

SUPREME COURT OF NORTH CAROLINA

SUGAR CREEK CHARTER SCHOOL,)
INC., et al.,)

Plaintiffs,)

v.)

STATE OF NORTH CAROLINA et)
al.,)

Defendants.)

From Mecklenburg County

No. 09 CVS 23289

COA No. 10-965

SCHOOL BOARD DEFENDANTS' MOTION TO DISMISS APPEAL
OR, IN THE ALTERNATIVE,
RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

IN THE OFFICE OF
CLERK OF THE COURT
OF THE STATE OF NORTH CAROLINA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

COUNTER-STATEMENT OF THE CASE AND FACTS 1

THE APPEAL SHOULD BE DISMISSED BECAUSE IT PRESENTS NO SUBSTANTIAL CONSTITUTIONAL QUESTION 3

REASONS THE PETITION SHOULD BE DENIED 4

I. NO SIGNIFICANT LEGAL QUESTION IS PRESENTED BY THE COURT OF APPEALS' CORRECT CONCLUSION THAT THE CONSTITUTION DOES NOT MANDATE CAPITAL FUNDING FOR CHARTER SCHOOLS 4

 A. The Status of Charter Schools Within the Public School System Is Not an Important Constitutional Issue Meriting This Court's Attention 5

 B. *Leandro* Established That the North Carolina Constitution Does Not Mandate Equality in Funding. 6

II. UNDIFFERENTIATED PUBLIC INTEREST IN FUNDING ISSUES DOES NOT WARRANT DISCRETIONARY REVIEW BECAUSE FUNDING DETERMINATIONS SHOULD BE MADE BY THE LEGISLATURE, NOT THE COURTS 8

CONCLUSION 11

CERTIFICATE OF SERVICE

TABLE OF CASES AND AUTHORITIES

Cases

Britt v. North Carolina State Bd. of Educ.,
86 N.C. App. 282, 357 S.E.2d 432 (1987)7

*Guilford County Bd. of Educ. v. Guilford
County Bd. of Elec.*, 110 N.C. App. 506,
430 S.E.2d 681 (1993)7

Hughey v. Cloninger,
297 N.C. 86, 253 S.E.2d 898 (1979)3

Leandro v. State,
346 N.C. 336, 488 S.E.2d 249
(1997)4, 6, 7, 8

Martin v. N.C. Housing Corp.,
277 N.C. 29, 175 S.E.2d 665 (1970)10

Rhyne v. K-Mart Corp.,
358 N.C. 160, 594 S.E.2d 1 (2004)10

State ex rel. Martin v. Preston,
325 N.C. 438, 385 S.E.2d 473 (1989)6

Constitutional Provisions

N.C. Const. art. IX, § 2(1)*passim*

Statutes

N.C. Gen. Stat. § 7A-301, 3

N.C. Gen. Stat. § 7A-311

N.C. Gen. Stat. § 115C-238.29A-K2

N.C. Gen. Stat. § 115C-238.29E2, 4

N.C. Gen. Stat. § 115C-238.29H3

N.C. Gen. Stat. § 115C-4263

Rules

N.C. R. App. P. 141
N.C. R. App. P. 151

Other Authorities

2011 N.C. Session Laws, S.B. 8, 3d Ed.
Engrossed 2/22/119

SUPREME COURT OF NORTH CAROLINA

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 INC., et al.,)
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 Defendants.)

From Mecklenburg County

No. 09 CVS 23289
COA NO. 10-965

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to N.C. Gen. Stat. §§ 7A-30 and 7A-31 and Rules 14 and 15 of the North Carolina Rules of Appellate Procedure, Defendants Charlotte-Mecklenburg Board of Education, Union County Board of Education, Nash-Rocky Mount Board of Education, Halifax County Board of Education, Edgecombe County Board of Education, Rutherford County Board of Education, and Cleveland County Board of Education (collectively "the School Board Defendants"), through counsel, respectfully move to dismiss Plaintiffs' appeal or, in the alternative, submit this Response in opposition to Plaintiffs' Petition for Discretionary Review.

COUNTER-STATEMENT OF THE CASE AND FACTS

In this lawsuit, Petitioners—a group of private companies that operate North Carolina charter schools pursuant to state-

issued charters¹, a group of students who have elected to attend a charter school, and their parents—seek a judicial declaration that they are entitled, as both a statutory and a constitutional matter, to “uniform” access to public funding for charter schools’ capital expenditures. In support of their claimed entitlement to funding, Petitioners have made two related arguments: *first*, that the Charter School Act, N.C. Gen. Stat. §§ 115C-238.29A-K, should be read to permit, if not to require, capital funding for charter schools, and *second*, that a contrary reading of the charter school funding scheme would run afoul of article IX, Section 2(1) of the North Carolina Constitution, which declares:

The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

The trial court dismissed Petitioners’ amended complaint for failure to state a claim upon which relief can be granted, and the Court of Appeals unanimously affirmed that dismissal, rejecting both the statutory and constitutional components of Petitioners’ funding argument in light of settled North Carolina law. Because this case raises only a straightforward, narrow question about the authority of counties and local school boards

¹ See N.C. Gen. Stat. § 115C-238.29E(b) (“[a] charter school shall be operated by a private nonprofit corporation . . .”).

to provide capital expenditure funding to the private companies that operate charter schools in North Carolina—a question definitively answered by the relevant statutory language and by prior decisions of this Court—further review is unwarranted.²

THE APPEAL SHOULD BE DISMISSED BECAUSE IT PRESENTS NO
SUBSTANTIAL CONSTITUTIONAL QUESTION

Petitioners purport to notice an appeal from the decision of the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-30 on the ground that this case "involves a substantial question arising under the Constitution . . . of this State." For the reasons discussed more fully below, this case involves no "substantial" constitutional question sufficient to support

² Petitioners ask this Court to consider only their arguments about the constitutionality of the charter school funding scheme; they appear to recognize that their statutory arguments do not merit further review. Those arguments are predicated almost entirely on two provisions: N.C. Gen. Stat. § 115C-426 (entitled "uniform budget format," a procedural provision that directs local school boards to maintain financial records in a prescribed arrangement but says nothing about how monies are to be allocated) and § 115C-238.29H (the charter school funding provision, which decrees that charter schools are entitled to receive, and local governments are authorized to provide, per-pupil shares of the state public school fund and the local current expense fund, two of the three categories of funding available to traditional public schools). The Court of Appeals observed (Slip op. at 7-14) that neither provision (nor any other statute) authorizes local governments to provide capital funding to charter schools—an omission that is determinative of Petitioners' statutory claim under the long-settled jurisprudence of this Court. See *Hughey v. Cloninger*, 297 N.C. 86, 88, 253 S.E.2d 898, 900 (1979) (declaring that "a county has no power to appropriate funds unless authorized to do so by the General Assembly").

further appellate review. The only constitutional issue Petitioners have raised—whether the North Carolina Constitution demands equality in funding among the public schools of this State—was definitively answered years ago by this Court's decision in *Leandro v. State of North Carolina*, 346 N.C. 336, 488 S.E.2d 249 (1997).

REASONS THE PETITION SHOULD BE DENIED

I. NO SIGNIFICANT LEGAL QUESTION IS PRESENTED BY THE COURT OF APPEALS' CORRECT CONCLUSION THAT THE CONSTITUTION DOES NOT MANDATE CAPITAL FUNDING FOR CHARTER SCHOOLS

Petitioners ask this Court to certify for review their claim that the North Carolina Constitution mandates capital outlay funding for charter schools. That claim is predicated on a four-step argument, no component of which merits this Court's consideration:

- (1) Charter schools are labeled "public schools" by statute. N.C. Gen. Stat. § 115C-238.29E(a) ("A charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located.").
- (2) The General Assembly can create only a single class of public schools.
- (3) Therefore, charter schools are necessarily part of the "general and uniform system" of public schools mandated by art. IX, § 2(1).
- (4) Section 2(1) mandates "uniformity" in funding for all public schools in the uniform system and therefore requires that charter schools have access to the same funding sources as traditional public schools, including capital funding.

The Court of Appeals acknowledged the first proposition (as do the School Board Defendants), rejected the second, and expressly declined to decide the third (Slip op. at 24-30), reasoning that Petitioners' argument for equal access to capital funding—the fourth proposition—fails in any event:

In view of the differences between charter schools and traditional public schools, we see no basis for constitutional concern arising from the use of differing funding mechanisms to support different types of public schools that are subject to different statutory provisions. Thus, 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 school system, we see no reason to decide whether charter schools are or are not parts of the general and uniform public school system.

(Slip op. at 30-31 (footnote omitted).) That is, the Court of Appeals found inequality in funding standing alone to be insufficient to raise a constitutional question.

A. The Status of Charter Schools Within the Public School System Is Not an Important Constitutional Issue Meriting This Court's Attention.

The first "important" question that Petitioners would have this Court consider—whether charter schools are part of the "general and uniform system" of public schools—was not even decided by the Court of Appeals, which found it unnecessary to the resolution of Petitioners' constitutional claim. No further consideration of that issue by this Court is warranted, because even if Petitioners' argument prevailed (and it should not), it

would make no difference to the outcome: The Court of Appeals correctly concluded that Petitioners' ultimate argument for uniformity in capital funding is unsound regardless of charter schools' "status" within the public school system.³

B. Leandro Established That the North Carolina Constitution Does Not Mandate Equality in Funding.

The issue of the constitutional right of public school students to receive equal public funding for education has been litigated extensively in North Carolina, and more than a decade ago, this Court definitively rejected the notion that uniformity in funding is constitutionally compelled. See *Leandro*, 346 N.C. at 347, 349, 488 S.E.2d at 255, 256 (construing § 2(1) and other education-related provisions to "guarantee every child of this state an opportunity to receive a sound basic education in our public schools" but declaring that Section 2(1) "does not require substantially equal funding or educational advantages in

³ Although the Court of Appeals found it unnecessary to decide whether charter schools are part of the "general and uniform system" of public schools (Slip op. at 29), it did reject Petitioners' contention that Section 2(1) precludes the General Assembly from establishing more than one class or category of public school. (Slip op. at 25-27.) Its conclusion followed from the settled proposition that the Constitution is a limitation, not a grant, of power, so that legislative action "is valid unless prohibited by that Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989). As the Court of Appeals noted, nothing in the Constitution forbids the legislature from creating public schools outside the "uniform system." (Slip op. at 27.)

all school districts") (emphasis added).⁴ Leandro makes emphatically clear that the only right guaranteed by Section 2(1) is the right to an opportunity to receive a sound basic education in the uniform system of public schools. The student-Petitioners have never claimed that the lack of capital funding for charter schools has deprived them of that right, nor could they. Each student-Petitioner chooses to attend a charter school. Any charter school student who is unhappy with the lack of capital funding available to his or her chosen charter school (or with any other aspect of the educational opportunity afforded by the charter school) can simply return to his or her assigned traditional school, at which he or she is guaranteed by the Constitution to be offered the opportunity to receive the sound basic education described in Leandro.

Leandro unequivocally forecloses any argument that the North Carolina Constitution requires equality in educational funding, capital or otherwise, among the public schools of this State. Petitioners contend that this Court's review of the Court of Appeals' unanimous decision will ensure a "full and exact understanding of what the State Constitution means"

⁴ Decisions of the Court of Appeals addressing constitutional challenges to public school funding are unanimously to the same effect. See, e.g., *Guilford County Bd. of Educ. v. Guilford County Bd. of Elec.*, 110 N.C. App. 506, 517, 430 S.E.2d 681, 688 (1993); *Britt v. North Carolina State Bd. of Educ.*, 86 N.C. App. 282, 285-86, 289, 357 S.E.2d 432, 434, 436 (1987).

(Petn. at 7), but *Leandro* decided what Section 2(1) means, both in terms of educational opportunity and equality of funding, years ago. No clarification or further exposition is needed.

After *Leandro*, there can be no argument that any public school students in North Carolina have a constitutional right to insist upon equal funding for public education, either as between school districts or as between traditional public schools and charter schools within a single district. It follows that the Court of Appeals properly rejected the argument that the "public school" label applied to charter schools by statute requires that they be afforded equal access to capital outlay funding as a constitutional matter. The Court of Appeals' holding is a logical and unremarkable consequence of *Leandro*. It does not "involve[] legal principles of major significance to state jurisprudence" (Petn. at 7) and thus does not warrant further review.

II. UNDIFFERENTIATED PUBLIC INTEREST IN FUNDING ISSUES DOES NOT WARRANT DISCRETIONARY REVIEW BECAUSE FUNDING DETERMINATIONS SHOULD BE MADE BY THE LEGISLATURE, NOT THE COURTS

Petitioners also ask the Court to certify this case for review because it "involves a matter of significant public interest," noting that school performance and general funding issues recently have drawn public attention and that the General Assembly earlier this year revised the Charter School Act.

(Petn. at 6.) In fact, the General Assembly's recent decision to lift the statutory cap on the number of charter schools underscores the correctness of the Court of Appeals' conclusion that "the issue that [the courts] have been asked to resolve in this case is one that must be decided by legislative action instead of a judicial decision." (Slip op. at 34.)

Earlier this year, the General Assembly considered providing for capital outlay funding for charter schools. Several early editions of the bill that ultimately became Sess. L. 2011-164 included provisions for capital expenditure funding for charter schools. See, e.g., 2011 N.C. Session Laws S.B. 8, 3d Ed. Engrossed 2/22/11, Sec. 2 (proposing statutory revision that would authorize counties to "provide funds to the nonprofit tax-exempt corporation that holds the charter of a charter school by direct appropriation" to be used for "[t]he acquisition of real property for school purposes," "[t]he acquisition, construction, . . . renovation, or replacement of buildings and other structures," or "[t]he acquisition or replacement of furniture and other furnishings, instructional apparatus, and similar items of furnishings and equipment"). The law ultimately enacted by the General Assembly, however, contained no provision for capital funding. There is thus no need for this Court to review the decision below in order to let "[c]ounties, charter schools, parents, and students . . . know

whether public charter schools . . . are allowed to ask for capital outlay funding." (Petn. at 7.) The General Assembly definitively answered that question in the Charter School Act and confirmed its intent in the recent amendment to the Act, both of which reflect the unambiguous legislative judgment that charter schools should be eligible to receive state and local operational funding but not public funding for capital expenditures.

The General Assembly's determination about the appropriate sources of public funding for charter schools is well within its legislative prerogative, and it is entitled to deference and presumed to be constitutional. See, e.g., *Martin v. N.C. Housing Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970); *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167-68, 594 S.E.2d 1, 7 (2004). In light of those settled rules, the Court of Appeals correctly rejected Petitioners' constitutional challenge to the unambiguous legislative judgment about appropriate measures of public funding for privately-owned charter schools. This Court's further consideration of Petitioners' constitutional claim is unnecessary.

CONCLUSION

The Court of Appeals' opinion is clear, thorough, well-reasoned, and reaches the correct conclusion in light of settled North Carolina law. Accordingly, the School Board Defendants respectfully request that this Court deny Plaintiffs' Petition for Discretionary Review.

This the 29th day of August, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

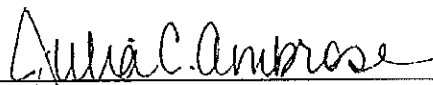
This is to certify that the undersigned counsel has this day served the foregoing SCHOOL BOARD DEFENDANTS' MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, RESPONSE TO PETITION FOR DISCRETIONARY REVIEW in the above-captioned action on all parties to this cause by depositing the original and/or a copy hereof, postage prepaid, in the United States Mail, addressed to the following:

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This the 29th day of August, 2011.



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