

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21-CVS-007081

2022 FEB 15 A 11: 56

TAMIKA WALKER KELLY, KRISTY
MOORE, AMANDA HOWELL, KATE
MEININGER, ELIZABETH MEININGER,
JOHN SHERRY, and RIVCA RACHEL
SANOGUEIRA

Plaintiffs,

v.

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

Defendants.

**ORDER DENYING THIRD-PARTY
SUBPOENA RECIPIENTS'
MOTION TO QUASH**

THIS CAUSE came before the Court during the January 14, 2021 civil session of Cumberland County Superior Court on three Cumberland County voucher-recipient schools' motion to quash or modify Plaintiffs' subpoenas seeking to depose their schools' administrators. The Court, having considered the motion, the file, and arguments of counsel, makes the following:

FINDINGS OF FACT

1. The Plaintiffs are seven North Carolina parents and taxpayers who contend that the Opportunity Scholarship Program ("the Program"), as implemented, violates various provisions of the North Carolina Constitution.
2. Plaintiffs' first claim for relief contends that the Program, as implemented, violates Article I, Sections 13 and 19 of the North Carolina Constitution.
3. Plaintiffs' second claim for relief contends that the Program, as implemented, violates Article I, Sections 13, 15, and 19, and Article V, Sections 2(1) and 2(7) of the North Carolina Constitution.
4. Plaintiffs' third claim for relief contends that the Program, as implemented, violates Article I, Section 15 and Article V, Sections 2(1) and 2(7).
5. Plaintiffs' first and second claims turn largely on the allegedly discriminatory policies and practices maintained by private schools who participate in the Program.
6. 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 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 Program.

7. 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."

8. The State Defendants, Legislative Intervenor-Defendants, and the Nunn Intervenor-Defendants subsequently filed notices of appeal from the Wake County Superior Court's May 7, 2021 order.

9. On August 3, 2021, the Plaintiffs served subpoenas for document production and depositions to six Durham County private schools that participate in the Program ("Durham County private schools").

10. On August 6, 2021, the Nunn Intervenor-Defendants filed a motion requesting that the Wake County Superior Court hold 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 twelve pending subpoenas.

11. On September 20, 2021, the Durham County private schools filed a motion for a protective order and motion to quash Plaintiff's August 3, 2021 subpoenas. The Durham County private schools asked the Court to allow them to recover attorneys' fees for fees "incurred in producing documents or attending depositions in response to the subpoenas[.]"

12. On September 24, 2021, the Wake County Superior Court entered an order denying the Nunn Intervenor-Defendants' August 6, 2021 stay motion, holding that third-party discovery into the policies and practices of private schools who participate in the Program was not stayed 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)."

13. On October 12, 2021, the Durham County Superior Court entered an order denying the Durham County private schools' motion for a protective order and motion to quash "without prejudice to any future proceeding pertaining to whether any subsequent subpoena requests are unduly burdensome or expensive."

14. On November 11, 2021, Plaintiffs sent document subpoenas to 11 Cumberland County voucher-recipient schools ("Cumberland County private schools"). The subpoenas sought production of the 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.
- g. All documents stating or describing the school's official religious beliefs, including any statement of faith.

15. On November 11, 2021, Plaintiffs also served deposition subpoenas on three of the Cumberland County private schools receiving document subpoenas: 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.

16. On November 13, 2021, the Cumberland County private schools sought through December 1, 2021 to object to Plaintiffs' subpoena requests. Plaintiffs consented to an extension beyond the 10 days allowed to file objections. N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. Rule 45(c)(5).

17. On November 30, 2021, the Cumberland County private schools filed a motion to quash or modify Plaintiffs' subpoenas arguing, pertinent to what ultimately came before this Court on January 14, 2022, that Plaintiffs' deposition requests sought irrelevant information and were unduly burdensome or expensive.

18. Plaintiffs and the Cumberland County private schools subsequently conferred and clarified the scope of the subpoena requests. On December 14, 2021, Plaintiffs and the Cumberland County private schools filed a joint stipulation memorializing the following:

- a. Plaintiffs did not request draft documents from the schools;
- b. The three administrators will be deposed on February 2 and 4, 2022;
- c. Plaintiffs will provide the school's counsel with deposition exhibits 48 hours in advance of each deposition; and
- d. Plaintiffs' questioning of each deponent will not exceed three hours.

19. The stipulation further confirmed that "[t]he only outstanding issues relating to the schools' Motion to Quash filed November 30, 2021 is their request for \$1500 in attorneys' fees for each of the three schools whose administrator is being deposed."

Based on the Findings of Fact and the law, the Court makes the following

CONCLUSIONS OF LAW

1. The October 12, 2021 Durham County Superior Court order denying the Durham County private schools' motion for a protective order and motion to quash was issued "without prejudice to any future proceeding pertaining to whether any subsequent subpoena requests are unduly burdensome or expensive." This Court is therefore not obligated to deny Defendants' motion to quash under the law of the case doctrine.

2. A person subpoenaed may file a motion to quash the subpoena within 10 days after service of the subpoena. N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. Rule 45(c)(5). "The court shall quash . . . the subpoena if the subpoenaed person demonstrates the existence" of specific grounds for the objection pursuant to Rule 45(c)(3). *Id.* These grounds include that "the subpoena subjects a person to an undue burden or expense" or is "otherwise unreasonable or oppressive." N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. Rule 45(c)(3)(c)-(d).

3. This Court rejects the Cumberland County private schools' argument that Plaintiffs' subpoena requests may be irrelevant due to Defendants' pending appeal of the denial of their motion to transfer to a three-judge panel. In denying Defendants' request for a stay, the Wake County Superior Court has already held that "[d]iscovery will be necessary to build an evidentiary record in this case to resolve Plaintiffs' claims, regardless of the outcome of Defendants' appeal." *See State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 131, 194 (2003) ("it is well established in our jurisprudence that no appeal lies from one Superior Court judge to another.").

4. A trial court cannot grant a motion to quash when the subpoenaed person's objections are "the functional equivalent of a mere allegation." *Taylor v. Ferri*, 265 N.C. App. 557, 591, 829 S.E.2d 240, 244 (2019). Instead, "objective indicia" supporting the objections are "required when a movant objects to a subpoena" under Rule 45(c)(3). *Id.* at 590, 829 S.E.2d at 243.

5. The Cumberland County private schools' objection that Plaintiffs' deposition subpoena requests impose an undue burden or expense lacks the requisite "objective indicia" of support. *Id.* In support of their undue burden and expense argument, the schools highlight their status as schools, and note that Plaintiffs previously deposed several Durham County private schools. Neither the schools' status nor the Durham County depositions establish an undue burden or expense.

6. 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, 139 (4th Cir. 2019).

7. 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 what the requesting party already has, and its availability from other sources. *Id.*

8. On the cost side of the ledger, courts look to the cost of compliance, whether the request is overbroad, implicates privacy or confidentiality interests, *id.*, or is voluminous, and when the request was made, *Fallis v. Watauga Med. Ctr.*, 132 N.C. App. 43, 59, 510 S.E.2d 199, 200 (1999).

9. Here, Plaintiffs' requests to depose three school administrators about their respective schools' policies and practices does not impose an undue burden.

10. The documents sought are directly relevant and necessary to support Plaintiffs' claims that the Program, as implemented, subjects them to religious discrimination.

11. Deposing school administrators about official school documents from the 2019-20 and 2020-21 school years and how they operate in practice has value beyond the documents Plaintiffs already have in their possession.

12. There are no "more logical targets for the [deposition] subpoenas" than the school administrators given their knowledge of the schools. *Jordan*, 921 F.3d at 182.

13. Plaintiffs' deposition requests are made well in advance of trial.

14. Plaintiffs' deposition requests do not implicate privacy or confidentiality interests.

15. Plaintiff's deposition requests are not overly taxing, seeking to depose three school administrators for a total of no more than nine hours.


16. By agreeing to limit each deposition to no more than three hours, Plaintiffs have taken reasonable steps to reduce any burdens imposed by the deposition subpoenas. N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. Rule 45(c)(1).

17. This Court must reject the Cumberland County private schools' requests for attorneys' fees to comply with Plaintiffs' deposition subpoenas. "[R]easonable attorneys' fees[]" are only available upon a showing that the subpoenas are unduly burdensome or expensive. N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. Rule 45(c)(1). Because Plaintiffs' requests are not unduly burdensome or expensive and Plaintiffs have taken steps to reduce the limited burden they do impose, the Cumberland County private schools are not entitled to attorneys' fees for complying with Plaintiffs' deposition subpoenas.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED as follows:

1. The Cumberland County private schools' motion to quash or modify Plaintiffs' deposition subpoenas is denied.
2. The Cumberland County private schools' request for attorneys' fees for complying with Plaintiffs' deposition subpoenas is denied.
3. This order is without prejudice to any future proceedings pertaining to whether any subsequent subpoena requests are unduly burdensome or expensive.

Entered the 14th day of January, 2022 and signed the 8th of February, 2022.


Gale M. Adams
Superior Court Judge