STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION CASE NO.: 13-CVS-16771
ALICE HART, RODNEY ELLIS, JUDY CHAMBERS, JOHN HARDING LUCAS, MARGARET ARBUCKLE, LINDA MOZELL, YAMILE NAZAR, ARNETTA BEVERLY, JULIE PEEPLES, W. T. BROWN, SARA PILAND, DONNA MANSFIELD, GEORGE LOUCKS, WANDA KINDELL, VALERIE JOHNSON, MICHAEL WARD, T. ANTHONY SPEARMAN, BRITTANY WILLIAMS, RAEANN RIVERA, ALLEN THOMAS, JIM EDMONDS, SASHA VRTUNSKI, PRISCILLA NDIAYE, DON LOCKE, and SANDRA BYRD, Plaintiffs, v. STATE OF NORTH CAROLINA and NORTH CAROLINA STATE EDUCATION ASSISTANCE AUTHORITY, Defendants.	**BRIEF OF AMICUS CURIAE NC NAACP**

COMES NOW the North Carolina Conference of the NAACP, as *amicus curiae* in support of the Plaintiffs, and in response to the Motion to Dismiss filed by the Defendants, and shows the Court:

I. Introduction

The North Carolina Conference of NAACP Branches ("NC NAACP") is over 70 years old, being organized about the time the NAACP began the dismantling of the egregious Jim Crow social system with the 9-0 Supreme Court ruling in *Brown v. Board of Education* in 1954.

NC NAACP has over 100 adult, youth, and college branches throughout North Carolina. It has gathered more than 170 partners into a multi-racial Peoples Assembly Coalition over the past eight years, and convened what has been called by the media the "Moral Monday" movement. Its larger mission is to dismantle the system of race discrimination that grew out of the 200 year slave system, and the 100 years of division and deprivation called Jim Crow, codified in 1896 by *Plessy v. Ferguson.*

In the early 1930's, the NAACP commissioned a study that found the "separate but equal" mandate of *Plessy* was chimerical. Under segregation, facilities, services, and supplies provided for blacks were indeed separate, but never equal to those provided for whites. The NAACP set out on a long road of lawsuits to prove what everyone knew. The primary target was segregated public education. "Segregated schools were the central symbol of African-American subordination, a visible and daily demonstration to children as they were growing up that whites did not consider them fit to associate with." Mark Tushnet, *Making Civil Rights Law,* Oxford University Press, NY, 1994, p.116.

Professor Charles Hamilton Houston and his protégé and best student, Thurgood Marshall, carefully laid the groundwork for the final victory over Jim Crow in 1954. *Brown v. Board of Education of Topeka, Kansas,* recognized that the system of segregation in public education violated the Constitution's guarantee of equal protection. Having won the constitutional victory, the hard county-by-county work across the south had just begun for the NAACP, including in North Carolina. Hundreds of cases were filed, and after Title VI of the Civil Rights Act was passed in 1964, hundreds of administrative complaints were filed. Across North Carolina today, the vestiges of dual school systems and unequal educational opportunities for children of color still haunt our rural counties and urban centers.

This past week, the NC NAACP gathered tens of thousands of people in Raleigh--African Americans, Latinos, Native Americans, European Americans, and Asian Americans -- to fight for our Public School System, from pre-kindergarten to post graduate work in our UNC system. The People's Agenda of the NAACP is comprehensive, addressing the disparities in housing, employment, health and the criminal justice system. But its number one issue is education.

The private school voucher legislation at issue in this case directly threatens the mission, members and the poorest children in North Carolina of the NC NAACP. If this deceptive legislation of an ideologically driven faction is allowed to become the policy in North Carolina, it will irreparably harm the NC NAACP. Rather than repair the continuing vestiges of discrimination and racial segregation in North Carolina's schools, it will further divide our children and our state.

II. The Origins and Legacy of Private Schools in Maintaining Racial Segregation

Prior to *Brown,* there were few formal state interactions with private schools in North Carolina. Within one year after it became the law of the land however, radical revisions to the public school statutes made the State Board of Education responsible for "regulating and supervising all non-public schools serving children of secondary schools age or younger." David Morgan, *History of Private School Regulation in North Carolina,* Division of Non-Public Education, N.C. Dept. of Administration, http://www.ncdnpe.org/documents/hhh138c.pdf (1980) p. 2.

The timing of this little-debated change provided segregationist leaders the legal rationale to undermine the Supreme Court's landmark ruling. The segregationist movement used the law to establish the foundation for the development of the Pearsall Plan. This proposal came out of the General Assembly's Education Committee that had been tasked with crafting North

Carolina's response to *Brown's* order to desegregate all public schools. While asserting that "defiance of the Supreme Court would be foolhardy," the Committee nonetheless made a ringing defense of segregation and an even stronger attack on the NAACP and others who insisted segregation must end.

> The Negro leaders from outside the state and those who are now vocal within the state, appear to be totally indifferent to the fact that their belligerence, their attempt to use the threat of federal punishment to achieve integration, will prevent Negro children from getting an education in North Carolina....
>
> If the State of North Carolina is to go forward, if the white race is to go forward, the Negro must go forward also. The advancement of our economy and the preservation of our democracy depend in large part upon the education, the understanding, and the morality of the Negro as well as the white. If there prevails ignorance in either race, our economy will stall, our society will seethe, and our democracy will degenerate.... [C]hildren do best when in school with children of their own race.

Report of the North Carolina Advisory Committee on Education, 1 Race Rel. L. Rep. 581, 583 (1956).

This Report and the Pearsall Plan were adopted by the General Assembly in 1956. Governor Luther Hodges told the legislators at the opening of the session that "the people of North Carolina expect their General Assembly and their Governor to do everything legally possible to prevent their children from being forced to attend mixed schools against their wishes." Governor's Address to the General Assembly, July 23, 1956, 10 Senate Journal.

Neither the Governor nor the all-white legislature disappointed those expectations. The quarter of the state represented by the NC NAACP was ignored. The State established a procedure for local referenda which would permit a school district that was ordered to desegregate to close all its public schools. The State would then provide vouchers to white students in those districts to attend private schools. The rationale behind the statutory change regarding the State Board of Education and non-public schools was out in the open. The ploy of

state oversight helped legitimize the use of taxpayer dollars to fund white families' abandonment of desegregated public schools and to subsidize racially segregated private schools. *See* Morgan, *History of Private School Regulation in North Carolina,* p.3. This is the direct and notorious ancestry of school vouchers in North Carolina, and the corrupt foundation upon which the current voucher legislation is built.

Although the Pearsall Plan was declared unconstitutional ten years later, it succeeded in postponing any real desegregation in North Carolina during that time. During those same ten years, the number of private schools in NC was relatively constant. In the 1964-65 school year, the state's 83 private schools enrolled approximately 9,500 students. But when Title VI was enacted, giving NAACP lawyers and the federal government a simpler method of challenging race discrimination in dual school systems, the number of students in private schools began to rise. During the four years of NAACP efforts to desegregate North Carolina's public schools--1968 to 1972—private school enrollment nearly tripled from approximately 18,000 to over 50,000. The number of private schools jumped from 174 in 1968 to 263 in 1972. Surging enrollment in non-public schools was often concentrated in areas with high concentrations of African-American students. *"Segregation Academies and State Action,"* 82 Yale Law Journal 7 (Jun. 1973) p. 1441-42. Dr. Jerome Melton, former Deputy Superintendent of Public Instruction, referred to the private schools that opened during this period as "a pop-off valve for the most arrogant whites to escape." Morgan, *History of Private School Regulation in North Carolina"* p. 5.

The segregative legacy of these private schools and academies continues to this day.

- Bertie County is 62% African American. Lawrence Academy was founded in Bertie County in 1968. Its student body is 98% white.

- Halifax County is 53% African-American. Halifax Academy and Hobgood Academy were both founded in 1969. Halifax Academy is 98% white; Hobgood Academy is 95% white.

- Hertford County is over 60% African-American. Ridgecroft School, founded in 1968, is 97% white.

- Northampton County is 58% African-American, but Northeast Academy, established in 1966, is 99% white.

- Vance County is 49% African-American; Kerr-Vance Academy, established in 1968, is 95% white.

Private school demographics in other Black Belt counties in the Eastern part of the state are the same. The only other private school in Bertie County is 99% white. The only private school in Greene County is 99% white. Majority African-American Warren County has one private school. It is nearly 90% white. Wilson County (39% African-American) has two private schools, 91% and 81% white, respectively.[1]

These virtually all-white schools have a dual segregative impact. Not only are the schools themselves racially isolated, but they leave the public schools from which they draw more racially isolated. Additionally, the one constraint on even greater white abandonment of public schools, particularly in these low-wealth counties, is the cost. Wealthier whites fled the public schools; school integration was accomplished with working and middle class whites and blacks that remained. The State's voucher program removed this constraint. Funds will no

[1] The county demographic data listed here is from the 2010 U.S. Census. The school enrollment data is from the Institute of Education Sciences, National Center for Education Statistics, *Private School Universe Survey (PSS): Public-Use Data File User's Manual for School Year 2009-2010.* The founding date information is from the individual school websites, http://www.lawrenceacademy.org/About_LA/School_History.asp; http://ridgecroftschool.org/about-us-2/; http://www.northeasteaglesnc.com/athletics.htm; http://www.halifaxacademy.org/about-us/our-history-philosophy.html; http://www.hobgoodacademy.com/history.php; http://www.kerrvance.com/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=185&MMN_position=211:207

longer be the impediment for less wealthy white parents to remove their children from more racially-diverse public schools to segregated white enclaves.

This use of public funds is unconstitutional. North Carolina's efforts to use public funds to maintain "a refuge for white students" was resoundingly rejected by the U.S. Supreme Court in *U.S. v. Scotland Neck City Bd. of Education,* 407 U.S. 484, 488 (1972). In 1969, after the majority African-American Halifax County School District adopted a desegregation plan, the General Assembly approved the creation of a new school district for the small town of Scotland Neck. Based on the demographics of the town and a proposed transfer plan that would bring whites from outside town limits into the district and move African-Americans in the other direction, the new Scotland Neck school system would be approximately 75% white. *Id.*, at 487. The Court declared the legislation creating the new district unconstitutional. "State policy must give way when it operates to hinder the vindication of federal constitutional guarantees." *Id.*, at 489 (internal quotations omitted). The State could not expend funds to subsidize racially segregated education. It should not be permitted to do so now.

In addition to the fundamental legal issues related to segregation in schools, the kind of racially segregated education that characterizes most private schools in North Carolina also has significant adverse educational impacts. These impacts were summarized in the U.S. Departments of Justice and Education's *Guidance on the Voluntary use of Race to Achieve Racial Diversity and Avoid Racial Isolation in Elementary and Secondary Schools* ("*Guidance*"):

> [W]here schools lack a diverse student body or are racially isolated . . . they may fail to provide the full panoply of benefits that K-12 school can offer. The academic achievement of students in racially isolated schools often lags behind that of their peers at more diverse schools. Racially isolated schools often have fewer effective teachers, higher teacher turnover rates, less rigorous curricular resources, and inferior facilities and other educational resources.

The *Guidance* also acknowledged that students consigned to racially isolated schools miss critical opportunities to interact with and learn from others with different backgrounds. The broad harms of segregated schools described in the *Guidance* are in turn supported by numerous independent and empirical research studies. *See, e.g.,* Roslyn Mickelson, "The Incomplete Desegregation of Charlotte-Mecklenburg Schools and its Consequences," in John Charles Boger and Gary Orfield, eds., *School Resegregation: Must the South Turn Back?*, (Chapel Hill, NC: University of North Carolina Press, 2005), 87-110; Gary Orfield, John Kucsera, Genevieve Siegel-Hawley, *E Pluribus...Separation: Deepening Double Segregation for More Students*, (The Civil Rights Project, UCLA, 2012) http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students.

This is the compromised historical and educational framework onto which the State now seeks to graft this voucher legislation. To financially support with taxpayers' money, and provide state sanction to schools that have, by history and practice, created and maintained a means for white families seeking to avoid attending integrated public schools is a betrayal of the constitutional imperative of *Brown* and the sacrifices and long struggles of thousands of Black and White and Native Americans in North Carolina to address the state's history of racial segregation in the education of its children. We can create schools based on hope, or on fear.

> But society's needs aside, the new schools also seem to be unfortunate places for their patrons, so little do they offer students living in the modern world. They seem narrow and insular when human perceptions are widening. They are homogeneous when the pluralism of American is newly apparent, and they are separatist when we are already polarized, politically, racially and even regionally. [. . .] For it is in the real and changing world that their children will live. The effect of the tranquil and somewhat sterile island of the schools is to sever its clientele from the pluralistic society around them.

David Niven & Robert Bills, *The Schools That Fear Built*, Acropolis Books, Washington, D.C., 1976, p. 88.

As Justice Thurgood Marshall warned forty years ago, "unless our children begin to learn together, there is little hope they will ever learn to live together." *Milliken v. Bradley,* 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

III. There is No Empirical Evidence that the Voucher Program Benefits Non-white and Low-Wealth Students, Whose Fundamental Educational Needs are Being Compromised to Help Privatize Education in North Carolina

It is a twisted irony that North Carolina's voucher movement, born from the racist desire of whites to maintain segregation at the public's expense, would claim to be advancing racial and social justice. An investigation of the movement's recent history explains why that claim became its centerpiece. Proponents of privatization began reaching out to African Americans only after voucher and tuition-tax-credit proposals foundered throughout the 1980s and 90s. See, James Forman, Jr., *The Rise and Fall of Vouchers: A Story of Religion, Race and Politics*, 54 UCLA Law Rev. 547, 569 (2007). Two of the intellectual architects of the school privatization movement have been quite transparent about their strategy. In their 1999 article, John Coons and Stephen Sugarman declared that school-choice coalitions

> must include and feature actors who are identified publically with groups that advertise their concern for the disadvantaged. The leadership must visibly include racial minorities of both sexes and prominent Democrats....The conservative commitment to the project is necessary but should remain mute until the coalition has secured leadership whose party affiliation, social class or race—preferably all three—displays what the media will interpret as concern for the disadvantaged.

Id., at 568 (quoting John E. Coons & Stephen D. Sugarman, Making School Choice Work For All Families 85 (1999)).

In addressing what he described as the "trench warfare" pitting conservatives against liberals, leading voucher advocate Paul Peterson said:

> There's only one force out there that's probably going to change the story, and that's black families....The reason is that if black families say this is something that's really important to them, it's going to change the calculations of all the politicians who have lined up on one side or another.

Id., at 569 (quoting from John E. Coons et al., *The Pro-Voucher Left and the Pro-Equity Right*, 572 Annals Am. Acad. Pol. & Soc. Sci. 98, 114 (2000)). According to Forman, the racial-justice claim for vouchers

> would need to be tied to educational quality, not values or religious freedom, and would therefore require some evidence that private schools were more effective than public ones at teaching academic skills.

Id., at 570.

Such evidence has not materialized. The studies on which privatization proponents rely—from James S. Coleman's 1982 study of Catholic high schools to the 2012 publication by voucher proponents Matthew M. Chingos and Paul Peterson—all suffer from bias and other measurement error that, at least in the case of Chingos and Peterson, are unmentioned by the studies' authors. *See, e.g.*, Sara Goldrick-Rab, Sept. 13, 2012 *Review of The Effects of School Vouchers on College Enrollment: Experimental Evidence from New York City*, Brookings Institution (August 23, 2012) (available at http://nepc.colorado.edu/thinktank/ review-vouchers-college). Accounting for measurement errors reveals that in fact there is no statistically significant educational advantage incurred by African American and poor voucher recipients. *Id.* *See also* 54 UCLA Law Rev. at 572, n. 129 (citing Alan B. Krueger & Pei Zhu, *Another Look at the New York City School Voucher Experiment*, 47 Am. Behav. Scientist 658, 683-85 (2004); Alan B. Krueger & Pei Zhu, *Inefficiency, Subsample Selection Bias, and Nonrobustness: A Response to Paul E. Peterson and William G. Howell*, 47 Am. Behav. Scientist 718, 726-27 (2004); Paul E. Peterson & William G. Howell, *Efficiency, Bias, and Classification Schemes: A Response to Alan B. Krueger and Pei Zhu*, 47 Am. Behav. Scientist 699, 702 (2004)). Nor is

there evidence that voucher programs and other schemes that shift public money to private schools have been successful in improving the education of low-income students in the places that those schemes have been tried. *See* Public Policy Forum, Research Brief: Choice Schools Have Much in Common with MPS, Including Student Performance, 2013 (available at: http://publicpolicy forum.org/sites/default/files/2013VoucherBrief-Clarified_1.pdf); Rouse, Cecilia Elena and Lisa Barrow, School Vouchers and Student Achievement: Recent Evidence, Remaining Questions, Annual Review of Economics, Volume 1, 2009 (available at http://www.ncspe.org/ publications_ files/OP86.pdf; Kim Metcalf et al., Evaluation of the Cleveland Scholarship and Tutoring Program 1998-2003, Executive Summary, October, 2004; Summary Report, 1998-2003; Technical Report 1998-2003, Bloomington, Ind., October 2004, available at http://www.crlt.indiana.edu/research/cstpe.html.Neovouchers.pdf).

Most of the studies done on the longest-running voucher scheme in the United States, the Milwaukee Parental Choice (MPC) Program, find that the peer public school students perform either the same or better than voucher recipients. *See* Rouse et al. The most recent study of MPC concluded that participating Milwaukee students performed significantly worse in both reading and math than students in Milwaukee Public Schools. *See,* Rouse, Cecilia Elena and Lisa Barrow, School Vouchers and Student Achievement: Recent Evidence, Remaining Questions, Annual Review of Economics, Volume 1, 2009 (available at http://www.ncspe.org /publications_files/OP86.pdf).

The country's next longest-running voucher program, the Cleveland Scholarship and Tutoring Program, has generated similar results. "Public school students made greater learning gains in comparison to voucher recipients, even though voucher recipients were less likely to be low-income." Rouse, Cecilia Elena and Lisa Barrow, School Vouchers and Student

Achievement: Recent Evidence, Remaining Questions, Annual Review of Economics, Volume 1, 2009; Kim Metcalf et al., Evaluation of the Cleveland Scholarship and Tutoring Program 1998-2003, Executive Summary, October, 2004; Summary Report, 1998-2003; Technical Report 1998-2003, Bloomington, Ind., October 2004 (available at http://www.crlt.indiana.edu/research/cstpe.html)).

These studies belie the claim that voucher programs (including North Carolina's) were created to benefit low-income and other at-risk students. Evaluations of the voucher schemes in Cleveland and Milwaukee show that these programs have not been effectively limited to low-income students. Both programs primarily serve a population of students that is less impoverished than the population of students remaining in the traditional public schools. See Rouse et al. 2009 and 2004; 54 UCLA Law Rev at 584. Furthermore, as Forman notes regarding Cleveland's program, there is ample evidence that the wealthier and whitest schools will not accept vouchers. 54 UCLA Law Rev. at 584. "This issue is highlighted in [*Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)]," Forman observes, "despite the fact that suburban districts could participate in the program, none chose to do so." 54 UCLA Law Rev. at 584. A year after winning *Zelman*, Clint Bolick, the lawyer who led the defense of school voucher programs, explained why those well-resourced doors were closed to voucher recipients:

> [The] reason was obvious: many of the families in the suburban public schools had escaped the inner city, and they didn't want the 'problems'—that is, poor minority schoolchildren—following them.

Id. at 584 (quoting Clint Bolick, Voucher Wars 92 (2003).

The NAACP resoundingly rejects the claim by North Carolina's voucher program proponents that it is for the benefit of poor students of color, and condemns this perverted "Talented Tenth" attempt to divide the African American community against its own best

interests— interests which are evidenced by the fact that the overwhelmingly majority of African American and poor students will remain in our public schools. Poor students, including those of color, benefit from strong public schools. The voucher program undermines public education by robbing its resources and privatizing a public good cherished in this state and enshrined in our constitution. It is a cruel hoax to market this regressive program as a means to further racial or social justice.

This hoax subverts the state constitution's guarantee of a sound basic education. The North Carolina Supreme Court made clear that the state has a particular obligation to its "at-risk" students. *Hoke County v. State (Leandro II)*, 346 N.C. 336, 488 S.E. 2d. 249 (1997). At a minimum, *Leandro II* demands a measure of accountability and transparency, especially with regard to at-risk students (many of whom the voucher program purports to target), from which private schools are exempt. By encouraging at-risk students to leave the public schools for private schools, where there is no obligation to comply with equal protection, and no accountability to even begin to determine whether the student is receiving a constitutionally-compliant education, the voucher program expressly undermines the State's core duty under *Leandro*.

Conclusion

The state's private school voucher program unconstitutionally uses public funds to exacerbate and entrench the legacy of private schools in maintaining racial segregation in education, and undermines the State's decades-long efforts to eliminate the vestiges of *de jure* discrimination. The voucher program is being hypocritically marketed to low wealth and minority communities when there is no evidence that the program can or will provide substantive educational benefits to these children.

The Court should grant the plaintiffs' motion for a preliminary injunction, and deny the State's motion to dismiss.

Respectfully submitted, this the 11th day of February, 2014.

UNC CENTER FOR CIVIL RIGHTS

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CERTIFICATE OF SERVICE

This is to certify that I have this day served all parties in this matter with a copy of the foregoing *Brief of Amicus Curiae North Carolina NAACP* by depositing in the United States mail, a copy in a properly addressed envelope postpaid pursuant to the North Carolina Rules of Civil Procedure. The names and addresses of the parties served appear below.

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