

NO. 347P11

TWENTY SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

v.)

From Mecklenburg County

STATE OF NORTH CAROLINA,)
et al.,)

Defendants.

STATE OF NORTH CAROLINA'S
MOTION TO DISMISS NOTICE OF APPEAL AND RESPONSE
TO PETITION FOR DISCRETIONARY REVIEW

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OF NORTH CAROLINA

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SUGAR CREEK CHARTER SCHOOL,)	
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STATE OF NORTH CAROLINA,)	
et al.,)	
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STATE OF NORTH CAROLINA'S
MOTION TO DISMISS NOTICE OF APPEAL AND RESPONSE
TO PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant State of North Carolina (the "State"), through counsel, hereby moves to dismiss Plaintiffs' Notice of Appeal on grounds that this case does not present a substantial constitutional question and fails to meet the standard for an appeal as of right pursuant to G.S. § 7A-30. In addition, the State responds to the Petition for Discretionary Review and requests the Court to deny such review on grounds that the Petition fails to set forth any basis for review under G.S. § 7A-31.

STATEMENT OF FACTS

Plaintiffs in this case consist of (1) seven nonprofit corporations that have been granted charters by the State Board of Education to operate public schools; (2) a number of charter school

students; and (3) some parents of charter school students. Plaintiffs are seeking a declaration that the nonprofit corporations operating charter schools should be allowed to access local capital outlay funds. Plaintiffs assert that (1) they are statutorily entitled to receive capital funding from county commissioners; or, in addition or in the alternative, (2) they are constitutionally entitled to such funding.

At the outset, it is critical to bear in mind that the "charter school" Plaintiffs are nonprofit corporations. These private corporations, by virtue of legislation adopted in 1996, have been awarded charters, or licenses, which allow them to receive public dollars with which to operate schools. Because these private corporations are required to use these public funds to educate students in schools described in their application for a charter school, these "charter schools" are statutorily deemed to be "public schools." G.S. §§ 115C-238.29B; 115C-238.29E(a). Nevertheless, the legal entity that owns the charter and operates such a school is a nonprofit corporation. These charter schools are separate and independent from the traditional public schools operated by the 115 local school districts in North Carolina. Charter schools are "operated" by private nonprofit boards of directors; traditional public schools are operated by local boards of education. In addition, while parents who send their children

to charter schools (as well as private and home schools) and are in compliance with the compulsory attendance law, attendance at charter schools is entirely voluntary. No child may be compelled or required to attend a charter school. They are strictly schools of choice. G.S. § 115C-238-29F(g)(2).

Furthermore, the General Assembly authorized the system of charter schools specifically to "operate independently of existing schools." G.S. § 115C-235.29A. Charter schools are supposed to be innovative in their approach to educating students. The legislation specifically exempts charter schools "from statutes and rules applicable to a local board of education or local school administration unit." G.S. § 115C-238.29E(f).

In order to receive a charter to operate a school, the corporation must submit a lengthy application and submit to a rigorous review process. A charter to operate a charter school only lasts for 10 years and expires if not renewed by the State Board of Education.

In addition to other statutory conditions, the General Assembly has specifically set forth a funding scheme for charter schools that is different from the funding scheme established for traditional schools. G.S. § 115C-238.29H. The statutes governing charter school funding provide generally that the schools receive funds from two sources. From the State, they receive an amount

equal to the State average per pupil allocation for average daily membership (ADM) as well as additional amounts for each enrollee with disabilities or limited English proficiency. G.S. § 115C-238.29H(a). From local boards of education, they receive "an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year." G.S. § 115C-238.29H(b). The statutes do not authorize the corporations holding charters to receive any capital funds.

Despite the absence of statutory authority, the Plaintiffs filed this action asking the trial court to declare they were entitled to capital funds, either statutorily or constitutionally. The trial court granted Defendants' Motions to Dismiss. On appeal, the Court of Appeals affirmed, finding no statutory authority and no constitutional right to such funds.

REASONS WHY APPEAL SHOULD BE DISMISSED

I. Plaintiffs Have Failed To Establish Any Grounds For Appeal Of Right To This Court.

Plaintiffs purport to file a Notice of Appeal pursuant to G.S. § 7A-30 which provides that a party may appeal as of right from a decision of the Court of Appeals in a case "[w]hich directly involves a substantial question arising under the Constitution of the United States or of this State" In order to

demonstrate grounds for an appeal as of right under G.S. § 7A-30(1), a litigant must show that the appeal "directly involves" a constitutional question that is real and substantial rather than superficial or frivolous. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968), cert. denied, 393 U.S. 1087, 21 L. Ed. 2d 780 (1969). Where, as here, a party cannot make such a showing, the appeal should be dismissed. Thompson v. Thompson, 288 N.C. 120, 215 S.E.2d 606 (1975).

In the instant case, Plaintiffs contend that the charter schools they operate are part of the "uniform system of free public schools" established and maintained pursuant to the North Carolina Constitution, Article IX, Section 2(1). Accordingly, Plaintiffs contended that because the schools they operate are part of that uniform of system of public schools, they must have access to the same funding sources as traditional public schools, including capital funds. Plaintiffs argue now that the Court of Appeals did not resolve the constitutional question of whether the charter schools operated by private corporations are part of the general and uniform system of public schools and, therefore, this Court should now take the case and resolve that constitutional question.

Plaintiffs' argument is misplaced. It is true that the Court of Appeals below stated that it saw "no reason to decide whether charter schools are or are not parts of the general and uniform

public school system." Slip Op. at 31. However, the Court of Appeals did address the constitutionality of the funding system established by the General Assembly for charter schools. That court specifically concluded "that NC. Const. Art. IX, § 2(1) does not forbid the State from establishing additional schools or educational programs to supplement those traditionally utilized to effectuate the constitutional mandate to provide access to a sound basic education." Slip Op. at 30. The court went on to reiterate that "the funding mechanisms that the General Assembly has authorized for both traditional public schools and charter schools are constitutional" Slip Op. at 30.

While Plaintiffs assert that the Court of Appeals did not address the constitutionality of the funding of charter schools, a reading of the Court of Appeals decision demonstrates that the court thoroughly reviewed the issue. Slip Op. pp. 22-31. Contrary to assertions in Plaintiffs' Notice of Appeal, this appeal does not "directly involve" any substantial question arising under the Constitution. The Court of Appeals addressed the constitutional issue of charter school funding and correctly concluded it did not run afoul of any constitutional provision. Plaintiffs have failed to demonstrate the existence of an "substantial" constitutional question warranting review by this Court.

The Notice of Appeal should be dismissed.

PLAINTIFFS' PETITION FOR DISCRETIONARY REVIEW SHOULD BE DENIED

In order to meet the standard for discretionary review by the Supreme Court, a litigant must show one of the grounds set forth in G.S. § 7A-31(c), only two of which are applicable here:

- (1) The subject matter of the appeal has significant public interest, or
- (2) The cause involves legal principles of major significance to the jurisprudence of the State,

G.S. § 7A-31(c). Plaintiff here cannot show either of these grounds and the Petition for Discretionary Review should be denied.

I. Plaintiffs Fail To Demonstrate That The Subject Matter Of This Case Has Significant Public Interest.

Although Plaintiffs correctly assert that the general public is interested both in education and in the expenditure of public monies, it does not follow that the availability of capital funding to 100 charter schools, representing a de minimus student enrollment compared to the enrollment of students in traditional public schools, has garnered any significant public interest in this State. And, whereas graduation rates in the State as a whole may "grab headlines and often dominate water cooler conversation," it is hardly likely that such water cooler talk concerns the issues of charter schools' entitlement to capital outlay funding by county commissioners.

Plaintiffs also mention recent legislation that raises the cap on charter schools and the impact that may have on the issue of capital funding. However, it is notable that several earlier versions of the legislation that ultimately was adopted provided for capital funding for charter schools. See e.g., 2011 N.C. Session Laws S.B.8 (Education/Higher Education Comm. Substitute Adopted 2/16/11; Third Edition Engrossed 2/22/11; Fourth Edition Engrossed 2/24/11; House Comm. Substitute Favorable 3/16/11; House Comm. Substitute #2 Favorable 4/7/11). While those provisions were eventually deleted in the final version of the bill, those earlier versions of the legislation certainly underscore the ongoing debate about the issue of capital funding and also underscore the well-established principle that this issue belongs in the policy-making arena of the General Assembly, not in the courts.

The Court of Appeals correctly recognized that the General Assembly has, thus far at least, elected not to provide capital funding for charter schools. Furthermore, the Court of Appeals has correctly concluded that nothing in our State Constitution requires the General Assembly to do otherwise.

II. Plaintiffs Have Not Shown That This Case Involves Legal Principles Of Major Significance To The State's Jurisprudence.

Plaintiffs set forth no additional grounds in support of this second prong required for Discretionary Review. Primarily, they

simply repeat their claim that this case has "substantial" constitutional questions. As set forth above, the Court of Appeals correctly concluded that there is nothing in our State Constitution that requires the General Assembly to fund charter schools any particular way.

Moreover, nothing in the Court of Appeals' statutory analysis, leading it to conclude that the current legislation does not permit charter schools to have access to capital funding, is of any jurisprudential significance. In holding that capital funding is not available to charter schools, the Court of Appeals relied on the well-established holding of Hughey v. Cloninger, 297 N.C. 86, 253 S.E.2d 898 (1979) that "a county has no power to appropriate funds unless authorized to do so by the General Assembly." Id at 88, 253 S.E.2d at 900. The court noted that no statutory provision exists to authorize charter schools to receive capital outlay funds and hence they are not entitled to such funds. Slip Op. at 14.

There is nothing in that holding or the analysis leading up to it that implicates "legal principles of major significance to the jurisprudence of the State" G.S. § 7A-319(c)(2). The Petition for Discretionary Review should be denied.

CONCLUSION

Plaintiffs have failed to demonstrate any grounds for review by this Court. The Notice of Appeal should be dismissed and the Petition for Discretionary Review should be denied.

Respectfully submitted,

This 29 day of August 2011.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **STATE OF NORTH CAROLINA'S MOTION TO DISMISS NOTICE OF APPEAL AND RESPONSE TO PETITION FOR DISCRETIONARY REVIEW** by depositing a copy, first class postage pre-paid in the United States mail, addressed to:

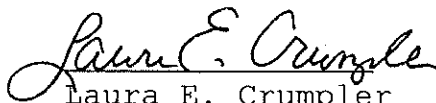
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This 29 day of August, 2011.


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