



Walker Kelly v. State: The NCAE's Latest Attack on School Choice

By Jeanette Doran
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On July 27, a group of anti-school choice activists filed a [lawsuit challenging](#) the constitutionality of North Carolina's immensely popular Opportunity Scholarship Program. The [North Carolina Association of Educators \(NCAE\) is backing the lawsuit](#) and its lead plaintiff, Tamika Walker Kelly is the current president of NCAE. This lawsuit is just the latest attack on school choice and the right of parents to manage the education of their children.

The lawsuit contains three claims for relief which can be briefly summarized as arguments:

1. That the Opportunity Scholarship Program subjects Plaintiffs to religious discrimination and interferes with their rights of conscience in violation of Article I, §§ 13 and 19 of the North Carolina Constitution;
2. That the Opportunity Scholarship Program funds schools that discriminate on the basis of religion and sexual orientation, gender identity and transgender status and therefore does not accomplish a public purpose in

violation of Article V, §§ 2(1) and 2(7); and

3. That the Opportunity Scholarship Program funds schools in an arbitrary and capricious manner and is not a valid exercise of constitutional authority.

These are all meritless.

The crux of the lawsuit takes aim at religious schools. But, that's why the case is so misguided. Opportunity Scholarships can be used at schools that are not religious schools. Plaintiffs in the lawsuit complain that many schools attended by scholarship recipients are religious. Naturally, they skirt around the fact that many schools attended by scholarship recipients are not religious. That's because of the nature of the Opportunity Scholarship Program itself.

A. Basics of the Opportunity Scholarship Program

The General Assembly created the [Opportunity Scholarship Program](#) in [2013](#) to expand educational opportunities for children with limited financial means.

Children from lower socioeconomic homes are generally [considered at-risk](#) for not achieving academic success. Opportunity Scholarships are but one way the legislature has tried to give a leg up to such schoolchildren. Since its inception the program has grown and the legislature enacted legislation to increase funding for the program through the 2027-28 fiscal year.

Opportunity Scholarships are available to students whose family income meets the [income eligibility requirements](#) and one of [other listed criteria](#) such as having attended public school the previous year, having been in foster care, having a parent on full-time active duty military duty, or entering kindergarten or first grade. The [financial eligibility requirements](#) are on a sliding scale based on family size and scholarship amount. Currently, to be eligible, the maximum family income is about \$64,000 a year for a family of four.

Not every eligible student receives a scholarship, though. Parents must apply for an Opportunity Scholarship. Students are then placed in a lottery if the number of applicants exceeds available funding. Most eligible students get a scholarship, but many do not. Last year, [8,959 students were eligible but 8,190](#) were awarded scholarships. The scholarship amount per student is \$4200 per academic year.

When a family gets the good news they have won the lottery and will receive an Opportunity Scholarship, they must select a participating school that fits their child's needs. Parents are free to choose any school

that will participate in the Opportunity Scholarship Program. They may choose a religious school or a non-religious school—that's a feature, not a bug. The emphasis is on finding the best fit for the child. The duty to find that best fit rests on the shoulders of the parents.

Once the parents and student have selected a school and the child has been accepted, parents endorse a direct deposit payment from the State to the school. This is similar to endorsing or signing a check for deposit or cashing at a bank. Without an endorsement from a parent, the school does not receive the scholarship money on behalf of the student.

B. Crux of the Attack of Opportunity Scholarships

As listed above, Walker Kelley v. State lawsuit sets out three claims for relief or theories why the Opportunity Scholarship Program is unconstitutional. The "Facts" section of the Complaint recites a host of facts which read more like a laundry list of grievances about private schools themselves. Here are just a handful:

- "Owners and operators of private schools are not subject to open meetings laws[.] ¶130¹
- Schools accepting Opportunity Scholarships "are not obligated to meet the requirements of the Common Core curriculum or any other recognized standard." ¶ 33
- Schools must administer a "nationally standardized test" in areas of English and

¹ Paragraphs in the Complaint are cited by "¶" and the number of the paragraph as listed in the Complaint.

math, but not other subjects like social studies. ¶ 35

- Schools which have fewer than 25 students receiving an Opportunity Scholarship do not have to make their test results public, and no school must reveal test schools of students who are not receiving the Opportunity Scholarship. ¶ 36

While these facts are true, they are not especially meaningful. Of course, private schools are not subject to open meetings laws; they are not government or public bodies. [Debates about the usefulness of standardized testing and the Common Core are well-known](#). Parents who select a school not following Common Core may do so precisely because a school does not use Common Core curriculum. Parents may also wish to choose a school that does not over-emphasize “national standardized test” in areas or subjects as history or social studies. As for not revealing testing information about students not receiving an Opportunity Scholarship, that information has nothing to do with the Opportunity Scholarship program or the use of public money.

The complaint’s main thrust, though, is its attack on religious schools. Most of the complaint, nearly 24 pages of the 39-page lawsuit, details the plaintiffs’ objections to religious schools. Dozens of schools are singled out by name and their policies are quoted at length. The complaint goes further and castigates unnamed schools, too.

The lawsuit breaks down the schools accepting Opportunity Scholarships on a county-by-county basis for the counties in which each of the seven plaintiffs lives. One of those counties is Cumberland. The complaint alleges that 25 private schools in

Cumberland accept Opportunity Scholarships and it also alleges that “many of the largest private schools in Cumberland County publicly admit to discriminating on the basis of religion and sexual orientation.” ¶ 66. It lists only 8 of those schools by name and quotes from school policies.

Assuming that those school participate in the Opportunity Scholarship Program, that leaves 17 other participating schools. The complaint attacks those schools this way: “Upon information and belief, many other Cumberland County private schools discriminate on the basis of religion even when they do not admit to doing so in public-facing documents.” ¶ 67

All in all the complaint includes allegations about participating schools in Cumberland, Randolph, Wake, and Durham. Allegations about schools in all those counties rely heavily on the use of “many” to lump all private schools together. This is odd for a couple of reasons. First, 10% of schools accepting Opportunity Scholarships are NOT religious schools. The lawsuit even acknowledges that fact. ¶ 42. Second, the complaint’s allegations are about “many private schools” and “many other private schools,” but not all private schools participate in the Opportunity Scholarship Program. Is this lawsuit an attack on private education as a whole or just the Opportunity Scholarship Program used by low-income students?

C. Deja Vu: The Attack, Part Two

The North Carolina Supreme Court weighed in on the constitutionality of the Opportunity Scholarship Program in 2015 in [Hart v. State](#). That was in what is known as a facial challenge to the program. In a facial

challenge, the plaintiffs must show that there is no circumstance in which the challenged law is constitutional. The Supreme Court ruled, 4-3, that the Opportunity Scholarship Program was not facially unconstitutional.

The current lawsuit is a challenge to the way the program has actually been implemented. That does not mean, however, that the Supreme Court's decision is not instructive.

In *Hart* the plaintiffs challenged the Opportunity Scholarship Program as violative of certain provisions of the North Carolina Constitution specific to education. Specifically, they alleged that the program violated [Article IX](#), §§ 2(1) and 2(6), concerning the constitutional mandate for a general and uniform system of public schools and funding sources for it, and [Article IX](#), § 5, concerning the duties of the State Board of Education to supervise and administer the public school system and funds provided for its support. The new lawsuit doesn't raise these issues.

The *Hart* plaintiffs also raised facial challenges based on the Public Purpose Clauses of [Article V](#), §§ 2(1) and 2(7), which mandate that the power of taxation may be exercised "for public purposes only and the power to contract and appropriate money may only be exercised "for the accomplishment of public purposes only." The Supreme Court's majority opinion explained the scope and nature of the Court's consideration of a challenge based on the Public Purpose Clauses.

Much like the current lawsuit, the *Hart* plaintiffs complained that the private schools Opportunity Scholarship recipients could attend would be "unaccountable" and that schools could discriminate on the basis of

religion." 369 N.C. at 135. They argued that this meant that the money for the scholarships was not being spent on a public purpose.

The Supreme Court rejected the Public Purpose Clauses argument. The Court explained that the scope of what constitutes a public purpose should not be narrowly construed and that the concept expands with changing conditions. *Id.* at 136.

One of the more critical parts of the Court's analysis rests on what the Court determines was not part of its consideration. After explaining that the wisdom or necessity of an appropriation is a "legislative decision," the Court stated, "our public purpose analysis does not turn on whether the appropriation will, in the words of plaintiffs, 'accomplish' a public purpose." *Id.* at 135.

Relying on [Maready v. City of Winston-Salem](#), 342 N.C. 708 (1996) (upholding economic development incentives against a Public purpose challenge), the Court explained two guiding principles determine whether the public purpose requirement is satisfied when the government appropriates money: "(1) it involves a reasonable connection with the convenience and necessity of the [State]; and (2) the activity benefits the public generally, as opposed to special interests or persons." As the first prong of the analysis, the Court wrote, "Here, the provision of monetary assistance to lower-income families so that their children have additional educational opportunities is well within the scope of permissible governmental action and is intimately related to the needs of our state's citizenry. 369 N.C. at 136. Moving to the second prong of the analysis, the Court concluded that "the ultimate beneficiary of providing these children additional

educational opportunities is our collective citizenry.” *Id.* at 138.

This background is instructive in the new lawsuit, *Walker Kelly v State*. That’s because the plaintiffs in that case consistently complain that the Opportunity Scholarships as implemented do not “accomplish” a public purpose. The *Hart* decision explicitly stated that consideration of whether an appropriation will “accomplish” a public purpose is not the correct framework for review.

The *Hart* decision had two dissents. One written by Justice Robin Hudson was joined by Justices Cheri Beasley and Samuel Ervin, IV. The dissenting opinion sharply disagreed with the majority opinion about the nature of the court’s review of a public purpose claim. “I conclude that the majority’s assertion that our public purpose analysis does not turn on whether the appropriation will accomplish a public purpose is contrary to our precedent. It is precisely this determination that we are called upon to undertake here.” *Id.* at 144.

All three of the dissenting justices are still sitting on the Supreme Court. These three together with current justices who were not in the Supreme Court when *Hart* was decided could adopt a test for public purpose cases which looks at whether an appropriation “accomplishes” a public purpose, something which the *Hart* majority deemed a legislative determination.

Beasley, who is now Chief Justice and is running for election in November, also wrote a separate dissent. According to Beasley, the General Assembly’s decision to create the Opportunity Scholarship Program “at this time and in this way is vexing.” Regardless of the outcome at the trial level, the most

recent lawsuit attacking Opportunity Scholarships will almost certainly be appealed to the Supreme Court. Whether Beasley will remain on the Court when the new lawsuit gets there will be up to voters in this fall’s election. Cases like this underscore a topic NCICL has previously written about—the [importance of the Supreme Court races](#).

D. Conclusion

The NCAE backed lawsuit, with NCAE’s president Walker Kelly as lead plaintiff, has just begun. It is the latest attack on a program aimed at improving the lives of our State’s neediest children. Moreover, it is an attack on the rights of parents to make the choices best suited to their children, whether that choice is at a religious school or a non-religious school.

The named defendants are the State and the State Education Assistance Authority which administers the Opportunity Scholarship Program. Whether legislative leaders or others join the lawsuit as intervenors remains to be seen. The families and schoolchildren who depend on Opportunity Scholarships deserve a rigorous defense of the program, that much is clear.

About the Author

Jeanette Doran has served as President and General Counsel of the North Carolina Institute for Constitutional Law since returning to the Institute to reorganize and restart the organization in July 2019.

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3509 Haworth Drive, Suite 304
Raleigh, NC 27609
984.242.4145
www.ncicl.org