at either day of the public hearing before the House Education Committee and none of the large number of legislators opposing the Program

during repeated debates asserted that the Program violated any provision of the North Carolina Constitution. This includes the representatives of the North Carolina Association of Educators, the North Carolina Justice Center, the North Carolina School Boards Association, and Representative Glazier.[3]

Thus, the House version of the budget bill included the Program when the Conference Committee of the House and Senate considered the competing bills, and the version recommended in the Conference Report also contained the Program, but with a modification. Instead of being implemented in the first year of the biennial budget, 2013-14, the modification moved implementation to the second year of the cycle, 2014-15. The effect of this change was to give any entities affected by the legislation, such as the local school districts, an entire year to prepare for implementation. The Conference Report passed its third reading on July 23, 2013, and was signed into law by Governor McCrory on July 26, 2013.

2. Procedural Posture of These Cases

On December 11, 2013, nearly five months after passage of the Program, twenty-five North Carolina taxpayers filed a declaratory judgment action challenging the Program as unconstitutional in five different ways. *Hart v. State*,

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[3] Representative Glazier has provided an affidavit for the *Hart* plaintiffs, ostensibly supporting their view that the General Assembly took funds from the public school budget to fund the Program. Rep. Glazier states a legal conclusion that the Program is funded with funds set apart for the public schools, a conclusion definitively rebutted by the affidavit of the Special Counsel to the General Assembly, Gerry Cohen, who for some 30 years was responsible for the legal review of the budget. *See* text *infra* at 24-26.

13 CVS 16771, Complaint.[4] This was followed on December 16, 2013, by a declaratory judgment action filed by four taxpayers, the North Carolina School Boards Association, and ultimately 65 local school boards. *Richardson v. State*, 13 CVS 16484, Complaint.[5] The *Richardson* Plaintiffs asserted the Program was unconstitutional in six ways, three of which overlap claims made in the *Hart* litigation. The State Defendants[6] moved to dismiss both actions on December 30, 2013. On January 13, 2014, both sets of Plaintiffs moved for preliminary injunctions. On January 30, 2014, Parents moved to intervene, which motion was opposed by both sets of Plaintiffs, with the State Defendants taking no position. Parents' motion to intervene was accompanied by Answers to both Amended Complaints, and Parents filed a motion for judgment on the pleadings on February 11, 2014.

Both cases were assigned to Judge Robert Hobgood, who set a briefing schedule for the Plaintiffs and State Defendants and a hearing date of February 17 for the State Defendants' motions to dismiss. At that hearing, the Superior Court heard oral arguments on Parents' motions to intervene and granted Parents permissive intervention. At the conclusion of that hearing, the Superior Court

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[4] The *Hart* Plaintiffs subsequently amended their Complaint on January 13, 2014.

[5] The *Richardson* Plaintiffs twice amended their Complaint, to add 40 local school boards on January 15, 2014, and another 25 on March 31.

[6] The State Defendants in both *Hart* and *Richardson* are the State of North Carolina and the North Carolina State Education Assistance Authority, with the North Carolina State Board of Education also named in *Richardson*.

denied the motions to dismiss in both cases, and held that all of the Plaintiffs had standing to bring all of the claims presented in their Complaints. He set February 21, 2014, for a hearing on both of Plaintiffs' motions for preliminary injunction, and at the conclusion of that hearing stated he was granting the injunction.

3. The Superior Court's Preliminary Injunction

Judge Hobgood concluded that the Plaintiffs had established a substantial likelihood of success on the merits and that they would suffer irreparable harm if an injunction were not granted. He ordered the Plaintiffs' attorneys to prepare appropriate Orders, which he subsequently signed on February 28, 2014. On March 3, 2014, Parents moved for a stay of his Orders granting the preliminary injunctions so that they could file an appeal with the Court of Appeals, and in the alternative requested a temporary stay of his Orders so that the lottery could be conducted and all the scholarship applicants notified of their respective status going forward. The court denied this motion on March 12, 2014.

The Superior Court's February 28 Order enjoins the Defendants:

> [F]rom implementing the challenged legislation, including the acceptance of additional voucher[sic] applications, the processing of voucher[sic] applications, the selection of voucher[sic] 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 [the Program] in light of this injunction to applicants, private schools and interested citizens.

Richardson Order at ¶ 2. Although the Orders state that as of February 18, "the SEAA had received 4,274 applications for vouchers[sic]," *Hart* and *Richardson* Orders at Findings of Fact ¶8, subsequent discovery has shown that by February 25, when the application period closed, 5,502 applications were filed for the 2,400 available scholarships, which would clearly have triggered the requirement that the SEAA conduct a lottery. Roughly three-quarters (74%) of the applications came from minority families. A substantial fraction of those applications, however, were from applicants who were obviously ineligible, most often by already being enrolled in private schools. According to the SEAA, 987 of the applications fell into this category (17%). All of the families that filed those applications are now left hanging by virtue of the Superior Court's Orders, which even prevents the SEAA from notifying the substantial number of ineligible applicants that they filed applications that cannot be considered under any circumstances. The rejection of the alternate relief requested by Parents to allow the SEAA to conduct the lottery also means that instead of 2,400 applicants being left in limbo by the Superior Court's preliminary injunction, all 5,502 applicants face significant uncertainty as to the future of the Program and their efforts to find a better school for their children.

REASONS WHY THE WRIT OF SUPERSEDEAS SHOULD ISSUE

1. Summary of Argument

The Superior Court erroneously found that both the *Hart* and *Richardson* Plaintiffs had shown a substantial likelihood of success on the merits and that it was necessary to enjoin the Program to avoid causing them irreparable harm. By enjoining the Program, the Superior Court has directly affected a substantial right of Parents: their right to direct the education of their children. Parents have a right to appeal the Superior Court's Orders under N.C. Gen. Stat. § 1-277(a) because they affect a substantial right. Absent this Court's issuance of a writ and a stay, Parents and all other similarly-situated families will lose the opportunity to choose their children's schools for the next school year and possibly beyond.

The Superior Court based its erroneous evaluation of the Plaintiffs' likelihood of success on two plainly wrong legal conclusions. First, the court misread the plain language of Article IX, Section 6 of the current North Carolina Constitution, as well as its predecessor, Article IX, Section 4 of the 1868 Constitution, as amended in 1875. Second, the Superior Court misread the budget documents before it to conclude that the Program was funded with funds "set apart" for the public school system.

The court's first error was premised on its belief that Section 6 limits the power of the General Assembly to support education at the K-12 level to

exclusively supporting the "general and uniform system of free public schools," called for in Article IX, Section 2(1). But neither Section 6 nor its predecessor, Section 4 of the 1868 Constitution, contains such a limitation. While both the current and former versions of this section of Article IX plainly reserve certain specific funds for the exclusive use of the system of public schools, both versions just as plainly refer to other funds that can be applied to that system at the discretion of the General Assembly, and in no way imply that the General Assembly is limited to supporting that system and that system alone. Nor are North Carolina's adoption of the Pearsall Amendment in 1956 and its subsequent deletion during the adoption of the 1971 Constitution relevant to the scope of Sections 2 and 6.

The court's second error was premised on its misunderstanding that the scholarships represented funds previously set apart for the system of public schools. The fact that the appropriation of $10 million to scholarships to be awarded by the SEAA might reduce the number of students educated in traditional public schools does not represent a use of funds set apart for the public school system. Section 6 in no way implies that the local districts are entitled to receive state allotments based on students that they are not actually educating.

Nor did the Superior Court properly balance the equities before granting the preliminary injunctions. There was no urgent need to enjoin the Program to

preserve the status quo, because there was no imminent danger of expenditure of the $10 million in scholarships. The SEAA was not scheduled to begin disbursing those funds until September 15, 2014, with the only public expenditures occurring in the meantime being the minor expenses of administering the Program. Moreover, whatever minimal urgency existed resulted from the dilatoriness of Plaintiffs in initiating these suits and prosecuting them. Had Plaintiffs shown reasonable diligence, these cases would have been resolved long before now, averting any need to halt the Program before a final resolution in the Superior Court.

The Superior Court has already rejected the State Defendants' motions to dismiss for failure to state a claim on which relief can be granted[7] at the February 17 hearing, at which the court also erroneously found that both sets of Plaintiffs had standing to assert all of their claims. *Richardson* Order Denying State Defs.' Motion to Dismiss at 1; *Hart* Order Denying State Defs.' Motion to Dismiss at 2. The arguments at that hearing encompassed all of the claims of both sets of Plaintiffs, including the claims cited by the Superior Court in support of its Orders granting the preliminary injunction, which are the First Claim of the *Hart* Plaintiffs

[7] Parents filed a motion for judgment on the pleadings because they had already filed the required Answer with their motion to intervene, which precluded them from joining the State Defendants' earlier motions to dismiss. The Superior Court has not ruled on this motion, but because the standards for evaluating a motion for judgment on the pleadings are the same as for a motion to dismiss, *Silverdeer, LLC v. Berton*, 11 CVS 3539, 2013 WL 1792524, at *3 (N.C. Super. Ct. Apr. 24, 2013), consistency requires that Parents' motion for judgment on the pleadings be treated the same as the State Defendants' motions to dismiss.

and the Fifth Claim of the *Richardson* Plaintiffs. Leaving the injunction intact will serve to prolong the disruption to the Program and increase the likelihood that Plaintiffs' strategy of delay in filing these lawsuits will result in the loss of at least one year of educational opportunities for Parents and similarly-situated families. Immediate action by this Court in the form of a writ of supersedeas and a stay of the Superior Court's injunction is essential to averting such irreparable harm to the low-income families desperate for the opportunities the Program offers to them for the first time.

2. The February 28 Orders Granting the Preliminary Injunctions Implicate a Substantial Right of Parents That Will Be Permanently Lost Absent Issuance of a Writ and Stay by This Court.

By enjoining the Program, the Superior Court has directly affected a substantial right of the Parents. Both the United States Constitution and the North Carolina Constitution recognize the right of parents to direct the educational upbringing of their children. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the U.S. Supreme Court upheld the fundamental "liberty of parents and guardians to direct the upbringing and education of children under their control," 268 U.S. at 534-35, in rebuffing an initiative passed by the voters of Oregon that would have required parents to send their children to the public schools alone, and thereby outlawed their use of private schools. The North Carolina Constitution similarly recognizes the right to education in Article I, Section 15, which states: "The people

have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." The duty of the State to encourage education is further developed in the first Section of the Education Article: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." N.C. Const. art. IX, § 1. Article IX, Section 3, which deals with compulsory education, further reflects the importance of this right when it provides that "the General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means." Nothing in these provisions limits the right of education, and the duty of the State to encourage it, to public schools alone. Yet the effect of the Superior Court's Orders is precisely that. Because of Parents' and similar families' lack of financial resources, they cannot access private education, leaving their children trapped in the public schools the State requires them to attend. The families will be forced to leave their children in public schools with which they are dissatisfied, and those public school districts will be able to take those children's continued attendance for granted. Parents will be unable to effectively direct the education of their children.

Imagine the uproar that would be caused if the State sought to emulate the 1922 voters of Oregon and forbid North Carolinians of their right to send their

children to private schools. This furor would not be limited to those families actually using private schools. Many families currently using the public schools would realize that converting what is now a voluntary decision on their part into coerced attendance would result in precisely the situation that low-income families face today: their school districts could take their children's presence for granted, and would likely become even less accountable to parents than they are now. The right to choose one's children's educational futures is clearly a significant right, although for low-income families it is largely one they cannot exercise because they lack the means to choose among alternatives to public schools. The Program makes low-income parents' right to direct their children's education more effective by giving them the *power* to choose their children's schools. By granting these Orders, the Superior Court has taken away that power from the parents, forcing them "to accept instruction from public teachers only." *Pierce*, 268 U.S. at 535.

Low-income children in a compulsory education system are in much the same situation as accused prisoners unable to afford the assistance of counsel. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the U.S. Supreme Court recognized that states were obliged to provide free lawyers to indigent criminal defendants. Similarly, in *Sneed v. Greensboro City Board of Education*, 299 N.C. 609, 264 S.E.2d 106 (1980), this Court carefully preserved the rights of children to attend the public schools, even if they were unable to pay certain fees that the schools

could otherwise impose on those able to pay them. Through this scholarship Program, the Legislature has provided the means for low-income parents to *actually exercise* their right to choose their children's school, and the action of the Superior Court leaves the parents as powerless to exercise their right as they were before enactment of the Program. Contrary to the assertions of both sets of Plaintiffs, the preliminary injunction has taken away Parents' ability to effectively exercise their right to choose their children's schools.

Unless this Court intervenes, Parents will be left without a remedy during the upcoming 2014-15 school year. Because of the timing of the preliminary injunction, the complex schedule for the implementation of the Program has been disrupted. The SEAA was to determine the facial eligibility of applicants, conduct a lottery, and notify by March 3, 2014, the 2,400 eligible applicants who would be awarded scholarships. Private schools were to have until May 1, 2014, to register to participate in the Program, after which parents who had been awarded scholarships could apply to schools and enroll their children. The SEAA anticipated disbursing funds by September 15, 2014, on behalf of scholarship recipients. Due to the Orders, the SEAA has already been unable to finish the process of collecting applications, weed out those facially ineligible, and conduct the lottery necessary to select the scholarship recipients. If the Orders are not stayed in the very near future, it is difficult to see how the process can be gotten

back on track. Accordingly, if this Court does not grant the writ and stay the Orders, Parents and all similarly-situated families are likely to lose irretrievably the benefits of the Program for the coming school year.

3. Parents' Underlying Appeal Is Meritorious.

This Section will explain four reasons why Parents' underlying appeal of the injunction is meritorious. First, the General Assembly may supplement the general and uniform system of free public schools and provide additional educational opportunities to families like Parents'. Second, North Carolina's adoption in 1956 of the Pearsall Amendment and its removal from the Constitution in 1971 are irrelevant to these cases. Third, the Program is not funded with funds "set apart" for the public school system. And fourth, there was no urgent need for the Superior Court to grant the preliminary injunction; whatever urgency there is exists because of the Plaintiffs' delay in bringing this lawsuit, which the Superior Court failed to properly evaluate in determining whether to grant the extraordinary relief of a preliminary injunction.

A. *The General Assembly may supplement the general and uniform system of free public schools and provide additional educational opportunities to families like Parents.*

As explained below, the North Carolina Constitution and case law allow the Legislature to spend public funds to create educational opportunities outside the

public school system. Furthermore, Plaintiffs' attempt to bolster their argument to the contrary with a flawed decision from the Florida Supreme Court falls short.

1. *The legislature's creation of the Program was not forbidden by the North Carolina Constitution.*

The trial court wrongly accepted Plaintiffs' contention that there are no provisions in the North Carolina Constitution that allow the Legislature to expend public funds outside the public school system. But despite Plaintiffs' failure to acknowledge their existence, there are in fact *two* such provisions: Article I, Section 15 and Article IX, Section 1. Article I, Section 15 provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." Article IX, Section 1 provides that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." Neither of these provisions limits the duty of the State to supporting only public schools and the "general and uniform system of free public schools" required by Article IX, Section 2(1). What the Constitution does in fact require, in Article IX, Sections 2 and 6, when read properly, is that *certain* funds be dedicated to the exclusive use of the system of public schools. This is reflected in the School Budget and Fiscal Control Act, as codified at N.C. Gen. Stat. § 115C-458, which reads as follows:

> § 115C-458 State Literary Fund—The State Literary Fund includes all funds derived from the sources enumerated in Section 6, Article IX of the Constitution, and all funds that may be hereafter so derived, together with any interest that may accrue thereon. The Fund shall be separate and distinct from other funds of the State.
>
> The State Literary Fund shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

Obviously, the intent is that while certain named funds are reserved for the exclusive use of the public school system, other funds are not so reserved and can be used to support programs such as the Opportunity Scholarship Program. This comports with the principle of constitutional interpretation that "all power that is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless expressly prohibited by that Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989). Expressly reserving certain funds for the support of the public school system plainly cannot be read as reserving *all* education expenditures to the public school system.[8]

Yet that is precisely what the Superior Court has done in concluding that the Plaintiffs are likely to succeed on the merits of their claims. The Superior Court's conclusion in its Orders that "Article IX, Section 6 of the Constitution specifies

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[8] The *Hart* Plaintiffs contend that the Parents' interpretation of Section 6 renders it meaningless and must be rejected for that reason. *Hart* Response to Parents' Petition for Writ of Supersedeas and Temporary Stay (hereinafter "*Hart* Response") at 20-22. This is obviously absurd, as shown by Section 115-458, which demonstrates how the State Literary Fund implements Article IX, Section 6.

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'" misinterprets that Section through a process of selective quotation. *Hart* Order at Conclusions of Law ¶ 18; *Richardson* Order at Conclusions of Law ¶ 19. The subsequent conclusion that "[b]y providing 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 . . . [the] system of free public schools'" is thus fatally flawed. *Hart* Order at Conclusions of Law ¶19; *Richardson* Order at Conclusions of Law ¶20. The full language of Section 6 makes plain that the Section does not reserve all State spending for educational purposes exclusively for the public school system. Because there is neither an explicit limitation nor one by necessary implication, the General Assembly acted well within its authority under Article IX in enacting the Program.

The full text of Section 6 reads as follows:

> 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.

Parents have underlined the portions of Section 6 quoted by the Superior Court, because this makes clear how its selective use of quotations has distorted the meaning of the provision as a whole. First, the phrase "for purposes of public education" does not refer to all the funds encompassed within Section 6 but only "all moneys, stocks, bonds, and other property belonging to the State" for that specific purpose. Second, while all funds specifically mentioned must be applied to the uniform system of public schools, there is one clearly discretionary category consisting of "so much of the revenue of the State as may be set apart for that purpose." In other words, this category consists only of funds that the General Assembly has deliberately set apart for the "purpose" of the exclusive use of the public school system. Thus, for example, if the General Assembly designated all proceeds deriving from a state lottery to be for the exclusive use of the public school system, those proceeds would have to be used for that system unless and until the General Assembly re-designates them for other purposes. Conversely, if the General Assembly does not designate those proceeds for the exclusive use of the public school system, then those funds would not be required to be used exclusively for the public schools unless and until the General Assembly creates such a requirement.

Thus, nothing in the plain language of Section 6 read as a whole prohibits the General Assembly from funding educational initiatives outside the uniform system of public schools, so long as those funds have not been set apart for the exclusive use of the public schools. Moreover, because the Constitution does not expressly limit all education spending by the State to be for the public school system, one needs a necessary implication of such a limitation to limit the plenary authority of the General Assembly under basic principles of constitutional interpretation.[9] But this language creates no such necessary implication either; indeed, it uses language of legislative discretion ("so much revenue . . . as may be set apart [by the General Assembly] for that purpose").

Nor, as the Superior Court seemed to believe, does the language referring to the General Assembly's discretion in "setting apart" revenue for the public school system imply that the General Assembly cannot change its mind and end any discretionary "setting apart." Thus, to return to the lottery example, the General Assembly could subsequently decide that setting apart lottery proceeds for the public school system was ill-advised and end that policy. Similarly, the same General Assembly that set apart funds when it passed a two-year budget could decide to reduce that funding for the second year of that budget as unnecessary or

[9] "The standards of constitutional interpretation are well established. It is elementary that the Constitution is a limitation, not grant, of power." *Britt v. N.C. State Bd. of Educ.*, 86 N.C. App. 282, 286, 357 S.E.2d 432, 434 (1987) (citing *Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 273 N.C. 137, 159 S.E.2d 745 (1968)). "All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989).

for no stated reason at all. "The power of the purse is the exclusive prerogative of the General Assembly and has been since the original 1776 Constitution." John V. Orth, *The North Carolina State Constitution with History and Commentary* 127 (1993) (discussing Article V, Section 7(1)). What the General Assembly can do, it can undo.

This does not, of course, render inoperative the language requiring that money appropriated for the public school system be "used" for the exclusive use of the public schools as to any funds so appropriated. While it is the General Assembly's job to appropriate funds, it is the executive branch's role to use the money so appropriated. The "exclusive use" language ensures that the governor and other executive agencies such as the Department of Public Instruction and the local districts use the public education funds for the purpose for which they were appropriated. Thus, if the General Assembly "sets apart" lottery proceeds for the public schools, the governor, the superintendent of public instruction, and the local districts cannot divert those proceeds to other uses. The Superior Court erred in reading this language as limiting the Legislature's discretion to "set apart" funds, when it actually limits how the Executive may use those set-apart funds.

In addition to misinterpreting the plain language of Section 6, the Superior Court ignored a controlling precedent of the Court of Appeals that implicitly rejected a reading of Section 2 as supporting its conclusion that all expenditures are

restricted to the system of public schools. In *Sugar Creek Charter School, Inc. v. State*, 214 N.C. App. 1, 712 S.E.2d 730 (2011), the charter school plaintiffs made precisely the same argument under Article IX, Section 2 that both sets of Plaintiffs advanced in these cases and that the Superior Court adopted. The schools argued that Article IX, Section 2's requirement that the General Assembly establish a general and uniform school system implicitly bars the State from supplementing that system by establishing non-traditional public schools, like charter schools, or other educational programs. Thus, the schools argued that because the State was limited to spending its education funds only on the uniform system of public schools, and because charter schools are public schools, the state had to fund all of its public schools uniformly. The Court of Appeals rejected that argument, finding that it did not have to decide whether charter schools were part of the uniform system of public schools. Judge Ervin held that whether or not charter schools were part of the uniform system, the General Assembly was not limited to supporting the system of traditional public schools. He concluded that the Constitution "does not forbid the State from establishing additional schools or educational programs to supplement those traditionally utilized to effectuate the constitutional mandate to provide access to a sound basic education." *Sugar Creek*, 214 N.C. App. at 20, 712 S.E.2d at 742. This holding necessarily conflicts with any reading of Section 2 or Section 6 that would prohibit the General

Assembly from funding the non-traditional public schools and other educational programs authorized by Article IX. Like charter schools, the Opportunity Scholarship Program is an example of an educational program supplementing the public school system, and is plainly constitutional.

2. *Plaintiffs' reliance on a flawed decision from the Florida Supreme Court is misplaced.*

The only case either set of plaintiffs cite for their erroneous reading of Section 2 as limiting the Legislature to supporting only the public school system is a poorly-reasoned decision from the Florida Supreme Court, *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). In that case, the court held that a 1998 amendment of the Florida Education Article indicated that providing "a uniform, safe, secure, and high quality system of public schools" was the exclusive means by which the legislature could fulfill its "paramount duty" of providing for the education of the children of Florida. *Id.* at 406. Unable to point to any description of the constitutional amendment provided to the voters that supported their reading of the constitutional change as limiting the legislature to exclusive funding of the public school system, the majority relied on principles of statutory construction instead, including "inclusio unius est exclusio alterius" to conclude that by expressly requiring the funding of the public school system the people were implicitly excluding funding for any other educational programs.

Neither the reasoning nor the result of *Bush v. Holmes* is applicable to the instant controversy. As noted by the Court of Appeals in *Sugar Creek*, 214 N.C.App at 18, 712 S.E.2d at 741, *inclusio unius est exclusio alterius* has no "role in the proper construction of N.C. Const. art. IX, § 2(1) . . . because it flies directly in the face of one of the underlying principles of North Carolina constitutional law," namely that all power not expressly limited by the constitution remains with the people and their elected representatives in the legislature.

There is another case from a foreign jurisdiction addressing a school-choice program that is far more relevant, because it addresses constitutional language far more similar to North Carolina's. In *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013), the Indiana Supreme Court dealt with an education article whose text is strikingly similar to North Carolina's and rejected arguments based on *Bush v. Holmes* identical to those that Plaintiffs make here.

At issue in *Meredith* was the interpretation of the Indiana Constitution's Article 8, Section 1, which reads as follows:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Ind. Const. art. 8, § 1. This Indiana language is almost identical to the language of North Carolina's Article IX, Section 1 and the first clause of Section 2. Article IX

Section 1 establishes the legislature's duty to forever encourage "schools, libraries, and the means of education," and Section 2(1) then establishes a second duty of the General Assembly to provide for a general and uniform system of free public schools. The plaintiffs in Indiana, like those here, argued that, based on *Bush*, the general and uniform system of free public schools was the exclusive means by which the legislature could encourage education. But, the Indiana Supreme Court rejected that reading of its constitution and held that the encouragement of education was a broader duty than establishing the public schools system and authorized initiatives in addition to supporting the public schools. *Meredith*, 984 N.E.2d at 1224 (holding that "the Education Clause directs the legislature generally to encourage improvement in education in Indiana, and this imperative is broader than and in addition to the duty to provide for a system of common schools").[10]

Three other aspects of the Indiana Supreme Court's decision are also directly relevant to Plaintiffs' claims. The Indiana Court viewed the education provision as affording the legislature "broad legislative discretion" and delegating to "the sound legislative discretion of the General Assembly" "the method and means" of encouraging education, and concluded that where the exercise of that discretion did not run afoul of the Constitution, it was "not for the judiciary to evaluate the

[10] The Indiana Supreme Court also rejected the argument that the fact that Indiana's Common School Fund was restricted by a provision analogous to Article IX, Section 6 to supporting the common school system implied that the legislature could only fulfill its duty through that system. "That the school fund may only be used for support of the public schools, in no way limits the legislature's prerogative to appropriate other general funds to fulfill its duty to encourage educational improvement in Indiana." *Id.* at 1225 n. 18.

prudence of the chosen policy." *Id.* at 1222. Second, the Indiana Court noted that "[u]nder the school voucher program, this public school system remains in place," even if 60% of all public school students were to use the program. *Id.* And finally, the Indiana Supreme Court rejected the claims that the school choice program violated the Indiana Constitution because the private schools were not "uniform," "equally open to all," and "without charge." *Id.* at 1224.

As in the Indiana case, Plaintiffs' claims here (1) are essentially an effort to constitutionalize policy disagreements with the Legislature over education policy in an area committed to that body's sound discretion; (2) ignore that the new program leaves North Carolina's general and uniform system of public schools in place for all who wish to use it; and (3) erroneously suggest that by providing families with scholarships, the Legislature has a duty to subject the private schools that those families select to all the requirements that public schools are subject to. The whole point of the scholarship Program is to provide low-income families like those of Parents with access to *new* educational opportunities in private schools that are *different* from the public schools—in other words, to provide these parents access to the same educational marketplace that wealthier North Carolina families can and do use every day.

B. *North Carolina's adoption in 1956 of the Pearsall Amendment and its removal from the Constitution in 1971 are irrelevant to these cases.*

Both sets of Plaintiffs have constructed a fanciful theory involving North Carolina's adoption of the Pearsall Amendment in 1956, which the Superior Court adopted in its Orders. *Hart* Order at Conclusions of Law ¶¶ 14-17; *Richardson* Order at Conclusions of Law ¶¶ 15-18. This theory is based on three assumptions: (1) that the 1868 Constitution that was operative in 1956 precluded the state from providing "tuition grants" similar to the scholarships to be awarded under the Program; (2) that this fact necessitated the Pearsall Amendment's explicit authorization of tuition grants in Article IX, Section 12; and (3) that the dropping of Section 12 when the 1971 Constitution was enacted eliminated any authorization for tuition grants and scholarships. All three assumptions are manifestly wrong.

The only aspect of this theory that holds water is that Article IX is essentially the same in the 1868 and 1971 Constitutions. Contrary to Plaintiffs' theory, however, both Constitutions permit scholarships such as those contemplated by the Program. Plaintiffs cannot show that the 1868 Constitution prohibited the General Assembly from creating scholarship programs any more than they can show that the current 1971 Constitution's language prohibits scholarship programs. The 1868 Constitution contained both what is now Article

I, Section 15 and Article IX, Section 1, which state that the people have a right to the privilege of "education" and which charge the state with "guard[ing] and maintain[ing] that right" (Section 15) and forever encouraging the "means of education" (Section 1). As noted previously in discussing that education is a "substantial right" for purposes of an interlocutory appeal, nothing in these sections suggests that the General Assembly's power is limited to education provided in public schools or the public school system only.

Article IX, Section 2 of the current Constitution and its corresponding section in the 1868 Constitution require that the State "provide by taxation and otherwise for a general and uniform system of public schools," but as Parents have shown, the Court of Appeals in its *Sugar Creek* decision has already held that this language, applying this Court's standard rules of constitutional interpretation, does not either explicitly or by necessary implication limit the General Assembly to supporting only the public school system in complying with Section 1's mandate to encourage the means of education. This is as true of the 1868 Constitution as it is of the 1971 Constitution. And just as Plaintiffs' efforts to (mis)read Section 6 of the current Constitution founder on the plain language of that section, their misreading of Section 6's predecessor in the 1868 Constitution founders equally on the plain language of that provision (Section 4).[11] Both versions designate certain

[11] Article IX, Section 4 of the 1868 Constitution read as follows:

funds for the exclusive support of the public school system, and authorize the General Assembly to appropriate additional "revenue" in the language of Section 6 and "ordinary revenue" in Section 4. Neither provision, however, suggests, let alone necessarily implies, that this language is intended to prohibit the General Assembly from undertaking additional initiatives to "encourage the means of education," or to guard "the right to education."

Plaintiffs' and the Superior Court's second assumption—that enactment of the Pearsall Amendment was necessary to authorize tuition grants—is equally wrong. The Pearsall Commission was clearly correct that "there must be some changes to the North Carolina Constitution" to implement the Pearsall Plan, but both the Superior Court and the Plaintiffs misstate the Pearsall Plan and thus misstate the changes they infer were necessary. Although the Commission never specified what changes were necessary, it did specify the elements of the plan in the Pearsall Amendment itself; those elements differ from the description provided by the Superior Court and the Plaintiffs in a critical way.

The proceeds of all lands that have been, or hereafter may be, granted by the United States to this State and not otherwise specially appropriated by the United States or heretofore by this State; also all monies, stocks, bonds, and other property now belonging to any fund for purposes of Education; also the net proceeds that may accrue to the State from sales of estrays or from fines, penalties and forfeitures; also the proceeds of all sales of the swamp lands belonging to the State; also all money that shall be paid as an equivalent for exemptions from military duty; also, all grants, gifts or devises that may hereafter be made to this State, and not otherwise appropriated by the grant, gift, or devise, shall be securely invested, and sacredly preserved as an irreducible educational fund, the annual income of which, together with so much of the ordinary revenue of the State as may be necessary, 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.

In the Superior Court's Orders, the Pearsall Commissions' recommendations are characterized as being to: "(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." *Hart* Order at Conclusions of Law ¶14; *Richardson* Order at Conclusions of Law ¶15. But that description does not match the actual language of the Pearsall Amendment, which provided that "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 for the private education of a child who is assigned against the wishes of his parent, . . . to a public school attended by a child of another race." Section 12 also provided that "[n]otwithstanding any other provision of this Constitution, the General Assembly may provide for a uniform system of local option" whereby local school units could "suspend . . . the operation of one or more or all of the public schools in that unit."[12]

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[12] The full text of Section 12 was:

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 for the private education of a child who is assigned against the wishes of his parent, or the person having control of such child, to a public school attended by a child of another race. A grant shall be available only for education in a nonsectarian school, and in the case of a child assigned to a public school attended by a child of another race, a grant shall, in addition, be available only when it is not reasonable and practicable to reassign such child to a public school not attended by a child of another race.

Notwithstanding any other provision of this Constitution, the General Assembly may provide for a uniform system of local option whereby any local option unit, as defined by the General Assembly, may choose by a

Parents underline the word "any" in the first part of the part of the Pearsall Amendment quoted above to point out that by using "any funds," the Pearsall Amendment authorized the use of public school funds previously reserved for the exclusive use of the public school system for the educational expense grants Section 12 authorized. Both Section 6 and Section 7 specifically reserved funds not at issue in this case for the use of the public schools and had to be overridden for such funds to be used for educational expense grants. Although releasing these funds from the exclusive use of the public schools would have been necessary to fund the grants under both circumstances contemplated by the Pearsall Amendment, it obviously would have been particularly important for any school districts that had to provide such grants because they had closed all of their public schools, as authorized by the second portion of the Pearsall Amendment quoted above. This second part of the Amendment was also necessary to override the prior language of Article IX, Section 2 requiring a general and uniform system of free public schools to be operated in every county, as well as to override the specific language of Section 7 that restricts the county school funds to the exclusive use of "the free public schools."

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majority vote of the qualified voters in the unit who vote on the question to suspend or to authorize the suspension of the operation of one or more or all of the public schools in that unit.

No action taken pursuant to the authority of this Section shall in any manner affect the obligation of the State or any political subdivision or agency thereof with respect to any indebtedness heretofore or hereafter created.

Hart Memo. in Supp. of Motion for Prelim. Inj. at Exhibit F.

Adoption of the Pearsall Amendment thus indicates *nothing* about whether its authors and the voters of 1956 believed the General Assembly could fund scholarships for students to attend private schools in the absence of a constitutional amendment. Instead, it indicates only that, absent the Pearsall Amendment, closing public schools and using *restricted* public school funds for scholarships would have each violated the 1868 Constitution. Because the Program at issue does neither of those things, it makes no sense to conclude—as the Superior Court did—that it is the same kind of program envisioned by the Pearsall Amendment.

The Superior Court and Plaintiffs' third assumption—that the elimination of the Pearsall Amendment eliminated any constitutional authorization for tuition grants and scholarships—is equally erroneous. Since the 1868 Constitution did not prohibit using unrestricted funds for scholarships for students using private schools, and the Pearsall Amendment's language was necessary only to authorize the use of public funds previously limited to the exclusive support of public schools, deletion of that amendment did not return the Constitution to a *status quo ante* that prohibited any and all scholarship programs. The actual *status quo ante* was that the General Assembly had the authority to create a scholarship program, and the Pearsall Amendment authorized the use of restricted public school funds for such scholarships. Its deletion from the new 1971 Constitution returned to a

status quo ante that allowed a scholarship program but not the funding of it with funds restricted for the use of the public school system.

Moreover, in a case that began just six years after adoption of the 1971 Constitution, this Court held that the Gaston County Board of Commissioners could not provide a grant to a private school for dyslexic children because the General Assembly had already authorized state "educational expense grants" to the families of exceptional children for the private education of such children. *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979). This Court found that because the Legislature had already created a specific statutory means of aiding disabled children through the passage of educational expense grants, this specific enactment controlled the more general statutory authority of county commissioners. Clearly, this Court did not view the recent deletion of the Pearsall Amendment and the adoption of the new Constitution as prohibiting such "educational expense grants," the very term used in the deleted Pearsall Amendment. In fact, the Plaintiffs' theory about the significance of the Pearsall Amendment is of such recent vintage and so strained that none of the multitude of opponents of the Program came up with it during the legislative process.

The latest iteration of the educational expense grants for special needs students discussed in *Hughey* are the recently enacted "Special Education Scholarship Grants for Children with Disabilities," N.C. Gen. Stat. §§ 115c-112.2

to -112.5. This program, which is also administered by the SEAA, is legally indistinguishable from the Opportunity Scholarship Program, except that it provides aid of up to $6,000 to public school students receiving special education services pursuant to individualized education plans for use at private schools to which they transfer. The Superior Court's injunction places this special needs program in jeopardy as well, despite this Court's recognition in *Hughey* that "[h]ad there been such statutory authority in this case the direct appropriation of funds by Gaston County to the Dyslexia School of North Carolina would have presented no 'public purpose' difficulties as it is well established that both appropriations and expenditures of public funds for the education of the citizens of North Carolina are for a public purpose." *Hughey*, 297 N.C. at 95, 253 S.E.2d at 904 (citing *Educ. Assistance Auth. v. Bank*, 276 N.C. 576, 174 S.E.2d 551 (1970)).

For all of these reasons, nothing in the history of the Pearsall Amendment has any relevance to the issue of whether the Program is constitutional. In relying on Plaintiffs' incorrect reading of that history, the Superior Court clearly erred.

C. *The Opportunity Scholarship Program is not funded with funds "set apart" for the public school system.*

In addition to its primary conclusion that Section 6 does not permit the Legislature to expend education funds on anything other than the uniform system of public schools, the Superior Court also held that Plaintiffs would likely prevail on their argument that the Program was unconstitutionally funded because the

funds used for the Program were taken from funds already appropriated—that is, "set apart"—for the public school system. But this finding was baseless. The State provided the Superior Court an unrebutted affidavit from Gerry Cohen, who currently serves as Special Counsel to the North Carolina General Assembly and who served as Director of Legislative Drafting for the General Assembly from 1981 to December 2012. Affidavit of Gerry Cohen in Supp. of State Defs.' Mem. in Opp'n to Mots. for Prelim. Inj. (hereinafter "Cohen Aff."). As Director of Legislative Drafting, Mr. Cohen worked on the biennial budget bills and was responsible for the final legal review of the budget bill every year for over 30 years. Mr. Cohen explained that the "reduction," on which the Superior Court and the Plaintiffs based their conclusion that funds "set apart" for the public education system are used to fund the Program, is "not a reduction to a previous appropriation for Public Education, it is simply an adjustment to the Governor's proposed appropriation." Cohen Aff. ¶ 13. Moreover, Cohan explained that the bill would not transfer funds from the K-12 education part of the budget to the UNC part of the budget, and concluded that "the two Items are not connected, they are adjustments to proposed appropriations to different departments." *Id.* Finally, Mr. Cohen explained that the process requiring local school districts to report the number of students who leave the district schools because of Opportunity Scholarship grants "does not reduce the Public Education appropriation . . . . It

only determines the amount of funding for each local school administrative units[sic] within the unchanged grant total." *Id.* ¶ 15.

Thus, it is plain that no funds "set apart" for the public schools were diverted to the Program.[13] The Superior Court's conclusion that Plaintiffs are likely to succeed on this claim is erroneous and is no basis for finding that Plaintiffs are likely to succeed on the merits of their cases. The Superior Court's conclusion that further implementation of the Program must be enjoined as a result is likewise in error.[14]

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[13] As previously noted, the *Hart* Plaintiffs submitted an affidavit from a legislative opponent of the Program, Representative Glazier, who stated a legal conclusion that the Program used funds "set apart" in the budget for the use of the public schools. Affidavit of Richard Glazier in Supp. of Mot. for Prelim. Inj. ¶ 16 (hereinafter "Glazier Aff."). In light of Mr. Cohen's affidavit, Rep. Glazier's conclusion is clearly erroneous and can provide no support for the Superior Court's similar conclusion. Moreover, the conclusion of Rep. Glazier and the Superior Court that there is something wrong with the same budget document both "setting apart" funds for public schools and taking them away is fundamentally inconsistent with the legislative authority of the General Assembly to determine what funds shall be set apart for the exclusive use of the public schools.

[14] The *Richardson* Plaintiffs assert two additional independent grounds for upholding the preliminary injunction: (1) that using taxpayer money to fund private education devoid of substance is unconstitutional as lacking a public purpose, and (2) that using taxpayer money to fund private schools that discriminate on the basis of religion lacks a public purpose and also violates Article I, Section 19, which forbids the State from subjecting any person to discrimination on the basis of religion. This first claim is patently absurd—the simple fact that the Scholarship Program allows any private school in North Carolina to receive scholarship students does not mean that the education provided by North Carolina private schools is devoid of substance. The second claim is equally invalid—when parents select a religious private school with their scholarships, whatever "religious discrimination" those schools may engage in is not attributable to the State. *See Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (discrimination by private school whose budget was 90% state-funded is not state action); *Blum v. Yaretzky*, 457 U.S. 991(1982) (discharge of Medicaid patients not state action). Moreover, despite the Superior Court's clearly erroneous conclusion to the contrary, none of the Plaintiffs have standing to assert claims under Article I, Section 19. *Saine v. State*, 210 N.C. App. 594, 608, 709 S.E.2d 379, 389-90 (2011) (requiring that in order to assert a discrimination claim a taxpayer must show that he belongs to the class that receives prejudicial treatment). None of the taxpayer Plaintiffs have sought a scholarship and thus cannot be subjected to any discrimination.

D. *There was no urgent need for the Superior Court to grant the preliminary injunction, and the Superior Court failed to consider Plaintiffs' delay in bringing this lawsuit in evaluating whether to grant the extraordinary relief of a preliminary injunction.*

Even if the Superior Court was correct in finding that Plaintiffs were likely to succeed on the merits—which, for the reasons above, it was not—it still erred in granting the injunction. This is because, as noted above, no scholarship funds would have been disbursed until September 15, a date that is over six months from the Superior Court's Orders enjoining the Program. Thus, even assuming that the scholarship payments constitute irreparable harm, which they do not, that harm was too far off to justify the granting of the preliminary injunction. In addition, as discussed below, there were two additional reasons that the Superior Court erred in granting the Plaintiffs' requests for a preliminary injunction: It ignored the Plaintiffs' delay in bringing their lawsuits, and it balanced the equities improperly because it mischaracterized the status quo before it.

1. *Plaintiffs' delay should have foreclosed the remedy of a preliminary injunction.*

Even if there was an urgent need to issue a preliminary injunction, which there was not, this urgency was purely the product of Plaintiffs' delay in filing and prosecuting these actions. In *Southtech Orthopedics, Inc. v. Dingus*, 428 F. Supp. 2d 410, 420-21 (E.D.N.C. 2006), a federal district court applying North Carolina law held that a six-week delay between when a plaintiff first learned of a

defendant's actions and when that plaintiff filed suit undercut plaintiff's right to a preliminary injunction. The court found that plaintiff's delay made it "reluctant to grant such an extraordinary remedy as a preliminary injunction, which is justified only when the urgency of preventing irreparable harm to plaintiff overshadows the fairness to defendant of awaiting final judgment on the merits." *Southtech*, 428 F. Supp. 2d at 420-21.

Here, not six but some *18* weeks elapsed from the time the Program was signed by the governor and the filing of these two lawsuits. Both sets of Plaintiffs then waited more than four additional weeks to file motions for preliminary injunctions and took weeks after that to file their memoranda of law. The State Defendants quickly moved to dismiss the Complaints as failing to state claims for which relief could be granted, and both they and Parents opposed the motions for preliminary injunctions. Thus, it was 25 weeks from the enactment of the Program before the Plaintiffs revealed their legal theories. Three weeks after Plaintiffs filed their legal memoranda supporting their motions for preliminary injunction, the Superior Court granted those motions at the conclusion of a hearing on them.[15]

If a mere six-week delay can preclude a plaintiff from getting an injunction, then it stands to reason that taking 25 weeks to establish your case should have a far stronger preclusive effect. As a result of the Plaintiffs' slow pace in pursuing

[15] Another week passed while the Plaintiffs' counsel prepared the Orders for the Superior Court to sign, which it did on February 28th.

their claims, low-income families filed approximately 5,500 scholarship applications with the SEAA for the 2,400 scholarships before the Superior Court issued the Orders enjoining the Program on February 28th. The application period closed on February 25th, and the SEAA was to hold a lottery and notify applicants by March 3rd whether they had been selected. As a result, thousands of low-income families are currently in limbo, neither knowing whether they win the lottery and an opportunity to move their children to better schools, nor even if the lottery will be held at all. This uncertainty is entirely due to the Plaintiffs' failure to move forward in challenging the Program in a timely fashion.

Had the Plaintiffs filed their Complaints in a timely fashion, the legal status of the program could have been resolved by the Superior Court on a final basis by now, and an appeal taken to this Court in the normal scheme of things. Had the Plaintiffs filed these lawsuits even ten weeks after the program was enacted, and accompanied their Complaints with their motions for preliminary injunctions and supporting memoranda of law, Parents would not be in the position of having to seek interlocutory relief from this Court. The Plaintiffs' claims on which the Superior Court based its decision granting the preliminary injunction[16] require no resolution of disputed facts but only constitutional interpretation.

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[16] The Superior Court did not rule on many of the Plaintiffs' claims, although as noted in the Orders, it held at the February 17 hearing at which it denied the State's motion to dismiss that the Plaintiffs in both cases had standing to raise all of their claims. *Hart* Order at Findings of Fact ¶ 15; *Richardson* Order at Conclusions of Law ¶ 1. This holding is clearly erroneous under the Court of Appeals' recent decision in *Saine v. State*, 210 N.C. App. 594, 709

2. *The court improperly balanced the equities because it mischaracterized the status quo.*

Even if the Superior Court was correct to ignore the Plaintiffs' delay in bringing their lawsuits—which it was not—it still erred in enjoining the Program because it improperly balanced the equities. The purpose of a preliminary injunction is to preserve the status quo pending a final resolution on the merits. The Superior Court concluded that "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." *Hart* Order at Conclusions of Law ¶ 26; *Richardson* Order at Conclusions of Law ¶ 27.

This description of the status quo wrongly minimized the harms to families that granting an injunction would create and overstated any harms the Plaintiffs were in imminent danger of suffering. The crux of Plaintiffs' Complaints is that the Program will result in unconstitutional funding of scholarships. The status quo is that while the Program was well under way and in the process of being implemented, the uncontroverted facts are that no scholarship funds would have been disbursed until September 15, 2014, some six and a half months from the date

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S.E.2d 379 (2011), which rejected for lack of standing an equal protection brought under Article I, Section 19 by taxpayers who did not "'belong[] to the class which is prejudiced by the statute.'" *Saine*, 210 N.C. App. at 608, 709 S.E.2d at 390 (*quoting In re Appeal of Barbour*, 112 N.C. App. 368, 373, 436 S.E.2d 169, 173 (1993)). *Saine* requires dismissal of the Article I, Section 19 claims in the *Hart* Plaintiffs' Fifth Claim and the *Richardson* Plaintiffs' Second, Third, Fourth and Sixth Claims, as well as the part of their Fifth Claim based on Article I, Section 19.

of the Superior Court's Orders enjoining the program. Affidavit of Elizabeth McDuffie ("McDuffie Aff.") Aff. at ¶ 12. Until then, only minimal amounts of state funds would have been expended conducting the lottery, verifying a 6% sample of applications, notifying the scholarship applicants of whether they had been selected, and registering participating private schools. The bulk of the activity triggered by the Program would have involved the 2,400 scholarship recipients seeking out participating schools, applying to them, and if accepted contracting with them for their children to attend. None of these activities can occur under the Superior Court's Orders.

The Superior Court could have prevented the supposedly unconstitutional disbursement of scholarships any time prior to September 15 of this year. Instead, granting the preliminary injunction halted the entire process at a critical time, such that even if the Superior Court ultimately reverses course, Parents and similarly-situated applicants will lose the benefits of the Program for the coming school year. Unless this Court acts and acts quickly, the Superior Court's Orders will have effectively killed the Program for a year, depriving 2,400 students of $10 million in scholarships and priceless educational opportunities, all to prevent the expenditure of trivial administrative expenses between now and September 15. This is not a proper balancing of the equities based upon the status quo; this is judicial destruction of the Program for a year. There was no need to halt the

Program in such a way that its benefits would be lost regardless of who prevails at final judgment.

3. *Parents may petition this Court for a writ of supersedeas and temporary stay whether or not the State joins the appeal.*

The *Hart* Plaintiffs contended at the Court of Appeals that the State's absence from Parents' petition "should preclude issuance of a writ of supersedeas." *Hart* Response at 25-26. Plaintiffs can cite no North Carolina cases supporting this proposition. Indeed, Plaintiffs' argument would defeat entirely the purpose of Parents' successful intervention—to protect their interests as distinct from the State's. Parents are pursuing their interests vigorously by appealing the preliminary injunction and petitioning this Court for a writ of supersedeas and temporary stay.

This Court is not bound by any of the cases that Plaintiffs cite because all are from foreign jurisdictions. *State v. Warren*, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960) (noting that the North Carolina Supreme Court is "not bound by the decisions of the Courts of the other States"). Furthermore, Plaintiffs cite only one case in which the party not included in the appeal was, like the State in this case, aligned with the party appealing: *Asch v. Friends of Cmty. of Mount Vernon Yacht Club*, 465 S.E.2d 817 (Va. 1996). But *Asch* is inapposite because the Virginia Supreme Court determined, based solely on Virginia caselaw, that the excluded party was indispensable to the proceedings. *Id.* at 818-19. The State is *not*

indispensable to these proceedings: This Court may determine whether it is proper to stay the Superior Court's preliminary injunction without the State.

The North Carolina Rules of Appellate Procedure recognize that parties can take separate appeals, by allowing for joinder of such separate appeals: "[i]f two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, . . . they *may* join in appeal after timely taking of separate appeals." N.C. R. App. P. 5(a) (emphasis added). If parties can take separate appeals that can but need not be joined, it stands to reason that any party entitled to appeal may do so despite the decision of an independent party not to appeal.

4. Conclusion

It is, to say the very least, a problem that so many low-income families are consigned to sending their children to unsatisfactory public schools. The General Assembly has attempted to combat this problem by empowering low-income families to choose better schools for their children. Plaintiffs are threatened by this empowerment because they fear the financial consequences of more parents—not just parents who can already afford to send their children to better schools—benefitting from enhanced competition in the educational marketplace. Plaintiffs therefore want to shut the Program down. But, as explained above, nothing in the North Carolina Constitution says that the General Assembly cannot give low-

income families the educational freedom to choose their own children's schools. The Constitution commands the General Assembly to encourage "the means of education" as "necessary . . . for the happiness of mankind," which is exactly what the representatives of the people have done in creating the Program. By blocking the implementation of this Program, the Superior Court erred. This Court should reverse that error.

MOTION FOR TEMPORARY STAY

Pursuant to Rules 8 and 23(e) of the North Carolina Rules of Appellate Procedure, Parents respectfully apply to this Court for an order temporarily staying enforcement of the February 28 Orders until determination of this Court as to whether it shall issue its writ of supersedeas. In support of this application, Parents represent that they sought from, and were denied by, the Superior Court a stay of the February 28 order. Parents also sought a temporary stay and writ of supersedeas from the Court of Appeals which were denied. Absent a stay, Parents will suffer irreparable harm while this Court determines whether it will issue its writ of supersedeas, because otherwise the effects of the delay in implementation of the Program will be impossible to reverse for the upcoming school year. Parents further incorporate and rely on the arguments presented in the foregoing Petition for Writ of Supersedeas in support of this Motion for Temporary Stay.

CONCLUSION

Wherefore, Parents respectfully pray that this Court issue a writ of supersedeas to the Superior Court, staying enforcement of the Orders entered February 28, 2014, pending issuance of the mandate to this Court following its review and determination upon the appeal which will be timely perfected; and that Parents shall have such other relief as to the Court may seem proper. Parents also request that this Court temporarily stay enforcement of the Orders entered February 28, 2014, until such time as this Court can rule on Parents' Petition for Writ of Supersedeas.

Respectfully submitted this 10th day of April, 2014.

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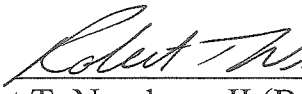
By: 
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VERIFICATION

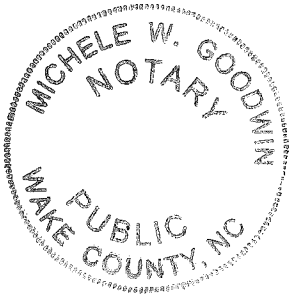
I, Robert T. Numbers, II, after being duly sworn, states:

I am counsel for the Intervenor-Defendants. The material allegations of the petition are true to my personal knowledge, except for those matters stated upon information and belief and, as to those matters, I believe them to be true.

Pursuant to Appellate Rule 23, I also hereby certify that the documents attached to this Petition for Writ of Supersedeas and Motion for Temporary Stay are true and correct copies of the pleadings and other documents from the file in Wake County Superior Court.

Robert T. Numbers, II

Sworn to and subscribed before me this 10th day of April, 2014.



Michele W. Goodwin
Notary Public, State of: NC
My Commission Expires: 1-29-19
Notary Seal
Michele W. Goodwin

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing upon the following individual by first-class mail, postage prepaid, at the indicated address:

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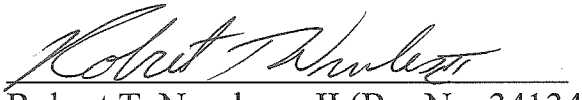
By: 

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