

NO. 347P11

TWENTY SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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SUGAR CREEK CHARTER SCHOOL,	)	
INC, ET AL.,	)	
Plaintiffs-Appellants	)	<u>FROM MECKLENBURG COUNTY</u>
	)	NO. 09 CVS 23289
v.	)	COA10-965
	)	
STATE OF NORTH CAROLINA,	)	
ET AL.,	)	
Defendants-Appellees.	)	

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COUNTY RESPONDENTS' RESPONSE TO PETITION

FOR DISCRETIONARY REVIEW PURSUANT

TO N.C.G.S. §§ 7A-30(1), 7A-31(c)

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INDEX

TABLE OF CASES AND AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... 1

STATEMENT OF THE FACTS ..... 2

REASONS WHY CERTIFICATION SHOULD NOT  
BE ISSUED..... 2

I. THE COURT OF APPEALS ADDRESSED ALL  
PERTINENT CONSTITUTIONAL CONSIDERATIONS  
IN UPHOLDING THE GENERAL ASSEMBLY'S  
CHARTER SCHOOL FUNDING STRUCTURE..... 3

II. THE GENERAL ASSEMBLY HAS SPOKEN ON  
THE ISSUE OF CHARTER SCHOOL FUNDING  
STRUCTURE..... 8

CONCLUSION..... 11

TABLE OF CASES AND AUTHORITIES

**CASES**

<u>Baker v. Martin</u> , 330 N.C. 331, 337, 410 S.E.2d 887, 891 (1991) .....	6
<u>Hughey v. Cloninger</u> , 297 N.C. 86, 88, 253 S.E.2d 898, 900 (1979) .....	4
<u>Kornegay v. Goldsboro</u> , 180 N.C. 441, 451, 105 S.E. 187, 192 (1920) .....	11
<u>Leandro v. State of North Carolina</u> , 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) .....	3, 5
<u>Mills v. Board of Comm'rs</u> , 175 N.C. 215, 219, 95 S.E. 481, 482 (1918) .....	8
<u>Shelby v. Power Co.</u> , 155 N.C. 196, 200, 71 S.E. 218, 219-220 (1911) .....	10
<u>State ex rel. Martin v. Preston</u> , 325 N.C. 438, 448-449, 385 S.E.2d 473, 478 (1989) .....	6
<u>Sugar Creek Charter Schools, Inc. v. State of North Carolina</u> , No. COA10-965, Slip op. at 3, 13-14, 22-31 (2 August 2011) .....	3, 4, 5, 6, 8
<u>Williams v. Alexander County Bd. of Educ.</u> , 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998) .....	8

**STATUTES**

N.C.G.S. § 7A-31(c) .....	2
N.C.G.S. § 115C-238.29H .....	9

**OTHER AUTHORITIES**

S.B. 8, N.C. Gen. Assem., Sess. Law 164 (2011) .....	8, 9
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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to N.C.G.S. § 7A-31 and Rule 15(d) of the North Carolina Rules of Appellate Procedure, Defendants-Appellees, Cleveland, Edgecombe, Halifax, Nash, Mecklenburg, Rutherford and Union Counties (hereinafter "Respondents"), respond to Petitioners' petition to the Supreme Court of North Carolina to certify for discretionary review the judgment of the North Carolina Court of Appeals filed 5 August 2011. This Court should not grant review as of right, pursuant to N.C.G.S. § 7A-30, nor should it grant discretionary review pursuant to N.C.G.S. § 7A-31, as the General Assembly and the Court of Appeals have fully answered Petitioners inquiries as to whether charter school funding statutes are constitutional and whether charter schools are statutorily entitled to receive funding from this State's Capital Outlay Fund.

**STATEMENT OF THE CASE**

Petitioners filed a declaratory judgment action in Mecklenburg County Superior Court on 8 September 2009 asserting, amongst other things, that charter schools should have access to funding from the Capital Outlay Fund and that the existing funding structure for charter schools enacted by the General Assembly is unconstitutional. On 24 May 2010, the trial court dismissed the matter pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Petitioners appealed the

trial court's decision and on 2 August 2011, the Court of Appeals issued its unanimous decision affirming the decision of the trial court. Petitioners now seek review from this Court as a matter of right on the basis that the underlying case presents a matter of substantial constitutional concern pursuant to N.C.G.S. § 7A-30(1), or, alternatively, that this Court should grant discretionary review alleging that the case involves matters of significant public interest and legal significance. N.C.G.S. § 7A-31(c).

**STATEMENT OF THE FACTS**

Respondents adopt by reference and incorporate herein the Statement of the Facts contained in the Response to Petitioners' Petition for Discretionary Review filed by the State of North Carolina.

**REASONS WHY CERTIFICATION SHOULD NOT BE ISSUED**

Respondents respectfully submit that the Court of Appeals correctly determined that the statutory structure enacted by the General Assembly reasonably and constitutionally precludes charter schools from petitioning for Capital Outlay Funds.

Petitioners have apparently abandoned their argument that the North Carolina General Statutes currently allow the counties to provide monies to the charter schools from the Capital Outlay Fund. The Court of Appeals determined that the General Assembly had a rational basis for its decision not to provide monies from

the Capital Outlay Fund to charter schools. Further, the Court of Appeals determined that the petitioners were not alleging a violation of the Leandro doctrine's duty to provide a sound basic education. Leandro v. State of North Carolina, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997). Finally, the Court of Appeals appropriately determined that the elected representatives of the people, the North Carolina General Assembly, was the proper body to address alterations to the charter school funding statutes.

**I. THE COURT OF APPEALS ADDRESSED ALL PERTINENT CONSTITUTIONAL CONSIDERATIONS IN UPHOLDING THE GENERAL ASSEMBLY'S CHARTER SCHOOL FUNDING STRUCTURE.**

Petitioners engage in an interesting semantic argument premised on the notion that the Court of Appeals could not have properly reached a determination on the constitutionality of whether charter schools should be allowed access to the Capital Outlay Fund because it failed to address whether charter schools are part of the uniform public school system. Respondents respectfully contend that this argument is substantively immaterial.

Petitioners argued before the Court of Appeals that they were improperly being denied access to the Capital Outlay Fund by the counties and local school administrative units. See Sugar Creek Charter Schools, Inc. v. State of North Carolina, No. COA10-965, Slip op. at 3 (2 August 2011). Underlying

Petitioners' argument was the premise that the existing funding statutes were being applied unconstitutionally insofar as they do not permit, as written, charter schools to access Capital Outlay monies.

In addressing Petitioners' allegation, the Court of Appeals concluded that "since 'a county has no power to appropriate funds unless authorized to do so by the General Assembly,' and since there is no statutory provision authorizing charter schools to receive monies from county Capital Outlay Funds, the relevant statutory provisions do not allow charter schools access to county Capital Outlay Funds." (Id.) at 14 (quoting Hughey v. Cloninger, 297 N.C. 86, 88, 253 S.E.2d 898, 900 (1979) (emphasis added)). The Court of Appeals rightly determined that the existing funding mechanisms did not grant access to the Capital Outlay Fund and were, thus, not being applied unconstitutionally.

Petitioners vaguely assert that "substantial questions" persist regarding the applicability of N.C. Const. art. IX, § 2. Petitioners would have this Court believe that the Court of Appeals merely "glossed over" pertinent, but unspecified, considerations undergirding the constitutionality of its holding. This is not the case. Respondents submit that a cursory examination of the Court of Appeals opinion reveals that it exhaustively considered Petitioners arguments and concluded that

the constitutional provisions raised by Petitioners and “[t]he interpretive principles upon which Plaintiffs rely d[id] not, however, have any role in the proper construction of N.C. Const. art IX, § 2(1),” because that provision deals with substantive access to educational instruction. Slip op. at 25.

In so holding, the Court of Appeals noted that this Court has interpreted N.C. Const. art. IX, § 2(1) as establishing the right to a “sound basic education.” (Id.) at 23 (quoting Leandro v. State of North Carolina, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997)). Significantly, the Court of Appeals observed that “[a]t no point in their amended complaint have Plaintiffs asserted that the State, or any of its subdivisions, has failed to provide them with the constitutionally-mandated access to a sound basic education.” (Id.) at 24. Because Petitioners failed to assert that they had been denied access to a sound basic education, the Court of Appeals correctly determined N.C. Const. art. IX, § 2(1) was not implicated and could not be construed as a vehicle barring alternative schools which provide a sound basic education to their students.

The Court of Appeals considered, at length, Petitioners’ arguments in tandem with their proposition that N.C. Const. art. IX, § 2 requires that there can be only a single class of public school and that the creation of any other school or program was implicitly banned. (Id.) at 22-31. Petitioners argue that, by

extension, all schools must receive Capital Outlay funding. The Court of Appeals noted that Petitioners cited no authority for this "single class of public schools" proposition and that such a conclusion by the courts would render any number of already existing alternative schools and educational programs unconstitutional.

The Court of Appeals held that "since the funding mechanisms that the General Assembly has authorized for both traditional public schools and charter schools are constitutional regardless of whether charter schools are or are not components of the uniform public schools system, we see no reason to decide whether charter schools are or are not parts of the general uniform public school system." (Id.) at 30-31. Citing to State ex rel. Martin v. Preston, 325 N.C. 438, 448-449, 385 S.E.2d 473, 478 (1989), Baker v. Martin, 330 N.C. 331, 337, 410 S.E.2d 887, 891 (1991). In support of its reasoning and constitutional analysis, the Court of Appeals held that the General Assembly was permitted to legislatively create charter schools unless prohibited by the Constitution. Thus, the Court of Appeals "conclude[d] that N.C. Const. art. IX § 2(1) does not forbid the state from establishing additional schools or education programs to supplement those traditionally utilized to effectuate the constitutional mandate to provide access to a sound basic education." Slip op. at 30.

Contrary to Petitioners contention, appeal of this decision cannot issue as of right because the Court of Appeals has unanimously adjudicated those constitutional questions which have been presented and Petitioners have failed to raise, or cite authority, for any arguments which they assert remain unaddressed. Moreover, it must be noted that the crux of Petitioners' declaratory judgment action below was whether the current statutory scheme as enforced allowed charter schools to access the Capital Outlay Fund. The Court of Appeals held that the General Assembly was constitutionally entitled to establish alternative statutory funding for charter schools which did not include the Capital Outlay Fund. This decision is sound, supported, and warrants no further review by this Court.

The constitutional issues raised in the instant Petition are tangential to the core questions relating to whether the existing statutes, as applied, constitutionally deny charter schools access to Capital Outlay Fund monies. The Court of Appeals concluded that the General Assembly had a rational constitutional basis for not giving charter schools access to the Capital Outlay Fund whether or not they were part of the Uniform System of Public Schools created by Article IX, Section 2(1) of the North Carolina Constitution. Since answering the question of whether charter schools are, or are not, part of the Uniform System of Public Schools it is not necessary to evaluate

the constitutional soundness of the Court of Appeals' decision, such a question is, by definition, tangential. It stands to reason that tangential constitutional issues cannot invoke a "substantial question arising under the Constitution," such as to trigger an appeal as of right under N.C.G.S. § 7A-30. "It is not desirable nor ordinarily permissible to decide questions regarding the North Carolina Constitution otherwise than on an issue directly presented." Mills v. Board of Comm'rs, 175 N.C. 215, 219, 95 S.E. 481, 482 (1918).

**II. THE GENERAL ASSEMBLY HAS SPOKEN ON THE ISSUE OF CHARTER SCHOOL FUNDING STRUCTURE.**

Determinations concerning the funding structure for North Carolina's charter schools are a matter squarely within the purview of the General Assembly. This summer the General Assembly exercised that authority through its enactment and ratification of Senate Bill 8 - new legislation which increased the number of charter schools within North Carolina. See S.B. 8, N.C. Gen. Assem., Sess. Law 164 (2011).

In ascertaining the intent of the legislature, the presumption is that it acted with full knowledge of prior and existing law.

Sugar Creek II, No. COA10-965, Slip op. at 13 (quoting Williams v. Alexander County Bd. of Educ., 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998)).

The General Assembly, a mere two months ago, enacted comprehensive legislative reform to the existing charter school statutes which reexamined and reworked the existing statutory provisions for such foundational substantive areas as: Board of Education and General Assembly oversight of charter schools, increasing the cap on the total number of charter schools, and the provision of additional revenue streams to charter schools by permitting them to charge certain fees charged by local school administrative units. See S.B. 8, N.C. Gen. Assem., Sess. Law 164. In short, in passing Senate Bill 8, the General Assembly rewrote or repealed a number of critical charter schools statutes, including: N.C.G.S. §§ 115C-238.29D(a), (b), 115C-105.37B(a)(2), 115C-238.29D(d), 115C-238.29F(b), and 115C-238.29G.

Notably absent in Senate Bill 8 reform is any manifestation of an intent to alter the existing funding structure which permits charter schools to access only the State Public School Fund and the local current expense fund. N.C.G.S. § 115C-238.29H. The recently enacted overhaul to charter school statutes does not provide access to the Capital Outlay Fund. The decision not to overhaul the funding statute, N.C.G.S. § 115C-238.29H, was not an accident or oversight by the General Assembly. Prior to enacting Senate Bill 8, the General Assembly

worked on six prior versions of the bill.<sup>1</sup> Editions two through six of Senate Bill 8 contain substantial revisions to N.C.G.S. § 115C-238.29H that would have allowed charter schools access to the Capital Outlay Fund for the purchase of real property and the construction of schools. Further, editions two through six of Senate Bill 8 would have allowed the counties to provide funds to the charter schools by direct appropriation as set forth in N.C.G.S. § 158A-457. These funds could have been used for the purchase of real property and the construction, renovation or replacement of buildings upon real property. The final version of Senate Bill 8 which was ratified by both chambers of the General Assembly and signed by Governor Perdue removed the changes to N.C.G.S. § 115C-238-29H. The legislative history just discussed makes it clear that the decision not to alter the funding statute was a knowing and conscious one on the part of the General Assembly and the Governor.

It is axiomatic that "[t]he power of the General Assembly to pass all needful law, except when barred by constitutional restrictions, is plenary." Shelby v. Power Co., 155 N.C. 196, 200, 71 S.E. 218, 219-220 (1911). "All acts of the Legislature are passed under constitutional authority, [however] if the position of the plaintiff can be maintained, it would withdraw

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<sup>1</sup> All of the various drafts of Senate Bill 8 are available for review on the General Assembly's website: [www.ncleg.net](http://www.ncleg.net).

from subsequent Legislatures the power of amendment or repeal.”  
Kornegay v. Goldsboro, 180 N.C. 441, 451, 105 S.E. 187, 192  
(1920).

The General Assembly chose not to allow charter schools to access the Capital Outlay Fund. Petitioners would now have this Court step in and legislate with a voice other than that of the duly elected representatives of the people of this State. This is not the purpose for which N.C.G.S. § 7A-31(c) was enacted and it does not serve as sufficient grounds for the grant of discretionary review of this matter. Accordingly, discretionary review of the Court of Appeals’ unanimous decision should not issue.

#### **CONCLUSION**

The Court of Appeals correctly affirmed the trial court’s dismissal of Petitioners’ case because it lacked support at law. Petitioners have offered no sustainable basis for granting appeal of that decision, either as of right, or pursuant to this Court’s closely guarded discretionary authority. Accordingly, the County Respondents respectfully request this Court dismiss Petitioners’ Notice of Appeal and deny their request for certification of discretionary review pursuant to N.C.G.S. §§ 7A-30(1), 7A-31(b).

This the 30<sup>th</sup> day of August, 2011.

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**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this date served the County Defendants' Brief upon all other parties to this cause via e-mail and by depositing a copy hereof, postage paid, in the United States mail, addressed to the attorneys for said parties as follows:

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This the 30<sup>th</sup> day of August, 2011.

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