

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

CASE NO. 20-CVS-8346

TAMIKA WALTER KELLY, )  
KRISTY MOORE, AMANDA )  
HOWELL, KATE MEININGER, )  
ELIZABETH MEININGER, JOHN )  
SHERRY, AND RIVCA RACHEL )  
SANOGUEIRA, )

PLAINTIFFS, )

v. )

THE STATE OF NORTH )  
CAROLINA, NORTH CAROLINA )  
STATE EDUCATION )  
ASSISTANCE AUTHORITY, )

DEFENDANTS, )

PHILIP E. BERGER *in his official* )  
*capacity as President Pro Tempore* )  
*of the North Carolina Senate and* )  
TIMOTHY K. MOORE *in his* )  
*official capacity as Speaker of the* )  
*North Carolina House of* )  
*Representatives,* )

LEGISLATIVE )  
INTERVENOR- )  
DEFENDANTS )

JANET NUNN, CHRISTOPHER )  
and NICHOLE PEEDIN, and )  
KATRINIA POWERS, )

INTERVENOR-DEFENDANTS. )  
\_\_\_\_\_ )

**NONPARTY SCHOOLS’ MOTION  
FOR RELIEF FROM ORDER, OR  
IN THE ALTERNATIVE, MOTION  
FOR REVISION OF ORDER, AND  
MOTION FOR SANCTIONS**  
(N.C. Gen. Stat. § 1A-1, Rules 60(b)(5),  
54(b), and 45(c)(1))

## **INTRODUCTION**

Non-party Subpoena Recipients Bethesda Christian Academy, Cresset Christian Academy, Fellowship Baptist Academy, Gorman Christian Academy, Liberty Christian Academy, and Mount Zion Christian Academy, Berean Baptist Academy, Fayetteville Christian School, Trinity Christian School of Fayetteville, Inc., Bal Perazim Christian Academy, Cornerstone Christian Academy, Cumberland County Christian School, Destiny Now Academy, Falcon Christian Academy, Greater Fayetteville Adventist Academy, and Riverside Christian Academy (collectively, “Movants”), by and through the undersigned counsel, respectfully move to set aside: (1) the Order Granting Plaintiff's Amended Motion to Compel and Denying Third-Party Subpoena Recipients' Motion For Protective Order and Motion to Quash filed in this matter in Durham County on October 12, 2021 (the “Durham Order”) and (2) the Order Denying Third-Party Subpoena Recipients Motion to Quash filed in this matter in Cumberland County on February 15, 2022 (the “Cumberland Order”), pursuant to North Carolina Rule of Civil Procedure 60(b)(5), or in the alternative Rule 54(b), and for the imposition of sanctions pursuant to Rule 45 (c)(1). In support of their motion, Movants show the following:

### **FACTUAL AND PROCEDURAL HISTORY**

1. Plaintiffs brought this action challenging the constitutionality of Section 115C-562.1, *et seq.*, of the North Carolina General Statutes (the “Opportunity Scholarship Program”) in Wake County Superior Court on July 27, 2020.

2. Defendants State of North Carolina and North Carolina State Educational Assistance Authority (“State Defendants”) and Intervenor-Defendants Philip Berger and Timothy Moore (“Legislative Intervenor-Defendants”) moved on October 20, 2020, to transfer this case to a three-judge panel pursuant to N.C. Gen. Stat. § 1A-1, Rule 42(b)(4), and N.C. Gen. Stat. § 1-267.1, based on their contention that Plaintiffs’ Complaint presents a facial challenge to the Opportunity Scholarship Program.

3. On May 7, 2021, Defendants’ motions to transfer were denied by the Wake County Superior Court because, *inter alia*, “the Complaint does not present a facial challenge to the validity of an act of the General Assembly.”

4. All Defendants subsequently filed notices of appeal from the Wake County Superior Court’s May 7, 2021 order (the “Appeal”).

**I. DURHAM COUNTY**

5. On August 3, 2021, the Plaintiffs served subpoenas for document production and depositions on six of the Movants – Durham County private schools that participate in the Opportunity Scholarship Program (“Durham County private schools”): Bethesda Christian Academy, Cresset Christian Academy, Fellowship Baptist Academy, Gorman Christian Academy, Liberty Christian Academy, and Mount Zion Christian Academy. The subpoenas sought production of the following documents from the 2019-20 and 2020-21 school years:

- a. All school handbooks, student handbooks, and parent handbooks;

- b. All applications or other forms required to be completed or signed by prospective or returning students, their families, or their pastors;
- c. All forms required to be completed or signed by students upon their enrollment, or in order to continue their enrollment;
- d. All documents stating the school's admission criteria, policies, or standards;
- e. All documents stating or describing the school's disciplinary criteria, policies, or standards;
- f. All criteria, policies, standards, or rules governing student conduct; and
- g. All documents stating or describing the school's official religious beliefs, including any statement of faith.

The subpoenas for document production requested that documents be produced by September 2, 2021, and for depositions of school administrators with knowledge of the above materials to take place later that month. A true and accurate copy of the requests for production included in the subpoenas is attached at Exhibit A.

6. On August 6, 2021, the Nunn Intervenor-Defendants filed a motion requesting the Wake County Superior Court to find that the August 3, 2021 third-party subpoenas were automatically stayed by the Defendants' appeal under N.C. Gen. Stat. § 1-294, or in the alternative, to issue a discretionary stay of the pending subpoenas.

7. On September 20, 2021, the Durham County private schools filed a motion for a protective order and motion to quash Plaintiffs' August 3, 2021 subpoenas in Durham County Superior Court pursuant to Rule 45(c)(5). Durham County Superior Court assigned this motion Case Number 21-CVS-3106. The Durham County private schools asked the Durham County Superior Court to quash the subpoenas and allow them to recover attorneys' fees for fees "incurred in producing documents or attending depositions in response to the subpoenas[.]"

8. On September 21, 2021, Plaintiffs filed an amended motion to compel responses by the Durham County private schools in Durham County Superior Court that reflected the proceedings pending in Wake County Superior Court for a stay.

9. On September 24, 2021, the Wake County Superior Court entered an order denying the Nunn Intervenor-Defendants' August 6, 2021 stay motion. The Wake County Superior Court denied the Nunn Intervenor-Defendants' motion from the bench, holding that third-party discovery into the policies and practices of private schools who participate in the Opportunity Scholarship Program was not stayed with respect to the 12 subpoenas then "at issue" before the Court, pending the Defendants' appeals, and could instead proceed during the pendency of the appeals. The Wake County Superior Court held that its order "does not prevent any recipient of a subpoena from raising any appropriate objection pursuant to Rule 45(c)(3) or moving to quash or modify a subpoena pursuant to Rule 45(c)(5)."

10. On October 12, 2021, the Durham County Superior Court entered its order denying the Durham County private schools' motion for protective order and

motion to quash “without prejudice to any future proceedings pertaining to whether any subsequent subpoena requests are unduly burdensome or expensive.” A copy of the Durham County Order is attached as Exhibit B.

11. Between October 11, 2021 and November 29, 2021, the Durham County private schools incurred \$9,635.85 in attorneys’ fees and \$1,809.45 in court costs and deposition transcript fees. An invoice for fees and costs reflecting these sums is attached as Exhibit C.

## **II. CUMBERLAND COUNTY**

12. On November 11, 2021, the Plaintiffs served subpoenas for document production on ten of the Movants – Cumberland County private schools that participate in the Opportunity Scholarship Program (“Cumberland County private schools”): Berean Baptist Academy, Fayetteville Christian School, Trinity Christian School of Fayetteville, Inc., Bal Perazim Christian Academy, Cornerstone Christian Academy, Cumberland County Christian School, Destiny Now Academy, Falcon Christian Academy, Greater Fayetteville Adventist Academy, and Riverside Christian Academy. The subpoenas sought production of final versions of the following documents from the 2019-20 and 2020-21 school years:

- a. All school handbooks, student handbooks, and parent handbooks;
- b. All applications or other forms required to be completed or signed by prospective or returning students, their families, or their pastors;
- c. All forms required to be completed or signed by students upon their enrollment, or in order to continue their enrollment;

- d. All documents stating the school's admission criteria, policies, or standards;
- e. All documents stating or describing the school's disciplinary criteria, policies, or standards;
- f. All criteria, policies, standards, or rules governing student conduct; and
- g. All documents stating or describing the school's official religious beliefs, including any statement of faith.

A true and accurate copy of the requests for production included in the subpoenas is attached at Exhibit A.

13. On November 11, 2021, Plaintiffs also served deposition subpoenas on three of the Cumberland County private schools: Berean Baptist Academy, Fayetteville Christian School, and Trinity Christian School. The deposition subpoenas requested to depose administrators from these schools on January 18 and 19, 2022.

14. On November 30, 2021, the Cumberland County private schools filed a motion to quash or modify Plaintiffs' November 11, 2021 subpoenas in Cumberland County Superior Court pursuant to Rule 45(c)(5) arguing that the requests sought irrelevant information and were unduly burdensome or expensive. Cumberland County Superior Court assigned this motion Case Number 21-CVS-7081.

15. On February 15, 2022, the Cumberland County Superior Court entered its order denying the Cumberland County private schools' motion to quash or modify

the subpoenas “without prejudice to any future proceedings pertaining to whether any subsequent subpoena requests are unduly burdensome or expensive.” A copy of the Cumberland County Order is attached as Exhibit D.

16. Between November 11, 2021 and January 26, 2022, the Cumberland County private schools incurred \$13,311.50 in attorneys’ fees and \$580.80 in court costs and deposition fees. An invoice for fees and costs reflecting these sums is attached as Exhibit E.

17. On October 18, 2022, the North Carolina Court of Appeals filed an opinion in the Appeal reversing the Wake County Superior Court’s holding that Plaintiffs’ Complaint did not assert a facial challenge to the validity of the Opportunity Scholarship Program and assigned a three-judge panel pursuant to N.C. Gen. Stat. §1-267.1. *See Kelly v. State*, Case No. COA21-709 (N.C. Ct. App. 18 October 2022). A copy of the opinion is attached as Exhibit F.

18. On April 19, 2023, Plaintiffs voluntarily dismissed their Complaint (the “Dismissal”). The Dismissal made no provision to pay any of Movants’ legal fees and costs. A copy of the dismissal is attached as Exhibit G.

### **ARGUMENT**

19. North Carolina Rule of Civil Procedure 60(b) provides that “upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistake, inadvertence, surprise, or excusable neglect;



- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void;
- (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (6) Any other reason justifying relief from the operation of the judgment.

20. Both the Durham County Order and the Cumberland County Order were based on the following conclusions of law:

- a. In assessing whether third-party subpoenas impose an undue burden, courts employ a cost-benefit analysis. *Virginia Dep't of Corr. v. Jordan*, 921 F.3d 180, 189 (4th Cir. 2019);
- b. On the benefit side of the ledger, courts look to the relevance of the material sought, the requesting party's need for it, its value over the what the requesting party already has, and its availability from other sources. *Id.*; and
- c. "The documents[/materials] sought are directly relevant and necessary to support Plaintiffs' claims that the [Opportunity

Scholarship] Program, *as implemented*, subjects them to religious discrimination” (emphasis added).

21. The Court of Appeals reversed the judgment of the lower court that Plaintiffs’ Complaint was not a facial challenge to the Opportunity Scholarship Program. Accordingly, the entire reasoning upon which the Durham County Order and Cumberland County Order were based has been reversed by the Court of Appeals.

22. Accordingly, Movants request that this Court relieve them from the Durham County Order and the Cumberland County Order pursuant to Rule 60(b)(5) & (6).

23. In the alternative, should the Court find that the Durham County Order and the Cumberland County Order are not final for purposes of Rule 60, Movants request that this Court revise the orders pursuant to Rule 54(b), which provides:

Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

24. Upon relief from the Durham County Order and the Cumberland County Order pursuant to Rule 60(b)(5) or revision of the orders pursuant to Rule 54(b), Movants request that this Court impose sanctions against Plaintiffs or their attorneys pursuant to Rule 45(c)(1).

25. Rule 45(c) provides that “A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.”

26. Plaintiffs served Rule 45 subpoenas on the Movants requesting information about the nonparty schools' admission policies, discipline policies, and religious beliefs. None of the Plaintiffs attended or sought to attend any of the Movant nonparty schools. This information sought is now and was then irrelevant to a facial challenge of the Opportunity Scholarship Program. In fact, the State Defendants argued as early as October 2020 in their Answer that Plaintiffs lacked standing and that their claims presented facial challenges to the Opportunity Scholarship Program. At all times when the Plaintiffs moved to compel the Movants to respond to and comply with the subpoenas, the Appeal was pending. The outcome of the Appeal would determine the issue of whether Plaintiffs' claims were as applied challenges, or in fact, facial challenges to the validity of the Opportunity Scholarship Program. Additionally, the Appeal would transfer the case to a three-judge panel, which has jurisdiction to hear the case, allowing the Defendants to test the sufficiency of the facial challenge and narrow the issues prior to the Movants replying to any subpoenas. By moving to compel enforcement of the subpoenas during the Appeal, resulted in the nonparty school Movants responding to discovery that was

unnecessary and irrelevant to Plaintiffs' actual case in contravention of Rule 26(b)(1). Plaintiffs should not have imposed this undue burden on the Movants because there was no benefit to the Plaintiffs which could outweigh the burden imposed on the Movants. *Va. Dep't of Corr.*, 921 F.3d at 189. The nonparty Movants deserved "special solitude." *Id.* at 194.

27. Because Plaintiffs and their attorneys failed to take reasonable steps to avoid imposing this undue burden or expense on the Movants, Rule 45(c)(1) requires this Court to "impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees." Rule 45(c)(1) (emphasis added); see *Kelly v. Agnoli*, 205 N.C, App. 84, 95 (2010).

28. The Movants request that this Court impose a sanction against Plaintiffs and their attorneys for Movants' attorneys' fees and costs in the amount of \$25,337.60.

### **CONCLUSION**

For all the reasons above, Movants ask this Court to set aside the Durham County Order and the Cumberland County Order pursuant to North Carolina Rule of Civil Procedure 60(b)(5), or in the alternative revise the orders pursuant to Rule 54(b), and impose of sanctions pursuant to Rule 45 (c)(1) against Plaintiffs and their attorneys for Movants' attorneys' fees and costs in the amount of \$25,337.60.

Respectfully submitted, this is the 1st day of May, 2023.

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been sent to the attorneys below, per agreement among the parties by e-mail to the addresses below on this the 1st day of May, 2023.

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