

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

SUGAR CREEK CHARTER SCHOOL, )  
Inc.; et al. )

Plaintiffs, )

vs. )

STATE OF NORTH CAROLINA; )  
et al. )

Defendants. )  
\_\_\_\_\_ )

**PLAINTIFFS’ BRIEF  
IN OPPOSITION TO DEFENDANTS’  
MOTION TO DISMISS**

**OVERVIEW**

This case requires the court to determine a constitutional issue: whether charter schools are part of North Carolina’s “general and uniform system of free public schools.” N.C. Const. Art. IX, § 2(1). Because charter schools are public schools serving public school children throughout the state, the plaintiffs allege that charter schools are necessarily part of the constitutionally required uniform system of free public schools and, therefore, are entitled to seek the same funding as traditional public schools. See, e.g., N.C. Gen. Stat. § 115C-238.29E (“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”); Francine Delany New Sch. For Children, Inc. v. Asheville City Bd. of Educ., 150 N.C. App. 338, 346, 563 S.E.2d 92, 97 (2002) (“[t]he Legislature clearly intended for charter schools to be treated as public schools subject to the uniform budget format.”). That is, as the defendant School Boards acknowledge in their brief, charter schools provide “expanded choices in the types of educational opportunities that are

available within the public school system,” Brief of the School Boards at 3 (quoting N.C. Gen. Stat. § 115C-238.29A) (emphasis added), and are part of the uniform school system.

In response to the plaintiffs’ complaint, the defendants contend at length that charter schools should not be viewed as part of North Carolina’s uniform system of public schools. But defendants do not—and cannot—cite any controlling authority that warrants dismissal of the plaintiffs’ constitutional claims. Instead, defendants engage in extensive arguments on the merits to convince the court that their interpretation should be adopted, thereby demonstrating that there is a dispute over the constitutional claims that they now seek to dismiss. Accordingly, this court should deny the defendants’ motions and ultimately decide whether charter schools, as public schools, are part of North Carolina’s “general and uniform system of free public schools.”

## **INTRODUCTION**

This case asks the court to consider the legal consequences of an unfortunate but real disparity in the public education system. In the very system which we entrust with the responsibility to inculcate principles of equity and justice in the minds of the public school students of North Carolina, there is inequity of opportunity.

Behind the fineries of legal briefs, real students are impacted. Some of their names are included in the complaint. The students of North Carolina’s public charter schools come from urban and rural counties, from poor, middle-class, and wealthy counties, from a variety of family backgrounds, and from varied educational experiences. There are over 40,000 public school students in the public school system.

The defendants have elected to allocate access to public funding for public education to some public school students in a way that disadvantages those students. The students in public charter schools hold bake sales and other fundraisers to maintain, renovate, or merely keep

functional basic school facilities. Traditional public schools, in contrast, request capital funds from their counties and school boards, funding provided largely through taxes paid by the parents of both public charter school students and traditional public school students. Yet, public charter schools are prevented from requesting from those same bodies capital funding on a uniform basis with the students attending the favored portion of North Carolina's public school system. The defendants do not deny this, and they cannot. Instead, they assert that no constitutional protection is available for the sixty-three plaintiffs – composed of public school students, their parents, and public charter schools – who have brought defendants actions to the court for review.

Instead of denying that an unconstitutional disparity exists in equal access to a uniform opportunity to be considered for capital funding, the State, Counties, and School Boards have concluded that North Carolina's public charter school students are not constitutionally protected, and hence, are not entitled to the opportunity to present requests for capital funding on a basis that is uniform with the other public school students who are their friends and neighbors in the traditional public schools.

In so doing, the defendants have established and now seek to defend a scheme of legal interpretation and enforcement which creates two classes of public school students: one favored, one disfavored. The constitution requires precisely the opposite: a general and uniform system of free public schools. The words could not be plainer.

All these students, charter and traditional, are public school students. All attend the public schools authorized by the General Assembly of North Carolina, controlled by the State Board of Education of North Carolina, and funded by the taxpayers of North Carolina. Some of those students are brazenly, disadvantaged by a practice which prohibits them from presenting

their annual requests for capital funding to their county school boards or to the counties in which they and their parents pay taxes authorized to fund all public schools in their county. That practice is not a policy issue; it raises a question of whether the defendants' practice itself is permitted by the Constitution. The plaintiffs challenge defendants' legal interpretation and enforcement policy as unconstitutional under the well-established and long-settled laws of this State.

The claims of the plaintiffs in this litigation are clearly stated in the complaint. The plaintiffs assert that their right as public school students and public schools to request capital funding from public sources is protected by the constitutional provisions requiring equality and uniformity in the general system of free public schools. Plaintiffs assert that the de jure blockade crafted and enforced by the defendants to prevent an opportunity to be uniformly considered for capital funding requests and to have those requests considered on the same bases as other public schools within the same county are unconstitutional. As the complaint states, plaintiffs seek the right to "the opportunity to be uniformly considered for expenditures from the capital outlay fund as compared to their friends and colleagues in the traditional public schools within the same county or local school administrative unit." Compl. ¶ 95. They seek a declaration from this court that the present interpretation and enforcement policy implemented by the defendants is unconstitutional or, in the alternative, is incorrect as a matter of law.

#### **STANDARD OF REVIEW ON A MOTION TO DISMISS**

The briefs advanced by the defendants, rather than challenge the legal sufficiency of the complaint, engage in extensive arguments on the merits of the issue. Plaintiffs assert that public charter schools are, as public schools, covered by Article IX, section 2(1) of the Constitution of

North Carolina. Defendants argue that they are not. The defendants thus by their own admission demonstrate the existence of a dispute over the very legal issues they seek to dismiss.

“A motion to dismiss under G.S. 1A-1, R. Civ. P. 12(b)(6) generally tests the legal sufficiency of the complaint . . . .” Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 681, 340 S.E.2d 755, 758 (1986). “A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief.” Dixon v. Stuart, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987) (emphasis added). “[O]ur courts have exercised great restraint in ruling on the factual sufficiency of pleadings.” Smith v. Charlotte, 79 N.C. App. 517, 528, 339 S.E.2d 844, 851 (1986) (emphasis added).

In analyzing the defendants’ motion to dismiss, the court must accept as true all factual allegations contained in the complaint, and must construe those facts in the light most favorable to the plaintiffs. Ford v. Peaches Entertainment Corp., 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986), cert. denied, 318 N.C. 694, 351 S.E.2d 746 (1987). The trial court may not grant dismissal unless it “appears to a certainty that plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim.” Terrell v. Kaplan, 170 N.C. App. 667, 669, 613 S.E.2d 526, 528 (2005) (quoting Arroyo v. Scottie’s Prof. Window Cleaning, Inc., 120 N.C. App. 154, 158, 461 S.E.2d 13, 16 (1995), quoting Davis v. Messer, 119 N.C. App. 44, 457 S.E.2d 902 (1995)) (emphasis added). Dismissal may be granted only if it is clear that the plaintiffs could prove no set of facts which would entitle them to relief under any law or any legal theory. See McAllister v. Khie Sem Ha, 347 N.C. 638, 641-42, 496 S.E.2d 577, 580-81 (1998); Meyer v. Walls, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997).

## **STANDARD OF CONSTITUTIONAL REVIEW**

### **I. PLAINTIFFS ALLEGE A VIOLATION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS.**

In the complaint, the plaintiffs seek review of a policy scheme interpreted and enforced by the defendants which abridges plaintiffs' fundamental constitutional rights under the North Carolina Constitution. "A fundamental right is a right explicitly or implicitly guaranteed to individuals by the United States Constitution or a state constitution." Comer v. Ammons, 135 N.C. App. 531, 539, 522 S.E.2d 77, 82 (1999). Strict scrutiny applies when a fundamental right is at issue and it is our Supreme Court's "highest tier of review. . . . Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest." Stephenson v. Bartlett, 355 N.C. 354, 377-378, 562 S.E.2d 377, 393 (2002).

The particular rights abridged addressed in this litigation are protected by Article IX, section 2(1) of the North Carolina Constitution. Our North Carolina Supreme Court has previously established that this section confers a "fundamental right," which may be justified only if the State demonstrates that abridgement of it is "necessary to promote a compelling governmental interest." Leandro, 346 N.C. at 357, 488 S.E.2d at 261; accord Hoke County Bd. of Educ. v. State, 358 N.C. 605; 599 S.E.2d 365 (2004).

### **II. THE JUDICIAL BRANCH IS EMPOWERED TO DETERMINE WHETHER OR NOT ACTS OF THE GENERAL ASSEMBLY ARE CONSTITUTIONAL.**

Defendants overstate the deference this court should afford to actions of the government which exceed the bounds of the Constitution. "It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental

rights of individuals is as old as the State.” Corum v. Univ. of North Carolina, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). “[I]t is nevertheless the duty of this Court, in some instances, to declare such acts unconstitutional.” Stephenson v. Bartlett, 357 N.C. 301, 305, 582 S.E.2d 247, 249 (2003) (citing State ex rel. Martin v. Preston, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989)). Indeed, even within the precise bounds of a claim under article IX, § 2(1), “[w]hen a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits.” Leandro, 346 N.C. at 345, 488 S.E.2d at 253; see also, Hoke County Bd. of Educ. v. State, 358 N.C. 605, 645, 599 S.E.2d 365, 395 (2004) (“we remain the ultimate arbiters of our state’s Constitution, and vigorously attend to our duty of protecting the citizenry from abridgments and infringements of its provisions”).

To assert, as the defendants here assert, that policy decisions are properly within the discretion of the legislature and are, therefore, entitled to deference not only misplaces the role of the judiciary, it commits gross logical error: the statement begs the question. The proper function of the courts is, of course, to determine whether or not a governmental action comports with the requirements of the Constitution. This determination goes far beyond the simple inquiry of whether or not “policy” is at issue, even “policy” on which the Legislature has acted.<sup>1</sup> Indeed, where, as here, a fundamental constitutional right is at issue, the presumption is against constitutionality of the policy, not for it. “[A] challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest.” Stephenson, 355 N.C. at 377-378, 562 S.E.2d at 393 (emphasis added).

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<sup>1</sup> In fact, the legislature itself has determined in the context of school funding that, contrary to defendants assertion that school funding is a “policy matter” outside the proper realm of the judiciary, a court is specifically empowered by statute in some instances to require a “board of county commissioners to appropriate a sum certain to the local school administrative unity, and to levy such taxes on property as may be necessary to make up this sum . . . .” N.C. Gen. Stat. §115C-431(c). That remedy is not sought here. But our Supreme Court recently established conclusively that such judicial authority comports with the requirements of the North Carolina Constitution. See Beaufort County Bd. of Educ. v. Beaufort County Bd. of Comm'rs, 363 N.C. 500, 505, 681 S.E.2d 278, 282 (2009).

Furthermore, there is not in this case a clear determination by the General Assembly that public charter schools are not entitled to receive funding which may be used for facilities or other permissible capital projects. Rather, there has been an opinion rendered by the Attorney General and compliance by the defendants to deny to plaintiffs the opportunity to be uniformly considered for capital funding requests. Thus, there is no explicit finding or act of the Legislature to which this court may pay its deference, even if it were so inclined. To their credit, legal counsel for the defendants in this case, including the Attorney General's office itself, do not assert that the Attorney General is owed judicial deference.

### **LEGAL ANALYSIS**

#### **I. PUBLIC CHARTER SCHOOLS ARE PART OF THE UNIFORM SYSTEM OF FREE PUBLIC SCHOOLS, THE SAME AS TRADITIONAL PUBLIC SCHOOLS.**

The defendants' opposition consists largely of a single assertion: charter school students are not a part of the uniform public school system. The defendants assume and assert that they may lawfully create and sustain two systems of free public schools, one truly public and one not fully public. Charter Schools are, they say, merely denominated "public" because they receive "public funding"; but in reality charter schools are "private corporations," run by "private bodies" and are at best are "hybrids, part public, part private." Brief of the State at 17-22; Brief of the Counties at 10; Brief of the School Boards at 2-4. "The statutory provisions compel this [] conclusion by drawing clear distinctions between charter schools and [u]niform [p]ublic [s]chools." Brief of the State at 20.

On this basis, reason defendants, public charter school students and public charter schools are not eligible for Constitutional protection, and since the State has the power to create or abolish them at will, there are no Constitutional restrictions on the State and it may treat the education of public charter school students, sight-impaired students, hearing impaired students,

and others, in “any way the General Assembly sees fit.” Brief of the State at 22. These novel arguments are unknown to our Constitution, our Constitutional jurisprudence, and the very statutes at issue.

**A. The General Statutes plainly contemplate that public charter schools are public schools, the same as traditional public schools.**

Appropriate statutory interpretation requires a court to give a statute effect when it is clear and unambiguous – “its clear meaning may not be evaded by . . . a court under the guise of construction.” State ex rel. Utils. Comm’n v. Edmisten, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). See also Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ., 150 N.C. App. 338, 345, 563 S.E.2d 92 97 (2002) (“If the language of a statute is unambiguous on its face, then we must construe the statute according to its plain meaning.”) The statutory authority that defines public charter schools as fully public, the same as traditional public schools, is robust.

Public Charter schools are governed by the same General Statute chapter and sub-chapter that pertain to all public schools, Chapter 115C, Subchapter IV, which addresses the public education program of the State of North Carolina. N.C. Gen. Stat. § 115C-81 through 115C-266 (2010). That Chapter of the General Statutes begins by describing the public schools which the General Assembly intends this Chapter to govern. “A general and uniform system of free public schools shall be provided throughout the State, wherein equal opportunities shall be provided for all students, in accordance with the provisions of Article IX of the Constitution of North Carolina.” N.C. Gen. Stat. § 115C-1. Thus, the public schools described in that Chapter are all intended to be and are a part of the same public school system – North Carolina’s Public Schools. Moreover, lest there be any doubt that charter schools are public and not private, North Carolina has foreclosed by statute the possibility that charter schools may even contemplate

existence as private entities: charter schools are public schools. “A charter school that is approved by the State shall be a public school within the local administrative unit in which it is located.” N.C. Gen. Stat. § 115C-238.29E(a) (emphasis added). It is hard to imagine a more clear and unambiguous statement.

In addition to this plain statement of law, the legal fact that public charter schools and traditional public schools should alike be considered as part of North Carolina’s unitary and uniform public school system is found throughout the general statutes. As with traditional public schools, public charter schools are created by the State. N.C. Gen. Stat. § 115C-238.29D. As with a traditional public school, the State controls the manner and method of a public charter school’s existence and operation. Id. As with traditional public schools, the State defines the health and safety standards under which a public charter school must operate. N.C. Gen. Stat. § 115C-238.29F(a). The State controls the liability insurance a public charter school must carry. N.C. Gen. Stat. § 115C-238.29F(c).

Moreover, the statutes abound with other indicia of the truly-public-school status of public charter school students and public charter schools. Public charter schools retain “sovereign immunity” except “to the extent of indemnification by insurance.” Id. The State controls the instructional program of a public charter school, including requiring that (a) students meet the performance standards adopted by the State Board of Education, (b) schools conduct student assessments required by the State Board of Education, (c) students with disabilities be educated in conformance with standard policies of the State, and (d) all public charter school students be disciplined precisely as public school students in a traditional public school. N.C. Gen. Stat. § 115C-238.29F(d). Teachers of public charter schools may participate in the State-funded public employee benefits programs, including “membership in the Teachers’ and State

Employees’ Retirement System and the State Health Plan for Teachers and State Employees.” N.C. Gen. Stat. § 115C-238.29E(4). A public charter school is funded with State and local public funds. N.C. Gen. Stat. § 115C-238.29H. The State permits local boards of education and the Department of Public Instruction to provide administrative and evaluative support to public charter schools. N.C. Gen. Stat. § 115C-238.29J.

When pressed to consider the constitutionality of how it has treated public charter school students, the State may desire to justify its discriminatory behavior on the ground that charter school students are not fully public school students entitled to constitutional protection and charter schools are not fully within the approved circle of truly public schools, but it does so in vain. The determination of the General Assembly as expressed in the Charter School Act says it clearly:

The State Board of Education provides funds to charter schools, approves the original members of the boards of directors of the charter schools, has the authority to grant, supervise, and revoke charters, and demands full accountability from charter schools for school finances and student performance. Accordingly, it is the determination of the General Assembly that charter schools are public schools and that the employees of charter schools are public school employees. . . . In no event shall anything contained in this Part require the North Carolina Teachers’ and State Employees’ Retirement System to accept employees of a private employer as members or participants of the System.

N.C. Gen. Stat. § 115C-238.29F(4) (emphasis added).

Let there be no doubt, public charter schools are, were intended to be, and may only be public schools, just as other public schools. In a case which previously overturned an attempt by a county school board to deny public charter schools access to public funding, our Court of Appeals definitively stated with finality: “[t]he Legislature clearly intended for charter schools to be treated as public schools subject to the uniform budget format.” Francine Delany New Sch.

for Children, Inc. v. Asheville City Bd. of Educ., 150 N.C. App. 338, 346, 563 S.E.2d 92, 97 (2002). The defendant School Boards, in fact, appear to have less trouble with the plain meaning of the statutes than do the State and County defendants: in their words, charter schools provide “expanded choices in the types of educational opportunities that are available within the public school system.” Brief of the School Boards at 3 (quoting N.C. Gen. Stat. sec. 115C-238.29A) (emphasis added). Public charter schools are public schools within the larger public school system, as are traditional public schools.

**B. The Constitution plainly contemplates a single constitutional system of public schools, of which traditional public schools and public charter schools are a part.**

The Constitution of North Carolina authorizes and contemplates a single category of State schools: a uniform system of free public schools. One system of public schools is authorized by the Constitution, one Constitutionally-appointed body makes policy for one system of schools, one Constitutionally-appointed chief administrative officer administers one system of public schools, and one system of public schools is funded by the Constitutionally-designated funds authorized to finance all public schools. The Constitution of North Carolina contemplates one system of public schools, of which traditional public schools and public charter schools are a part.

**1. The Constitution authorizes a single system of free public schools, without classification.**

First, the Constitution authorizes only one system of free public schools, of which all public schools are a part. “The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools.” N.C. Const. Art. IX, § 2(1). Plainly, the characteristics of the system authorized by the Constitution are that it must be general and uniform. See Lane v. Stanly, 65 N.C. 153, 157-58 (1871) (reasoning under a previous version

of the Constitution that the constitutional system of free public schools “is to be a ‘system’; it is to be ‘general’, and it is to be ‘uniform.’”).<sup>2</sup> Although defendants attempt to assert that there may be two or more classes of public schools, and that they may select which of those classes is entitled to constitutional protection, such a possibility is expressly foreclosed by the Constitution itself in another place. “[A]ll constitutional provisions must be read in *pari materia*.” Stephenson v. Bartlett, 355 N.C. 354, 378, 562 S.E.2d 377, 394 (2002); see also Bailey v. State, 348 N.C. 130, 148, 500 S.E.2d 54, 64 (1998) (“Isolated interpretations of statutory and constitutional provisions are contrary to the jurisprudence of North Carolina.”).

Classes are not constitutionally permissible within a general, uniform system of free public schools. Article XIV, section 3, “General laws defined,” lays out the constitutionally established meaning of three terms: “general laws,” “general laws uniformly applicable throughout the State,” and “general laws uniformly applicable in every . . . unit of local government.” N.C. Const. Art. XIV, § 3. That provision states in full:

Whenever the General Assembly is directed or authorized by this Constitution to enact [1] general laws, or [2] general laws uniformly applicable throughout the State, or [3] general laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws, and every amendment or repeal of any law relating to such subject matter shall also be general and uniform in its effect throughout the State. General laws may be enacted for classes defined by population or other criteria. General laws uniformly

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<sup>2</sup> The jurisprudence of North Carolina is unclear on the propriety of using a principle of interpretation, *inclusio unius est exclusio alterius* – the inclusion of one is to the exclusion of another – in construing provisions of the State Constitution. See, e.g., In re Spivey, 345 N.C. 404, 412 (N.C. 1997) (using with approval the concept that “applying the maxim *inclusio unius est exclusio alterius* (inclusion of one is exclusion of another)” is proper to interpret a State constitutional provision). But see, e.g., Baker v. Martin, 330 N.C. 331, 339 (1991) (an earlier case citing with approval the then-law of California, Idaho, and Alabama for the proposition that the maxim should not be used in interpreting the State Constitution). Though there may be conflicting uses of that principle in our constitutional jurisprudence, which would bolster Plaintiffs’ interpretation, use of the principle may not be necessary here, where the Constitution directly, expressly, and of necessity addresses the scope of the limitation intended by the words “general and uniform system.”

applicable throughout the State shall be made applicable without classification or exception in every unit of local government of like kind, such as every county, or every city and town, but need not be made applicable in every unit of local government in the State. General laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, shall be made applicable without classification or exception in every unit of local government, or in every local court district, as the case may be. The General Assembly may at any time repeal any special, local, or private act.

N.C. Const. Art. XIV, § 3 (emphasis added).

Thus, among the three categories of general laws, only where the legislature is authorized to enact “general laws” may there be classifications. Where there is authorization only for “general laws uniformly applicable” there may be no classification. Here, the Constitution plainly calls for the General Assembly to enact laws incident to a “general and uniform system of free public schools.” There is one system of public schools authorized; there may not be subclasses composed of privileged and non-privileged public school students.

The foundation of the defendants’ case – creation of an interpretive scheme which permits the State to place students into separate classes of public school students, some with constitutional protection and some without – is not only seriously shaken, it crumbles. The Attorney General’s office itself has reached the same conclusion in the past. In opining that public charter schools must adhere to a requirement of 180 days of instruction as do all public schools under Chapter 115C, the Attorney General expressly reasoned that the 180-day requirement was binding on public charter schools because they were, in fact, within the same constitutional group of “public schools” to which public charter schools and traditional public schools alike belonged. Opinion of Attorney General to Brad Sneed, 1999 Op. Att’y Gen. 10 (1999).

In our opinion, this 180 instructional day requirement reflects the requirement in Article IX, sec. 2(1) of the North Carolina Constitution that the General Assembly ‘shall provide . . . for a general and uniform system of free public schools, which shall be maintained at least nine months in every year . . . .’ That constitutional requirement is echoed in G.S. § 115C-1 . . . . In G.S. §115C-84.2, the General Assembly once again makes clear that ‘traditional public schools,’ i.e. non-charter schools, must provide a minimum of 180 days and 1000 hours of instruction. In short, there is nothing in the General Statutes to indicate that the General Assembly intended to permit a charter school, or any public school for that matter, to offer less than 180 days of instruction.

Id. The uniform system of free public schools contemplated and authorized by the Constitution is, quite simply, one general system of public schools, of which the public charter schools are a part, and must be given uniform access to the same opportunity to be uniformly considered for capital funding as all other members of the public school system.

While the State and other defendants have attempted to argue that the General Assembly has created one (or more) systems outside the reach of the Constitution, their argument proves too much and collapses on itself. If the defendants’ overzealous central argument were accepted, it would mean that the State has unconstitutionally created not only public charter schools, but public schools for the hearing impaired students, sight impaired students, and students gifted in the arts, math, and science. All these public schools stand or fall together, they are either inside or outside the reach of Constitutional protection. We contend that they are inside the authority, and therefore the protection, of the Constitution of North Carolina. If the State or other defendants wish to argue ancillary legal points that are not included within the plaintiffs’ complaint or properly before the court, they may challenge the determinations of the General Assembly elsewhere. But for purposes of the defendants’ motions to dismiss this case, the claims of plaintiffs in the complaint must be accepted as true.

**2. The Constitution requires that the same oversight be provided to all constitutional public schools, including the public charter schools.**

Second, the Constitution contemplates a single class of public schools, of which the public charter schools are a part, because all public schools have their ultimate oversight from the same single body constitutionally appointed to oversee all public schools. The constitutional system of free public schools consists of all those schools “under the regulation and control of the public school authorities.” Bd. of Educ. v. Bd. of Commiss’rs, 174 N.C. 469, 473, 93 S.E.2d 1001, 1002 (1917). There is one body which “shall supervise and administer” the general and uniform system of free public schools and one “chief administrative officer” of the public school system. N.C. Const. Art. IX, §§ 4, 5.

Public charter schools are no different in this respect than any other public school authorized by the Constitution and operated by the State.<sup>3</sup> The State Board of Education is the “chartering entity” for most public charter schools. N.C. Gen. Stat. § 115C-238.29B(c)(3). The State Board of Education approves the applications of public charter schools. N.C. Gen. Stat. § 115C-238.29D. The State Board of Education may and does dictate the location of public charter schools, set the precise length of a charter, require that the school meet generally accepted standards of fiscal management, require strict compliance with nuanced State health and safety guidelines, and constantly monitor and determine whether it is in compliance with

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<sup>3</sup> See Appendix A for correspondence from the State indicating its present understanding that it may and does exert control of nuanced issues involving the operation of public charter schools no different from traditional public schools. In that correspondence addressed to the “Public Schools of North Carolina” by the Department of Public Instruction, the State exerts control over such particulars as: (1) “testing exceptions based on significant medical emergencies and/or condition”; (2) “technology reporting requirements”; (3) “reporting a course for credit and the EOC test”; (4) which sources of data may be used as the “authoritative data sources for accountability”; and (5) a survey on teacher working conditions addressed to all “public school principals” for use in reports to “the General Assembly, the State Board of Education, Local Boards of Education, and the school community.”

applicable laws and provisions of its charter.<sup>4</sup> N.C. Gen. Stat. § 115C-238.29B, -238.29D, -238-29E. The State Board of Education assumes control over the public charter school’s primary governing document, the school charter itself, by requiring changes to the charter application or by imposing on the charter “any terms or conditions” permitted by statute or constitution. N.C. Gen. Stat. § 115C-238.29E(c). The State Board of Education dictates detailed grade-by grade standards for academic student performance, mandates the precise assessment techniques that may be used by public charter schools, issues the policies that must be followed for handling students with disabilities, exhaustively controls the manner, method, and procedures for student discipline, establishes the school’s financial audit requirements, and imposes the school’s accountability reporting requirements. N.C. Gen. Stat. § 115C-238.29F. The State Board of Education is required to allocate and determine, consistent with statutes and the Constitution, the funding that will be provided from the State to public charter schools. N.C. Gen. Stat. § 115C-238.29H. In addition to all of the above, the State Board of Education oversees, directs, and advises public charter schools through the State Office of Charter Schools, and may act through the Charter School Advisory Committee or through numerous rules and regulations it makes applicable to public charter schools. See N.C. Gen. Stat. § 115C-238.29I and -238.29J.

It should be noted that the administrative flexibility granted to public schools is well within the constitutional requirement for uniformity. “[T]he constitutional mandate relates to the statewide scheme for public education. The mandate does not require every school within every county or throughout the State to be identical in all respects. Such a mandate would be impossible to carry out as there are differences within a given school as the caliber of teachers and students differ.” Kiddie Korner Day Schs., Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55

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<sup>4</sup> Some charter schools may be held accountable to their local board of education for compliance with applicable laws and the provisions of the school’s charter if approved by the local board, rather than the State Board of Education. N.C. Gen. Stat. § 115C-238.29E(a).

N.C. App. 134, 138, 285, S.E.2d 110, 113 (1981) (rejecting the contention that latch key school was not part of the “uniform system” constitutionally required because of administrative and operational variance). Pursuant to Constitutional restrictions and statutory limitations imposed by the legislature, the State Board of Education leaves a variety of day-today operational decisions to the discretion of all its schools through their administrative structure, but retains ultimate control. See, e.g., Coggins v. Bd. of Educ., 223 N.C. 763, 767, 28 S.E.2d 527, 530 (1944) (“The establishment and operation of the public school system is under the control of the legislative branch of the government, subject only to pertinent constitutional provisions as to uniformity . . .”). Principals of traditional public schools operate their schools with different emphases, organizational and leadership techniques, time of opening and closing of schools, length of school day, or school calendars. See id. at 767-768, 28 S.E.2d at 530 (noting the flexibility permissible create variance in “time of opening and closing schools” and “length of school day”) ; Morgan v. Polk County Bd. of Educ., 74 N.C. App. 169, 328 S.E.2d 320 (1985) (permitting variance in school calendars). Traditional public schools embrace magnet schools and alternative schools. No two schools are the same in their methods of operation, whether traditional public school or public charter school. Kiddie Korner Day Schs., Inc., 55 N.C. App. at 140, 285, S.E.2d at 115 (traditional public schools have “some degree of latitude in providing services as their particular schools may require”). It has been squarely established that differences in school programs do not constitute a problem under the uniformity requirements of the Constitution. Morgan, 74 N.C. App. 169, 328 S.E.2d 320 (holding that an extended day and extended school year school program used as an educational research project did not violate the uniformity requirement of N.C. Const. Art. IX, § 2(1)).

The fact that innovative management and leadership are permitted in both traditional public schools and public charter schools does not change the fact that the same constitutional body ultimately oversees them both and the same General Assembly ultimately controls the objectives, operations, and management of both, subject to constitutional limitations. N.C. Const. Art. IX, § 5. There is nothing constitutionally problematic about variation in school-by-school management method or style; indeed, our Court of Appeals has held that the Constitution “does not require every school within every county or throughout the State to be identical in all respects.” Kiddie Korner Day Schs., Inc., 55 N.C. App. at 138-39, 285, S.E.2d at 113. The General Assembly has deemed that the management of public charter schools should be performed by charitable non-profit organizations to foster improvements, innovations, and “best practices” in public education by shifting the school’s management theory “from a rule-based to performance-based accountability system.” N.C. Gen. Stat. § 115C-238.29A(6), and -238.29I(c)(3). The General Assembly desired to foster new solutions to well-known public school management challenges so that the “best practices” of its public charter schools may be utilized in all the other public schools, thereby resulting in benefits for the whole public school system. See N.C. Gen. Stat. § 115C-238.29A(6) and -238.29I(c)(3). Management or operation nuances, or even expanded public education opportunities, do not exempt public schools from constitutional protection; rather than imposing a burden on the students who choose to attend them, those students are “blessed with the opportunity to receive more free education.” Morgan, 74 N.C. App. at 175, 328 S.E.2d at 324.

Public charter schools are constitutionally indistinguishable from traditional public schools and are manifestly within the public school system contemplated by the Constitution

because they are managed by and accountable to the same constitutional governance structure as all public schools.

**3. The Constitution requires that the same funding must be provided to all constitutional public schools, including the public charter schools.**

Third, the Constitution contemplates and authorizes a single class of general and uniform public schools, of which the public charter schools are a part, because all public schools are to be funded from the same two public school funds: the State School Fund and the County School Fund. N.C. Const. Art. IX, §§ 6, 7. Even the defendants in this case readily admit that public charter schools are publicly funded. Plaintiffs will not endeavor to argue that point robustly unless the defendants wish to argue what is patently clear: public charter schools are publicly funded.<sup>5</sup>

For each of these three reasons, there is and can be but one constitutional class of free public schools in North Carolina. They are known inclusively as North Carolina's public schools, of which all the public school students of North Carolina are a part. And to those students all the protections of the North Carolina Constitution are extended, whether public charter school students, hearing-impaired students, visually impaired students, or traditional public school students. The constitution does not admit the possibility of preferred public school students and constitutionally disenfranchised public school students.

**II. COUNTIES HAVE CONSTITUTIONAL AND STATUTORY AUTHORITY TO ACCEPT PUBLIC CHARTER SCHOOLS' CAPITAL FUNDING REQUESTS ON THE SAME BASES AS OTHER PUBLIC SCHOOLS.**

The defendants have reasoned from a broad proposition to a legally untenable conclusion. In North Carolina it is true that "all legislative power is vested in the General Assembly." N.C. Const. Art. II, § 1; Adams v. N.C. Dep't of Natural & Economic Res., 295 N.C. 683, 690, 249

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<sup>5</sup> Plaintiffs are willing to supply the court with additional briefing on the issue for its assistance in deciding the matter should defendants wish to raise this matter.

S.E.2d 402, 406 (1978); Mills v. Williams, 33 N.C. 558, 560 (1850). This legislative power includes control over counties; “[c]ounties are creatures of the General Assembly and constituent parts of the State government.” Hughey v. Cloninger, 297 N.C. 86, 88, 253 S.E.2d 898, 900 (1979); Harris v. Bd. of Comm’rs, 274 N.C. 343, 346, 163 S.E.2d 387, 390 (1968). Upon this reasoning, courts have held that counties may act only under proper legal authorization. See Hughey, 297 N.C. at 88-89, 253 S.E.2d at 900.

But courts have established since the early part of the past century that the General Assembly’s power to control counties is bounded by the Constitution. Counties are “subject to almost unlimited control [by the General Assembly], except where this power is restricted by constitutional provisions.” Harris, 274 N.C. at 346, 163 S.E.2d at 390 (quoting Jones v. Comm’rs, 137 N.C. 579, 596, 50 S.E.2d 291, 297 (1905)).

Thus, the defendants err in broadly concluding that these general propositions may support an unconstitutional legal condition. In this case, the defendants’ conclusion that the relevant statutes prohibit the provision of funds for capital purposes is strained at best.

The defendants stake their case on a negative principle, arguing from the supposed silence of the General Assembly to their preferred legal conclusion. They do so against replete, positive, express statements of law which demonstrate that public charter schools may be given access to a uniform opportunity to request funding for capital purposes. As the State correctly notes, our Supreme Court has established that “[w]here a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter.” Wayne County Citizens Assn for Better Tax Control v. Wayne County Bd. of Comm’rs, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991); Beaufort County Bd. of Educ. v. Beaufort County Bd. of Comm’rs, 363 N.C. 500, 505, 681 S.E.2d 278, 282 (2009) (“where one

of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted.”) (citations omitted). In light of the unconstitutionality of defendants’ position, in the alternative to holding the offending statutes void as unconstitutional, the court may adopt a constitutional interpretation of the relevant legal provisions which permit the capital funding requests of public charter schools.

The defendants’ position as expressed in their briefs is adequately but not exhaustively summarized by the 1998 opinion rendered by the Attorney General’s office. See Opinion of Attorney General to Thomas B. Griffin, 1998 Op. Att’y Gen. 20 (1998). There, the Attorney General’s office issued a letter opining on an interpretation of the charter school statutes that concluded (in not quite one full page of text) that counties and local governmental units do not have statutory authority to appropriate funds to charter schools for capital purposes. 1998 Op. Att’y Gen. 20. According to the Advisory Opinion, “[t]here is no provision of the Charter School Act that authorizes a board of county commissioners to allocate county monies directly to charter schools, whether for capital needs or for operating expenses.” Id. Thus, the Attorney General has concluded both then (and now) that the Charter School Act does not authorize charter schools to receive funds for capital expenses. Id. That opinion is incorrect.<sup>6</sup> Public charter schools may receive county funding for facilities or other permissible capital projects.

**A. The State and counties have constitutional authority to provide capital funding to all public schools generally, without qualification.**

The defendants do not assert that express authority exists by which they may justify their actions to deny to public charter schools access to funding for facilities and other capital projects.

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<sup>6</sup> It has long been established that an Attorney General’s opinion is “advisory only” and a even corresponding determination by a county based on that opinion is “not authoritative” for a reviewing court. Lawrence v. Shaw, 210 N.C. 352, 361, 186 S.E. 504 (1936), rev’d on other grounds, 300 U.S. 245, 57 S. Ct. 443, 81 L. Ed. 623 (1937); see also Advisory Opinion in Re House Bill, 227 N.C. 708, 712 (1947) (where the Attorney General’s Office admitted that “[a]ny opinion expressed by me would be inconclusive and not in anywise binding upon the Courts”); In re J.E., 182 N.C. App. 612, 616 n.1 (2007) (noting that the court must take care to remember that Attorney General Opinions have an inherent “non-binding nature.”).

Instead, they are argue from silence. But their hearing is selective. The laws of this State, the Constitution and general statutes, speak robustly to the issue of whether public schools generally and public charter schools particularly may have equal access to a uniform opportunity to be considered for State and county funds that may be used for facilities or other qualifying capital projects.

As a matter of first importance, the State authorizes the provision of public funding of all kinds to public schools of all sorts in its Constitution.

The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or by the terms of the grant, gift, or devise, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

N.C. Const. Art. IX, § 6 (emphasis added). Courts may and should construe statutes in pari materia with the provisions of our North Carolina Constitution. See Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2009) (Sugar Creek II). Thus, the State is constitutionally permitted to appropriate monies for establishing and maintaining a uniform system of free public schools, of which the public charter schools are a part.

More specifically, however, the Constitution also permits counties to fund any school properly deemed a public school, without any restriction as to facilities or capital expenses.

Except as provided in subsection (b) of this section, all moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

N.C. Const. Art. IX, § 7(a). “It is the policy of the State of North Carolina that the facilities requirements for a public education system will be met by county governments.” N.C. Gen. Stat. § 115C-408(a)(b). The funds under the control of the State include “educational funds provided by the State and federal governments . . . excepting such local funds as may be provided by a county, city, or district.” Id. Thus, separate and apart from the constitutional authority of the State to provide facilities funding, the counties are also constitutionally permitted (even constitutionally required) to appropriate public funds to maintain all free public schools, including expenditures related to facilities. No distinction is made on the basis of whether or not the monies from the fund are ultimately used for facilities or other capital expenses. The Supreme Law of The State, the Constitution, affirmatively and expressly establishes that the county is likewise empowered to fund public charter schools for expenses related to facilities or other qualifying capital expenses in the same manner and method as counties are empowered to fund traditional public schools.

If the counties required statutory authority in addition to the Constitutional authority already existing (we contend that they do not and that if contradictory statutes existed, they would be void for unconstitutionality), the North Carolina General Statutes in fact support and agree with the Constitution’s authorization to provide funds to all public schools, without distinction as to part of the public school system or use of the funds in qualifying capital projects. In its primary statute pertaining to the financing of public schools, the General Statutes indicate

that “[i]t is the intent of the General Assembly by enactment of this Article to prescribe for the public schools a uniform system of budgeting and fiscal control.” N.C. Gen. Stat. § 115C-424 (the “Uniform Budget Format” or “Uniform Budget Act”). “The board of county commissioners may, in its discretion, allocate part of all of its appropriation by purpose, function, or project as defined in the uniform budget format.” N.C. Gen. Stat. § 115C-429(b); see also, Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ., 188 N.C. App. 460, 655 S.E.2d 850 (2008) (Sugar Creek I) (“the Board may, in its discretion, allocate part or all of its appropriation to CMS for local current operating expenses, capital outlay expenses, or other special program expenses”). Our Court of Appeals conclusively determined that “[t]he Legislature clearly intended for charter schools to be treated as public schools subject to the uniform budget format.” Francine Delany New Sch. for Children, 150 N.C. App. at 346, 563 S.E.2d at 97.

The Uniform Budget Format<sup>7</sup> authorizes funding from the capital outlay fund. N.C. Gen. Stat. § 115C-426(f). The capital outlay fund defines what may be funded out of that source. It authorizes State and local (predominately local) appropriations for: (1) purchasing real property for use as a school, athletic field, playgrounds, administrative headquarters, or garage; (2) constructing, reconstructing, or acquiring buildings or facilities for a variety of school uses; (3) replacing or acquiring furniture, instructional apparatus, business machines, and similar items; (4) buying school buses, activity buses, or other motor vehicles; and (5) providing money to any other “object[] of expenditure that may be assigned to the capital outlay fund by the uniform

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<sup>7</sup> N.C. Gen. Stat. § 115C-426 is part of the School Budget and Fiscal Control Act (Uniform Budget Act). Section 115C-426 describes the uniform budget format that is applicable to all public schools. Under the uniform budget, public schools receive funds from three separate funds: (1) the State Public School Fund, (2) the local current expense fund, and (3) the capital outlay fund. § 115C-426(c). Counties are authorized to make appropriations into these funds for the purposes specified by the fund. See e.g., N.C. Gen. Stat. § 115C-429; compare N.C. Gen. Stat. § 115C-429 and N.C. Gen. Stat. § 115C-426.

budget format.” Id. Thus, there are many important categories of expenditure qualifying as “capital expenditures.”

The language of the statute could hardly be clearer: all public schools in N.C. Gen. Stat. § 115C, of which the public charter schools are a part, are entitled to receive funds for these purposes. “The Legislature clearly intended for charter schools to be treated as public schools subject to the uniform budget format.” Francine Delany New Sch. for Children, 150 N.C. App. at 346, 563 S.E.2d at 97.

**B. Counties and county school boards have authority to provide capital funding to all public charter schools specifically.**

“It is well settled that states dealing with the same subject matter must be construed in pari materia, ‘as together constituting one law.’” Williams v. Alexander County Bd. of Educ., 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998) (citation omitted). Discerning the intent of the legislature is the cardinal principle. Id. “In ascertaining the intent of the legislature, the presumption is that it acted with full knowledge of prior and existing laws.” Id. Courts have consistently reasoned specifically in the public charter school context that it is proper to “constru[e] the Charter School Funding Statute with other public funding statutes in Chapter 115C.” Francine Delany New Sch. for Children, 150 N.C. App. at 346, 563 S.E.2d at 97.

Against the backdrop of the Uniform Budget Format, section 115C-238.29H further authorizes the provision of the particular amounts of public funding to public charter schools: (1) the State Board of Education may allocate to each charter school local current expense funds in specific amounts, funds related to children with disabilities, and an amount for children with limited English proficiency and (2) the State Board of Education may allocate funds to be used for a variety of capital expenses, including leases for real property, except that no State funds can be used to obtain an interest in real property. N.C. Gen. Stat. § 115C-238.29H(a) and -

238.29H(a1). The only limitation expressed as applicable to public charter schools is that State (not county) funds may not be used to obtain an interest in real property. Id. All other capital projects – and access to capital funding generally – remain uniform with those of traditional public schools. Otherwise, the statute is silent in expressing any contradiction to the statutorily permissible categories of funding in the Uniform Budget Format. And by the well known maxim of statutory construction, the expression of one thing is to the exclusion of the alternative, the only modification to the Uniform Budget Format made by the charter school statutes pertains to the use of State funds in purchasing an interest in real property. No contravening words cast doubt that each public school may have equal access to uniform consideration of its requests for capital outlay funds.

As a matter of individual county discretion, as with all public schools, capital funding requests may or may not be granted. But the position of the counties and county school boards that they are and should be shielded from even having to entertain the requests of public charter schools is flatly contradicted by law. Nor does it make any sense. All public schools, including public charter schools, should be entitled to bring requests for capital funding before their localities and to have those annual requests considered uniformly with the requests of their traditional public school counterparts.

Also against this backdrop of uniformity, the legislature has articulated the required amount applicable to the local administrative units “within” which a public charter school “is located.” N.C. Gen. Stat. § 115C-238.29E(a). “If a student attends a charter school, the local school administrative unit in which the child resides shall transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year.” N.C. Gen. Stat. § 115C-238.29H(b). Thus, the statute

specifies the required amount of funding that must, without discretion, be allocated to public charter schools and the source of that fund. The counties and county school boards, including some defendants in this case, have learned before that their attempts to disadvantage public charter school students in their funding have been rebuffed by our courts, even recently. See Sugar Creek I, 188 N.C. App. at 460, 655 S.E.2d at 854 (holding that counties and county school boards cannot withhold from public charter schools an equal pro rata share of the local current expense fund); Sugar Creek II, \_\_\_ N.C. App. at \_\_\_, 673 S.E.2d at 673-74 (again holding that a county and county school board may not withhold an equal pro rata share of “all money in the local current expense fund”); Francine Delany New Sch. for Children, 150 N.C. App. at 347, 563 S.E.2d at 98 (holding that a county school board’s attempt to withhold from public charter schools “supplemental school taxes and penal fines and forfeitures received by the Board” violated the law).

The county funding requirement only specifies the amount of local current expense funds that must be provided. No restriction is imposed on the use of funds for facilities or other capital expenses.

Thus, in addition to the statutory authority provided to all public schools generally, there is statutory authority for public charter schools particularly, to receive funds for operational and financing leases for real property, payments on loans for facilities and equipment, facility maintenance costs, bus and vehicle purchases, facility renovations, and any other expenditure allocable to the capital outlay fund. Compare N.C. Gen. Stat. § 115C-238.29H with 115C-426(f). Apart from the very particular and narrow proscription on the use of State Board of Education funds for the purchase of an interest in real property (which may be unconstitutional), it is flatly incorrect to assert that no legal authority – constitutional or statutory – exists by which

a county our county school board is authorized to provide funding for facilities and other capital expenses.

Contrary to the defendants' assertion that no legal authority exists for counties to appropriate capital outlay funds to public charter schools, ample authority exists for all public schools to receive capital funding for any of the purposes specified in the capital outlay fund, see N.C. Gen. Stat. § 115C-426(f), except the use funds received from the State Board of Education directly for the purchase of an interest in real property or mobile classroom units. N.C. Gen. Stat. § 115C-426H(a1). The same authority exists for public charter schools to receive funds for capital expenses as exists for traditional public schools. Even if it was constitutional to prohibit public charter school students and public charter schools from offering a request for capital funds and receiving consideration for their request that was uniform with traditional public schools, such a policy of interpretation and enforcement is not permitted by statute.

### **III. FAILURE TO PROVIDE AN OPPORTUNITY TO RECEIVE UNIFORM CONSIDERATION OF A PUBLIC CHARTER SCHOOL'S CAPITAL FUNDING REQUEST VIOLATES THE UNIFORMITY REQUIREMENTS OF THE NORTH CAROLINA CONSTITUTION.**

The State and other defendants urge upon the court an odd and novel constitutional principle in support of their arguments. They argue that because a particular form of public school, public charter schools, are created by fiat of the General Assembly, the defendants are free to enact, interpret, and enforce whatever laws they shall choose for the management, funding, and control of those schools and the students in them in "any way the General Assembly sees fit," free from the limitations of the Constitution. Brief of the State at 22. This proposition confuses the relationship between the Constitution which gives power to and organizes government, and the government which derives its existence from that Constitution.

The defendants' position is contrary to over one hundred years of settled constitutional law, which has even recently been followed, assumed, restated, and reinforced.

The non-uniform funding provisions made applicable to public charter schools by defendants fly in the face of the North Carolina Constitution, which requires “uniformity.” N.C. Const. Art. IX, § 2(1). While the State may permit management and administration variety in public schools as it generally sees fit, the duty to provide a general and uniform system of free public schools is mandatory. See Coggins v. Bd. of Educ., 223 N.C. 763, 767, 28 S.E.2d 527, 530 (1944) (“The establishment and operation of the public school system is under the control of the legislative branch of the government, subject only to pertinent constitutional provisions as to uniformity . . . .”); Mebane Graded Sch. Dist. v. Alamance County, 211 N.C. 213, 223, 189 S.E.2d 873, 880 (1937). The Uniformity Clause does not require identity of school operations, but it does require a measure of uniformity in the system. Bd. of Educ. v. Bd. of Comm’rs, 174 N.C. 469, 473, 93 S.E.2d 1001, 1002 (1917) (uniformity does not require that there be a mirror image for “each and every school in the same or other districts throughout the State”). By interpreting and enforcing a scheme which prevents the plaintiffs from an opportunity to be uniformly considered for capital funds, the defendants have violated the Uniformity Clause.

**A. The Constitution requires uniform access to capital funding opportunities for all public schools.**

Article IX, section 2(1) of the North Carolina Constitution requires a uniform system of public schools for all North Carolinians. The North Carolina Supreme Court has had many opportunities to pass on the issue of public education and interpret the Uniformity Clause. Commenting on a precursor to the current Uniformity Clause in the 1868 Constitution, the Court noted that “it will be observed that [the public school system] is to be a “system”; it is to be “general,” and it is to be “uniform.” Lane v. Stanly, 65 N.C. 153, 157-158 (1871).

As early as 1890, the North Carolina Supreme Court determined that the Constitution prohibited state laws that required non-uniform funding of public school schools, whether the disproportionate funding which then existed between city or county schools or between (then innovative) graded schools or common schools. In Greensboro v. Hodgin, the State attempted to disproportionately allocate greater funding to schools within the City of Greensboro as compared to those schools within Guilford County, leaving county schools with fewer funds per pupil. 106 N.C. 182, 183, 11 S.E. 586, 586 (1890). The offending act of the General Assembly required that taxes paid by residents of the City of Greensboro would be disbursed only to Greensboro city schools, not to the Guilford county schools. Id. (“All taxes now paid, or which hereafter may be paid by the citizens of city of Greensboro, for State and county school purposes, shall be paid by the county treasurer to the treasurer of the city of Greensboro, and by him applied to the graded schools of the city, as provided by law.”)

If funding for each school in the entire county, including Greensboro schools, had been appropriated uniformly, each Guilford county school would have received \$1.54 per pupil. Id. Under the scheme established by the unconstitutional state law, however, city schools would have received \$3.95 per pupil, while county schools would have received only \$1.34 per pupil. Id. at 184, 11 S.E. at 586. The Supreme Court held that the law would require disproportionate funding of city schools as compared to other schools in the same county on a non-uniform basis and, thus, was “repugnant to the constitutional [uniformity] provisions cited above . . . .” Id. at 191, 11 S.E. at 589.

The unanimous Court reasoned that the Uniformity Clause of the Constitution required that each county must give each public school in that county equal access to funding from county coffers based on a uniform rule. Id. at 187-88.

A very material part of the fund thus devoted to the support of public schools is taken from the ordinary revenue of the State, raised by taxation . . . is to be distributed as nearly as may be per capita for the education of all the children in the State, as prescribed without regard to who paid the taxes . . . .

But the funds necessary for the support of public schools – the public school system – are not derived exclusively from the State. The Constitution plainly contemplates and intends that the several counties, as such, shall bear a material part of the burden of supplying such funds. . . .

As we have seen, the public school fund of the State must be distributed to the several counties in proportion to the number of school children in each. It is likewise required that the funds supplied by the counties shall supplement that of the State, and be distributed in the counties supplying the same, as pointed out above.

Id. at 187-91.

To conform to the Uniformity Clause, the State must guarantee all children a uniform opportunity to access funding within the county:

An essential requirement of the provision above recited [the Uniformity Clause] is that the system, whatever it may be, in whatever manner constituted, must be general and uniform as a whole, and therefore so in all its material parts, the purpose being to extend to all the children within the prescribed ages, wherever they may reside in the State, the same opportunity to obtain the benefits of education in free public schools--certainly to the extent that the State itself shall supply means to support such schools.

Id. at 186, 11 S.E. at 587 (emphasis added). The Hodgin court determined that all public schools – no matter the district in which they were located – may not be prohibited by law from the opportunity to receive uniform funding from their cities, counties, or local school administrative units:

The means so provided, and required to be provided, are to be faithfully appropriated and devoted to the support of such system of schools – not in one place or locality more or less than another, but in all places in and throughout the State in like manner and just and equal proportion.

Id. (emphasis added). The Supreme Court mandated (as later affirmed in Leandro) that while “counties . . . shall bear a material part of the burden of supplying [school] funds,” this can only be accomplished if counties have the power to distribute funds uniformly to all public schools.

Id.

Perhaps the settled interpretation of the Uniformity Clause by our Supreme Court is best summarized in the holding of a similar Supreme Court case decided a generation after Hodgin in answering the particular question of whether or not the defendant school board had the authority “to appropriate money from the building fund to the plaintiff [graded school] to be used in the erection of a school building in the city of Winston.” Bd. of Graded Sch. Comm’rs of Winston v. Bd. of Educ. of Forsyth County, 163 N.C. 404, 404, 79 S.E. 886, 886 (1913). In that case, as here, the defendant had provided a per capita apportionment of funding for maintenance of the school, but argued that another statute (which was silent on the issue) lacked authority for defendants to provide funding for new capital construction since the school was controlled by another board. Id. at 407-08, 79 S.E. at 887-88. The court rebuffed that argument as well, this time in the particular context of facilities funding because of the requirement for uniformity of access to a capital fund:

in the apportionment of the building fund, just as in the apportionment of the other part of the school fund, they [the then-progressive Graded Schools of the city] are entitled to be treated exactly like any other public school district of the county. The fact that these districts are operated under a special charter does not prevent them from being public school districts entitled to all the rights and privileges of other school districts in the distribution of the common public school fund, including the building fund.

Id. at 408-09, 79 S.E. at 888. Indeed, the court praised (rather than faulted plaintiffs) for their “choice” to raise extra money on behalf of their school to supplement public assistance, which

efforts “certainly ought not to cause them to be discriminated against by excluding them from sharing in that fund, which they helped to pay . . . .” Id.

A generation after Graded School Commissioners of Winston established the Constitutional principles, the Supreme Court re-affirmed those principles. In Mebane Graded School District v. County of Alamance, the Court addressed a county’s failure to support the financing of “the sites, buildings and equipment acquired, constructed, and used by the plaintiff Mebane Special Charter or Graded School District.” 211 N.C. 213, 225, 189 S.E. 873, 881 (1937). There, the county appears to have made a similar defense that the Mebane school was not a part of the established public school system of the county, and therefore the county was without power to provide capital funding. The court rejected that argument. The court found that, consistent with the Constitution, “[i]t is the duty of the State to provide a general and uniform State system of public schools . . . .” Id. at 223, 189 S.E. at 879. The court then noted with approval the prior case of Reeves v. Board of Education which stated that “[t]he maintenance and construction of school buildings for the six months public school term being prescribed by the Constitution, the county commissioners could have been compelled to have provided the school building in Buncombe Count as a county-wide charge . . . .” Id. at 223-24, 189 S.E. at 880. The court held that the county should provide capital financing to the Mebane school because financing for the special charter districts had in the past “been paid out of the county’s general school fund, and [] the special charter districts have, since said time, received the per capita allotment of the county-wide levy for debt service.” Id. at 225, 189 S.E. at 881. Thus, the county could be compelled to finance the capital costs of needed facilities in the school created under the Mebane Special Charter or Graded School District.

Technicalities and refinements should not be seriously considered in a case like this involving a constitutional

mandate . . . . Under the facts in this case and the findings of the jury, it would inequitable and unconscionable for defendants to assume part and not all of the indebtedness of the school districts of Alamance and not assume the plaintiffs' indebtedness and give them the relief demanded.

Id. at 226-27, 189 S.E. at 882. The defendants' contentions of today fare no better. It would be inequitable and unconscionable for the defendants not to provide the public charter schools a uniform opportunity to receive capital funding on the same bases as their counterparts in the traditional public school system.

**B. The General Statutes consistently evidence the requirement of uniform access to capital funding opportunities for public charter schools.**

The General Assembly has made clear its concurrent understanding of the constitutional requirement that students have an opportunity to receive substantially uniform access to funding from counties in stating its rationale for the School Budget and Fiscal Control Act, N.C. Gen. Stat. § 115C-422 et seq. (2009): “[i]t is the intent of the General Assembly by enactment of this Article to prescribe for the public schools a uniform system of budgeting and fiscal control.” N.C. Gen. Stat. § 115C-424 (emphasis added). Whereas the uniform budgeting statutes permit all public schools to uniformly request and use funds for capital projects, the legislative intent of those statutes additionally demonstrates the General Assembly's understanding that it must provide all public schools, including public charter schools, an equal opportunity to request and be considered uniformly for capital funding by the counties to maintain compliance with the Constitution.

The General Assembly has prescribed that for public schools, however else the management of the day-to-day operations of schools may vary, laws concerning opportunity for uniform fiscal allocation may not vary. The Uniform Budget Format requires that all public schools have (1) have a uniform budget format and (2) a uniform opportunity to receive funding

from three funds: the State Public School Fund, the local current expense fund, and the capital outlay fund. Compare N.C. Gen. Stat. § 115C-424 with -429.

When the Court of Appeals in Delany concluded that “[t]he Legislature clearly intended for charter schools to be treated as public schools subject to the uniform budget format” and “[t]he Legislature has clearly expressed its intent that charter schools approved by the State be treated as public schools,” the court reasoned thusly: (1) charter schools are public schools under N.C. Gen. Stat. § 115-238.29E; (2) public schools must be subject to the uniform budget format; therefore, (3) charter schools are subject to the uniform budget requirements. Francine Delany New Sch. for Children, 150 N.C. App. at 345-46, 563 S.E.2d at 97-98.

Thus, the scheme of interpretation and enforcement employed by defendants violates the statutory understanding of the uniformity requirement of Article IX, § 2(1). The courts have established that uniform budgeting as reflected in the General Statutes is required for public charter schools, just as all public schools. The General Statutes which reflect the need for uniform budgeting are applied to public charter schools.

**C. Leandro assumed the existence of state laws permitting public school students a uniform opportunity to obtain school funding within their counties.**

The defendants appear to disagree on the relevance of the Supreme Court’s holding in Leandro. The State asserts that it is not relevant. Brief of the State at 23 (“Unlike Leandro, the present case is not concerned with access to a sound, basic education” and “Nor does the present case involve the issues which consumed the Leandro decision concerning the problem of lesser school funding in poor counties as opposed to affluent counties.”) The School Board defendants come close grounding their case on an oversimplified view of Leandro which frames it almost as a previous litigation of this case. Brief of the School Boards at 11 (Plaintiffs’ argument is “unequivocally foreclosed” by Leandro). Neither is fully accurate.

The North Carolina Supreme Court’s landmark decision in Leandro v. State offers guidance on the constitutional requirement that students have an opportunity to receive substantially uniform funding within their counties. In Leandro, the plaintiffs asserted that children in poor county school districts and counties across the state were not receiving equal educational opportunities compared to children in wealthier county districts. 346 N.C. 336, 348, 488 S.E.2d 249, 256 (1997). Wealthier counties were able to supplement state funds for public schools more easily than poorer county districts, thus resulting in inter-county inequality of funding. Id. at 342, 488 S.E.2d at 252. The Leandro majority held that as far as a sought-after requirement by the plaintiffs for the State to provide equalizing funds to individual counties so as to make funding equal in each county of the State “the equal opportunities clause of Article IX, § 2(1) does not require substantially equal funding or educational advantages in all school districts.” Id. at 349, 488 S.E.2d at 256. The Court reasoned explicitly that its ruling applied only as between districts in the State precisely because the counties were permitted to supplement state funding for public schools in a substantially uniform manner within the county. Id. at 349-350, 488 S.E.2d at 256. It was not (and has never been) disputed that counties had the requisite authority under state law to fund all public schools uniformly. Nor was it established in that case (contrary to the defendants’ assertion) that the State or Counties could erect a legal barrier to uniform funding of the public schools within their own county. As previously argued, that possibility is expressly foreclosed by the Uniformity Clause. See Bd. of Graded Sch. Comm’rs of Winston, 163 N.C. 404, 408 (“in the apportionment of the building fund, just as in the apportionment of the other part of the school fund, they are entitled to be treated exactly like any other public school district of the county”); Hodgin, 106 N.C. at 191, 11 S.E. at 589 (State

laws requiring disparate funding of students within the same county are “repugnant to the constitutional provisions cited above [i.e., the Uniformity Clause] . . .”).

**IV. THE INTERPRETATION AND ENFORCEMENT SCHEME CRAFTED BY THE DEFENDANTS VIOLATES THE EQUAL PROTECTION RIGHTS OF THE PLAINTIFFS AS PROVIDED UNDER THE CONSTITUTIONS OF NORTH CAROLINA AND THE UNITED STATES.**

Under the Charter School Act, the General Assembly articulated six reasons for establishing charter schools in North Carolina:

1. Improve student learning;
2. Increase learning opportunities for all students, with special emphasis on expanded learning experiences for students who are identified as at risk of academic failure or academically gifted;
3. Encourage the use of different and innovative teaching methods;
4. Create new professional opportunities for teachers, including the opportunities to be responsible for the learning program at the school site;
5. Provide parents and students with expanded choices in the types of educational opportunities that are available within the public school system; and
6. Hold the schools established under this Part accountable for meeting measurable student achievement results, and provide the schools with a method to change from rule-based to performance-based accountability systems.

N.C. Gen. Stat. § 115C-238.29A (2007). In order to accomplish these laudable goals targeted to improve teaching, learning, and access to education, the defendants have nonsensically concluded that counties are de jure prohibited from uniformly funding charter schools within their own county in comparison to traditional public schools. This classification of public charter schools for discriminatory funding is arbitrary, not related to achievement of the legislative goals stated in the statute, and violates the equal protection clause in Article I, § 19 of the North Carolina Constitution and the equal protection clause in the 14th Amendment of the U.S. Constitution.

The North Carolina Supreme Court has held that “[w]hile the General Assembly may not establish a classification that is arbitrary or capricious, a classification [under equal protection] is

constitutional if founded upon a reasonable distinction or difference and bears a substantial relation to the object of the legislation.” In re Appeal of Martin, 286 N.C. 66, 76, 209 S.E.2d 766, 773 (1974) (citing Ohio Oil Co. v. Conway, 281 U.S. 146, 74 L.Ed. 775, 50 S.Ct. 310 (1930)). The object of the Charter School Act is clear – increased student learning – and the goals are specifically laid bare. The defendants’ interpretation and enforcement scheme is not only irrational, arbitrary, and capricious, but the policy of prohibiting the opportunity to request capital funding and be uniformly considered for funding to be used for facilities or other capital projects militates against the achievement of those goals. In the context of capital funding in particular, the Supreme Court has indicated that for a court to enforce a governments’ action permitting a school to participate in one pool of public funds, but denying its access to a similar pool of public funds for school buildings, might constitute unreasonable and arbitrary enforcement. Bd. of Graded Sch. Comm’rs of Winston, 163 N.C. at 408, 79 S.E. at 888.

The Court in Leandro v. State noted that “a funding system that distributed state funds to the districts in an arbitrary and capricious manner unrelated to such educational objectives simply would not be a valid exercise of that constitutional authority and could result in a denial of equal protection or due process.” 346 N.C. at 353, 488 S.E.2d at 258 (emphasis added). For funding related to education, it must be rationally related to an educational objective. In the present case, the defendants have by their interpretation and enforcement scheme denied counties the opportunity to fund all public schools substantially uniformly. In so doing, they have arbitrarily and capriciously determined that one type of public school – public charter schools – should be legally disfavored in comparison to other public schools. Such action is unreasonable, irrational, and lacks a substantial relation to the achievement of “educational goals” as required by Leandro.

As stated above, one of the main legislative goals of the charter school act was to “[i]ncrease learning opportunities for all students, with special emphasis on expanded learning experiences for students who are identified as at risk of academic failure or academically gifted.” N.C. Gen. Stat. § 115C-238.29A(2). Proponents of charter schools, most notably President Barack Obama, have stated that public charter schools help foster improved performance among all public schools and ensure that educational opportunities are provided to all students – especially minority students<sup>8</sup> – within the public school system.<sup>9</sup> Furthermore, former North Carolina State Board of Education Chairman Howard Lee, a long-time supporter of public charter schools, believes that a variety of restrictions such as the cap on charter schools, prevents progress and growth in the public schools and militates against the stated goals of the charter school act.<sup>10</sup> These and other arbitrary restraints on public charter schools, coupled with the disparate opportunities for funding of public charter schools, contradict the stated goals of the charter school act and violate plaintiffs’ the equal protection rights under Article I, § 19 of the North Carolina Constitution and the equal protection clause in the 14th Amendment of the U.S. Constitution.

## **CONCLUSION**

The claims brought by plaintiffs are simple. Contrary to the defendants’ repeated mischaracterization of Plaintiffs’ claims, Plaintiffs are not asking the Court to order that the State

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<sup>8</sup> Congressman George Miller (D-CA), Chair of the House Committee on Education and Labor, noted recently, “Outstanding charter schools are proving that low-income and minority kids can achieve at the highest levels, graduate from college and thrive as adults.” Outstanding Charter Schools Provide Models to Help Students Succeed, Witnesses Tell Education House Panel, June 4, 2009 at <http://edlabor.house.gov/newsroom/2009/06/outstanding-charter-schools-pr.shtml> (last visited July 6, 2009).

<sup>9</sup> During the third presidential debate against John McCain on October 15, 2008, President Obama stated, “Senator McCain and I actually agree on charter schools . . . I think it’s important to foster competition inside the public schools.”

<sup>10</sup> “[W]e [i.e., North Carolina] can reach a point where we won’t have to worry about how many charter schools we have and get rid of the charter [school] cap altogether. Shelvia Dancy, Commission studies charter schools, June 21, 2007 at [http://www.news14.com/content/school\\_news/583978/commission-studies-charter-schools/Default.aspx](http://www.news14.com/content/school_news/583978/commission-studies-charter-schools/Default.aspx) (last visited July 6, 2009).

or any county expend funds to make the funding of public charter schools and traditional public schools precisely equal. Rather, plaintiffs are asking that the defendants' interpretation and enforcement schemes, specifically the statute's funding provisions, either (1) be held unconstitutional as a violation of the Uniformity Clause of Article IX, § 2(1) of the North Carolina Constitution or (2) in the alternative, be interpreted to allow all public school students to receive a uniform opportunity to receive funding for capital expenses.

Defendant School Boards seek to shift the blame for the scheme of non-uniform funding opportunity to the very students harmed by their proposed exclusion: public charter school students. These students, or more correctly their parents, have elected to participate in the public school options provided to them by the General Assembly. That they chose this option is no ground for legally cognizable blame. All parents choose schools for their students – some private, some traditional public schools in different districts, some public charter schools. All these choices are legally permissible. Most importantly, they do nothing to alleviate the defendants from their obligation to obey the restrictions placed upon them by the people of North Carolina in the Constitution of North Carolina. Students who attend a public charter school are not burdened with forfeiting constitutional protection by their choice in attending a school: they are “blessed with the opportunity to receive more free education.” Morgan, 74 N.C. App. at 175, 328 S.E.2d at 324.

As Delany correctly established, “[t]he Legislature clearly intended for charter schools to be treated as public schools subject to the uniform budget format.” 150 N.C. App. at 346, 563 S.E.2d at 97. The defendants should, thus, reflect this requirement rather than continue to violate clear constitutional constraints.

Defendants incorrectly state that some public school students are entitled to constitutional protection and some are not. The Constitution does not so distinguish. All public school students are under the contemplation and protection of the Constitution. Under the Uniformity Clause, public charter school students must have the opportunity to receive uniform funding from their counties. Defendants may only enact, interpret, and enforce legislation that allows counties to provide equal opportunities to all public school students within their county districts to receive funding on the same uniform basis as it offers to other students in the public schools.

For the foregoing reasons, the plaintiffs ask this court to deny the Motions to Dismiss submitted by the defendants.