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 NORTH CAROLINA COURT OF APPEALS

)	
)	
SUGAR CREEK CHARTER SCHOOL,)	
Inc.; et al.)	
)	
Plaintiffs,)	
)	From 09 CVS 23289
v.)	Mecklenburg County
)	
STATE OF NORTH CAROLINA;)	
et al.)	
)	
Defendants.)	

 PLAINTIFFS-APPELLANTS' BRIEF

ISSUE PRESENTED

I. DID THE TRIAL COURT ERR IN GRANTING THE DEFENDANTS' MOTIONS TO DISMISS UNDER RULE 12(B)(6) AND DETERMINING THAT THERE IS NO STATUTORY OR CONSTITUTIONAL AUTHORITY UNDER WHICH COUNTIES OR COUNTY SCHOOL BOARDS MAY ALLOCATE CAPITAL FUNDING TO PUBLIC CHARTER SCHOOLS?

STATEMENT OF THE CASE

Sugar Creek Charter School, Inc., et al. filed a First Amended Complaint on 29 April 2010. On 24 May 2010, an order was entered dismissing plaintiffs' case for failure to state a claim upon which relief may be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The plaintiffs filed a notice of appeal on 22 June 2010. Transcript was ordered on 10 June 2010 and delivered on 6 July 2010. The record on appeal was filed on 10 August 2010, and the case was docketed in the Court of Appeals on 18 August 2010.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The trial court's order granting the defendants' motion to dismiss the plaintiffs' claims is a final judgment. Therefore, appeal lies of right to the Court of Appeals. See N.C. Gen. Stat. § 7A-27(b) (2010).

STATEMENT OF THE FACTS

Plaintiffs-Appellants are charter school students, parents of charter school students (as taxpayers and parents), and charter schools. The charter school plaintiffs are "public schools within the local school administrative unit in which they are located." N.C. Gen. Stat. § 115C-238.29A (2010). The charter school student plaintiffs are public school students. The defendants are the State, various counties, and various county school boards. R pp 50-59.

Sugar Creek Charter School and the other public charter school plaintiffs have been kept from merely requesting capital funding from the county and county school board defendants. The defendants justify their position on the basis of an absence of legal authority for counties to appropriate funds for capital purposes. The plaintiffs allege that this funding scheme is legally incorrect and fails to provide the constitutionally required opportunity to be considered for

capital funding requests on a uniform basis with other public schools in the same county. R pp 60-69.

ARGUMENT

I. STANDARD OF REVIEW

In evaluating a dismissal pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the Court of Appeals conducts a de novo review. Welch Contracting, Inc. v. N.C. Dep't of Transp., 175 N.C. App. 45, 622 S.E.2d 691 (2005). The question on review is “whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.” Block v. County of Person, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (citation omitted). “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). In sum, 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).

II. INTRODUCTION

The defendant counties and county school boards refuse to entertain the public charter schools' requests for access to capital outlay funding principally on the ground that an Attorney General's opinion has concluded that counties are forbidden from allocating public funding to public charter schools for capital needs. This opinion was founded on the proposition that no legal authority exists by which counties have been given permission to appropriate funds to

charter schools for capital expenses: “[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.” Opinion of Attorney General to Thomas B. Griffin, 1998 Op. Att’y Gen. 20 (1998). The defendants justify this opinion on the assertion that public charter schools are not public schools on the same basis as other public schools. The plaintiffs challenge the validity of that advisory opinion.

Prior cases from this court have established 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, Inc. v. Asheville City Bd. of Educ., 150 N.C. App. 338, 346, 563 S.E.2d 92, 97 (2002). Counties are permitted to appropriate funds to public schools for any “purpose, function, or project as defined in the uniform budget format.” N.C. Gen. Stat. § 115C-429(b) (2010). That uniform budget format provides that local school administrative units are permitted to provide allocations to public schools from (1) the State Public School fund, which shall include funds from the State for operating expenses; (2) the local current expense fund, which shall include additional appropriations by the county for operating expenses; and (3) the capital outlay fund. N.C. Gen. Stat. § 115C-426 (2010). The capital outlay fund, in turn, authorizes State and local (predominately local) appropriations to public schools for a variety of “capital” needs: (1) purchasing real property; (2) constructing, reconstructing, or acquiring buildings; (3) furniture, instructional apparatuses, and machines; (4) school buses, activity buses, or other motor vehicles; and (5) any other “object[] of expenditure that may be assigned to the capital outlay fund by the uniform budget format.” N.C. Gen. Stat. § 115C-426(f) (2010).

In addition to these statutory permissions are the express provisions of the North Carolina Constitution. Those provisions more than merely permit, they require, that county public school

moneys “shall be faithfully appropriated and used exclusively for maintaining free public schools.” N.C. Const. art. IX, § 7. See also N.C. Const. Art. IX, § 2(2) (“The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.”) and N.C. Const. Art. IX, § 6 (State public school funds “shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.”).

Nevertheless, against these statutory and constitutional provisions, the North Carolina’s Attorney General’s office opined that N.C. Gen. Stat. section 115C-238.29H prohibits counties from appropriating funds to charter schools for capital projects because there is no legal authority under which counties can appropriate funds to public charter schools. See 1998 Op. Att’y Gen. 20.

III. THE TRIAL COURT ERRED IN FAILING TO DETERMINE THAT THE PLAINTIFFS COULD PROVE SOME SET OF FACTS UNDER ANY LAW INDICATING THAT PUBLIC CHARTER SCHOOLS ARE PUBLIC SCHOOLS ON THE SAME BASIS AS OTHER PUBLIC SCHOOLS.

A. PUBLIC CHARTER SCHOOLS ARE A PART OF THE GENERAL AND UNIFORM SYSTEM OF FREE PUBLIC SCHOOLS ON THE SAME BASIS AS OTHER PUBLIC SCHOOLS.

Public charter schools are part of the general and uniform system of free public schools on the same basis as other public schools because: (1) they are functionally indistinguishable from other public schools; (2) the legislature and courts have declared them to be indistinguishable from other public schools; and (3) they have the same defining constitutional characteristics as other public schools.

1. PUBLIC CHARTER SCHOOLS ARE FUNCTIONALLY
INDISTINGUISHABLE FROM OTHER PUBLIC SCHOOLS.

Public charter schools are members of the general and uniform system of free public schools because they are functionally indistinguishable from other members of the general and uniform system of free public schools. The statutory evidence of this fact is exhaustive.

As with all other public schools, public charter schools are free. N.C. Gen. Stat. § 115C-238.29F (2010). They do not charge tuition and are not permitted to do so. Id. They are funded with State and local public funds and are non-sectarian. Id. Public charter schools may not discriminate in their admission policies or practices and are open to all public school students who wish to attend. See id.

As with all members of the uniform system of free public schools, public charter schools are created by the State, and the State controls the manner and method of their existence. N.C. Gen. Stat. § 115C-238.29D (2010). The State defines the health and safety standards for public charter schools. N.C. Gen. Stat. § 115C-238.29F(a). The State controls the liability insurance public charter schools must carry and grants them sovereign immunity. N.C. Gen. Stat. § 115C-238.29F(c) (except “to the extent of indemnification by insurance.”).

As with all members of the uniform system of free public schools, the State controls the public charter schools’ instructional programs and operations. This includes requiring that: (a) students of public charter schools meet the detailed grade-by-grade standards for academic performance adopted by the State Board of Education (“BOE”); (b) public charter schools conduct the same BOE-required student assessments; (c) students with disabilities attending a public charter school must be educated in conformance with the same State policies as apply to

other public schools; and (d) public charter schools discipline their students under the same guidelines as other public schools. N.C. Gen. Stat. § 115C-238.29F(d) (2010). Public charter schools must meet the same instruction-hour requirements as other public schools. N.C. Gen. Stat. § 115C-84.2 (2010).

Public charter schools are overseen in the same way by the same entity, the State Board of Education (BOE), as other public schools authorized by Article IX, section 2(1) of the Constitution. In fact, the BOE is the “chartering entity” for most public charter schools; approves public charter school applications; dictates public charter schools’ locations; sets the precise length of the charter; requires that public charter schools meet its standards of fiscal management; and constantly monitors and determines whether a public charter school complies with applicable laws and charter provisions. N.C. Gen. Stat. §§ 115C-238.29B; -238.29D; -238-29E. In addition, the BOE 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.

But the functional similarities go even further. Teachers of public charter schools are public school teachers and 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,” in which other public school teachers participate. N.C. Gen. Stat. § 115C-238.29E(4) (2010). 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 (2010).

In sum, nearly every meaningful aspect of a public charter school's functional environment is legally indistinguishable from any other member of the general and uniform public school system. It is, therefore, illogical to deny the same constitutional rights under Article IX, section 2(1) to public charter schools and their students as are granted to other public schools and their students.

2. THE GENERAL ASSEMBLY AND COURT OF APPEALS HAVE CONCLUSIVELY DECLARED THAT PUBLIC CHARTER SCHOOLS ARE INDISTINGUISHABLE FROM OTHER PUBLIC SCHOOLS.

Public charter schools are members of the general and uniform system of free public schools because the General Assembly and Court of Appeals have conclusively determined that public charter schools are public schools on the same legal basis as other public schools. Both the legislative and judicial branches have been unambiguous on this point.

The General Statutes declare that 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)(2010) (emphasis added). The General Statutes continue: because public charter schools are on the same legal footing as other public schools "it is the determination of the General Assembly that charter schools are public schools" N.C. Gen. Stat. § 115C-238.29F(4) (2010). It is instructive to note that the reason the General Assembly reached this conclusion was that public charter schools are not meaningfully distinguishable from other public schools and public charter schools are public school employers.

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).

This Court, in answering the prior challenges of certain localities to the truly-public-school status of public charter schools (some of whom are part of this litigation), has also reached this conclusion: “[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., 150 N.C. App. at 346, 563 S.E.2d at 97.

3. PUBLIC CHARTER SCHOOLS HAVE THE SAME DEFINING CONSTITUTIONAL CHARACTERISTICS AS OTHER PUBLIC SCHOOLS.

Public charter schools are members of the general and uniform system of free public schools because the North Carolina Constitution indicates that there is a single class of public schools and identifies the criteria of membership in that class, which public charter schools share with other members of the general and uniform free public schools.

a. THE CONSTITUTION AUTHORIZES ONE GENERAL AND UNIFORM SYSTEM OF FREE PUBLIC SCHOOLS.

The Constitution requires the General Assembly to provide and fund through taxation a single class of general and uniform free public schools. N.C. Const. Art. IX, § 2(1). The fundamental characteristics of the single-class 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.”). More specifically, under this provision of the Constitution, the State may not create a sub-class of second-class free public schools. Having directed the General Assembly in this specific matter, the Constitution’s

direction may not be ignored or gutted by the insertion of additional public school systems which do not have the same constitutional rights as others. In re Spivey, 345 N.C. 404, 412, 480 S.E.2d 693, 697 (1997) (applying the maxim “inclusio unius est exclusio alterius [inclusion of one is exclusion of another]” in interpreting the North Carolina Constitution).¹

Article XIV, section 3 of the Constitution goes even further: it prohibits anything other than a single constitutional system of schools. According to this provision, sub-classes are impermissible within a law that is to be general and uniform, such as the general and uniform school system. Article XIV, section 3, entitled “General laws defined,” defines (1) “general laws,” (2) “general laws uniformly applicable throughout the State,” and (3) “general laws uniformly applicable in every . . . unit of local government.” N.C. Const. Art. XIV, § 3. This section provides in relevant part:

General laws may be enacted for classes defined by population or other criteria. General laws uniformly applicable throughout the State shall be made applicable without classification or exception in every unit of local government of like kind. . . . General laws uniformly applicable in every [unit of local government] shall be made applicable without classification or exception in every unit of local government. . . .

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

Thus, among the three categories of general laws, only where the legislature is authorized to enact merely “general laws” may there be classifications. Here, the Constitution plainly calls for the legislature to enact laws to provide a “general and uniform system of free public schools.” And within a law that is required to be “general and uniform,” classes are not permitted.

Article IX, section 2(1) and Article XIV, section 3 must be read in pari materia. Stephenson v. Bartlett, 355 N.C. 354, 378, 562 S.E.2d 377, 394 (2002) (“[A]ll constitutional

¹ In re Spivey implemented and qualified the reasoning of Baker v. Martin: the legislature is limited when the “Constitution expressly or by necessary implication restricts the actions of the legislative branch.” 330 N.C. 331, 338-39, 410 S.E.2d 887, 891-92 (1991).

provisions must be read in pari materia.”); 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.”) When that requirement is observed, it becomes apparent that the legislature may not permit there to be some free public schools with students who are disenfranchised from the constitutional privileges afforded to students of other free public schools.

b. THE CONSTITUTION DESCRIBES FIVE INDICIA OF MEMBERSHIP IN THE GENERAL AND UNIFORM SYSTEM OF FREE PUBLIC SCHOOLS, ALL OF WHICH CHARACTERIZE PUBLIC CHARTER SCHOOLS.

Article IX of the Constitution plainly contemplates that public schools in the general and uniform system commanded by Article IX, section 2(1) will share certain constitutional characteristics. Specifically, the Constitution contemplates that schools in the general and uniform system are: (1) free; (2) public; (3) ultimately overseen by the constitutionally appointed public school authorities; (4) funded by State public school funds; and (5) funded by county public school funds. See N.C. Const. Art. IX, §§ 2, 4, 5, 6, and 7.²

The first two of these indicia reside directly in the same Article, section, sub-section, and clause of the North Carolina Constitution as the uniformity requirement. A member of the uniform system of free public schools must be free and public. See N.C. Const. Art. IX, § 2(1). That public charter schools are free and public has not been factually disputed. Public charter schools are open to all public students and free to all public school students. N.C. Gen. Stat. § 115C-238.29F. Furthermore, the General Assembly and Court of Appeals have conclusively

² Uniformity does not pertain to “schools” but to a “system” which should include “schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support.” Bd. of Educ. v. Bd. of County Comm’rs of Granville County, 174 N.C. 469, 473, 93 S.E. 1001, 1002 (1917).

determined that public charter schools are “public schools.” Francine Delany New Sch. For Children, Inc., 150 N.C. App. at 346, 563 S.E.2d at 97; N.C. Gen. Stat. § 115C-238.29E(a).

The Constitution, however, provides three more indicia of a school’s status as a uniform free public school. Public charter schools bear these marks as well.

First, all members of the general and uniform system of free public schools are overseen by the same constitutionally appointed body, which “shall supervise and administer” the general and uniform system of free public schools by and through its constitutionally designated “chief administrative officer,” the Superintendent of Public Instruction. N.C. Const. Art. IX, §§ 4, 5. The Constitutional uniform 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). It is not disputed in this litigation, and has been previously demonstrated in this Brief, that the BOE and the Superintendent of Public Instruction legally have – and factually exercise – ultimate oversight authority, within Constitutional limits, over the public charter school plaintiffs. See, e.g., N.C. Gen. Stat. §§ 115C-238.29B; -238.29D; -238.29E; -238.29I; -238.29J (illustrating the BOE’s and Superintendent’s ultimate authority to control and manage).

Second, the Constitution establishes that “all moneys, stocks, bonds, and other property belonging to the State for purposes of public education . . . 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). Section 2 of that same Article provides that financial provision is made “by taxation and otherwise.” N.C. Const. Art. IX, § 2(1). Stated more pointedly, the Constitution indicates that members of the general and uniform system of free

public schools are funded through funds “belonging to the State for purposes of public education,” which funds are to be used “exclusively” for the uniform system of free public schools. It is not factually disputed in this case that public charter schools receive State funds set aside for purposes of public education. They are part of the class that must “exclusively” receive State public school funds.

Third, the Constitution indicates that “[a]ll moneys, stocks, bonds, and other property belonging to a county school fund . . . shall be faithfully appropriated and used exclusively for maintaining free public schools.” N.C. Const. Art. IX, § 7 (emphasis added). Simply stated, all members of the free public schools – and only those members – receive appropriations from that fund. It is factually undisputed in this case, and has been plainly established from previous cases, that counties not only provide, but must provide, certain portions of the county school fund to public charter schools. See 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), Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ., 195 N.C. App. 348, 673 S.E.2d 667 (2009) (Sugar Creek II). Thus, public charter schools carry this indicator of Article IX, section 2(1) membership as well.

Of the five indicia of membership in the general and uniform system of free public schools, public charter schools factually demonstrate that they share with other public schools all five characteristics. Public charter schools are part of the general and uniform system commanded by Article IX, section 2(1).

In conclusion, public charter schools are legally indistinguishable from other public schools because they are indistinguishable in function, indistinguishable in legal declaration, and

indistinguishable in Constitutional identity. The defendants have attempted to exercise authority to create a member of the general and uniform system of free public schools, exercise control and authority over that member, and yet deny it full constitutional rights. They cannot have it both ways.

B. PROGRAMMATIC AND OPERATIONAL DIFFERENCES ARE NOT RELEVANT CONSTITUTIONAL DISTINCTIONS.

Despite the clear and multi-varied indications that public charter schools are part of the general and uniform system of free public schools, the Constitution permits all public schools to have a measure of freedom in day-to-day operational details, curriculum nuances, organizational structure, or method of administration. According to the Court of Appeals,

the constitutional mandate [for uniformity] 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.

Kiddie Korner Day Schs., Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 138, 285 S.E.2d 110, 113 (1981) (emphasis added) (rejecting the contention that a latch key school was not part of the “uniform system” because of curricular, administrative, and operational variance). Principals of traditional public schools operate their schools with different emphases, organizational and leadership techniques, administrative structures, delivery mechanisms, opening and closing times, school day lengths, and school calendars. See, e.g., Kiddie Korner Day Schs., Inc. at 767-68, 28 S.E.2d at 530 (variance in curriculum, opening and closing, administration, and operations); Morgan v. Polk County Bd. of Educ., 74 N.C. App. 169, 328 S.E.2d 320 (1985) (permitting variance in school calendars). Public schools embrace magnet schools and alternative schools. No two schools are the same in their operation methods or structure. Kiddie Korner Day Schs., Inc., 55 N.C. App. at 140, 285 S.E.2d at 115 (all public

schools have “some degree of latitude in providing services as their particular schools may require”). Thus, charter schools are not excluded from the general and uniform system of free public schools simply because the legislature has ordained that they be innovative in their curriculum, operational details, organizational structure, mechanism of education program delivery, or administration.

IV. THE STATE AND THE COUNTIES HAVE CONSTITUTIONAL AND STATUTORY AUTHORITY TO PROVIDE FUNDS TO PUBLIC CHARTER SCHOOLS FOR CAPITAL NEEDS.

The defendants, without citation to any express provision of law, assert that no legal authority exists under which they may appropriate funds to public charter schools for capital projects. They argue from silence, but their hearing is selective.

A. THE CONSTITUTION AUTHORIZES THE STATE AND COUNTIES TO PROVIDE FUNDING TO PUBLIC CHARTER SCHOOLS FOR CAPITAL NEEDS.

North Carolina’s Constitution authorizes providing State funds to any free public school, without restriction as to funding type:

all moneys, stocks, bonds, and other property belonging to the State for purposes of public education . . . 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).

More specifically, however, the Constitution also permits counties to fund free public schools without restriction as to funding type:

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). Thus, separate and apart from the constitutional authority of the State to provide funding for capital projects, the counties are also constitutionally permitted (even constitutionally required) to appropriate public funds to maintain free public schools, including expenditures related to capital expenses.

This conclusion is further buttressed by Article IX, section 2(2), which states that although the General Assembly is not compelled to bear the entire burden of maintaining public schools within the counties, the State may not prohibit counties from using local revenues for the support of any public school: “[t]he governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.” N.C. Const. Art. IX, § 2(2).

B. THE GENERAL STATUTES AUTHORIZE COUNTIES AND THE STATE TO PROVIDE FUNDING FOR PUBLIC CHARTER SCHOOLS FOR CAPITAL NEEDS.

To add to the constitutional authority of the State and counties to provide to public charter schools funds for any school expenses, including capital expenses, there is statutory authority to provide funds for these purposes. At the outset, it is critical to observe two things.

The first is that capital expenses include a great many things more than purchasing real estate. Capital expenses include, without limitation: (1) acquisition of real property; (2) acquisition, construction, reconstruction, enlargement, renovation, or replacement of buildings and other structures; (3) acquisition and replacement of furniture, instructional apparatus, data-process equipment, and business machines; (4) school buses; (5) activity buses and other motor vehicles; and (6) any other expenditure assigned as a capital outlay fund expense. In other words, buying real property is one among many things, too many to list, considered to be a capital expenditure.

The second is that county funds are not State funds. They are statutorily and constitutionally separate. N.C. Gen. Stat. § 115C-408(a)-(b) (State funds are “educational funds provided by the State and federal governments . . . excepting such local funds as may be provided by a county, city, or district.”); see also N.C. Const. Art. IX, §§ 6 and 7 (identifying and separating two sources of public school funding).

1. THE COUNTIES HAVE STATUTORY AUTHORITY TO PROVIDE FUNDS TO PUBLIC CHARTER SCHOOLS FOR CAPITAL NEEDS.

If counties required statutory authority in addition to the already-existing constitutional authority (which they do not, and if contradictory statutes existed, they might be void for unconstitutionality), such authority is present. The General Statutes agree with the Constitution’s authorization for counties to provide funds to all public schools for use in capital projects.

In the primary public school financing statute, the General Statutes declare 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 (2010) (the “Uniform Budget Format” or “Uniform Budget Act”). This is the basic method for how counties appropriate money to public schools: “[t]he board of county commissioners may, in its discretion, allocate part or all of its appropriation by purpose, function, or project as defined in the uniform budget format.” N.C. Gen. Stat. § 115C-429(b) (2010); 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 . . . allocate part or all of its appropriation to CMS for local current operating expenses, capital outlay expenses, or other special program expenses.”). Additionally, “[i]t 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) (2010).

As this Court conclusively determined: “[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 statutes give “the board of county commissioners” authority, in its discretion, to provide funds for any purpose outlined in the uniform budget format, including capital expenditures. N.C. Gen. Stat. § 115C-429(b). Were it not for the fog of the Attorney General’s opinion to the contrary, it would be difficult to imagine a more clear legal proposition: counties may provide to all public schools, including public charter schools, funding for capital expenses.

2. THE STATE HAS STATUTORY AUTHORITY TO PROVIDE FUNDS TO PUBLIC CHARTER SCHOOLS FOR CAPITAL NEEDS.

The State has statutory authority to provide funds to public charter schools for capital needs, which public charter schools can expend for anything except obtaining an interest in real property. The funding statutes indicate that the BOE may allocate funds to public charter schools 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 expense limitation expressly applicable to public charter schools is a prohibition on the use of State (not county) funds to obtain an interest in real property. Id. And even this limitation is a usage limitation, not a funding limitation. Other capital funding and expenditure matters – and access to capital funding generally – remain substantially uniform with those of other public schools. Otherwise, the charter school statute expresses no contradiction to the statutorily permissible categories of funding in the Uniform Budget Format, which the Court of Appeals declared applies to public charter schools.

3. CONCLUSION.

As a matter of State or individual county discretion, as with all public schools, particular capital funding requests from a public charter school may or may not be granted – not all requests for a new gymnasium or business machine upgrade are equally meritorious or needful. But the counties’ and county school boards’ position that they are and should be shielded by law from even entertaining public charter schools’ requests is contradicted by law. Nor does their position make any sense. All public schools, including public charter schools, should be entitled to bring requests for capital funding and to have those annual requests considered uniformly with the requests of other public schools.

To be clear, not all funding decisions are discretionary. The legislature has chosen to require in one area of funding – operational funding – that localities allocate a precise amount for charter schools. “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 removes discretion from this area of public charter school funding. And it is well that it does – attempts by counties and county school boards to systematically disadvantage public charter school students have been rebuffed by the courts on this specific ground. 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, 195 N.C. App. at 358, 673 S.E.2d at 673-74 (not permitted to withhold an equal pro rata share of “all money contained in the local current expense fund”)(citation omitted); 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). But these provisions requiring mandatory funding do not limit power to fund qualifying capital projects.

V. TO CATEGORICALLY BLOCK SOME PUBLIC SCHOOLS FROM ACCESS TO PUBLIC FUNDING INTENDED FOR PUBLIC SCHOOLS, INCLUDING CAPITAL FUNDING, VIOLATES THE UNIFORMITY PROVISION OF THE NORTH CAROLINA CONSTITUTION.

Were there express statutes that prohibited charter schools and their students from access to public funding for capital projects, those statutes would be unconstitutionally void. When counties fail to uniformly consider public charter schools’ requests for capital funding, they violate the uniformity requirement of North Carolina’s Constitution. With respect to county funding, this principle has long been settled.

A. UNIFORM ACCESS TO CAPITAL FUNDING OPPORTUNITIES FOR ALL PUBLIC SCHOOLS IS CONSTITUTIONALLY REQUIRED.

Our State has been here before. Despite several attempts by some local governments over the years to categorically block some public schools from public funding in their jurisdictions, the courts have refused public school funding policies with spurious distinctions and sweeping consequences.

Article IX, section 2(1) of North Carolina’s Constitution requires a general and uniform system of free public schools for all North Carolinians. The North Carolina Supreme Court has had many opportunities to pass on the issue of county funding for public schools in interpreting 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, 157-58 (1871). As early

as 1890, the North Carolina Supreme Court determined that the Constitution prohibited state laws permitting non-uniform funding opportunities for public schools, whether the proposed funding lock-out was between city and county schools or between the then-innovative graded schools and common schools. Our Constitution emphatically requires a general and uniform system of free public 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 legislature 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. If funding for each school in the county, including Greensboro schools, was uniformly accessible, each Guilford county school would have received \$1.54 per pupil. Id. Under this unconstitutional scheme, 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 access to funding opportunities by city schools as compared to other schools in the same county and, thus, was “repugnant to the constitutional [uniformity] provisions.” Id. at 191, 11 S.E. at 589.

The unanimous Court reasoned that the Uniformity Clause required that each county must give each public school in the county a uniform opportunity to receive funding from county coffers. 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 public school funding within the county:

An essential requirement of 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 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. The Supreme Court mandated (as later recognized 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.

This interpretation of the Uniformity Clause by our Supreme Court was further applied in a similar case decided a generation after Hodgin. There, the Court addressed the issue of whether 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). The defendant-school board had provided a per capita apportionment of funding for maintenance of the school, but argued that another statute (which was similarly 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 rejected 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 city schools] 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 (emphasis added).

The Supreme Court re-affirmed this constitutional principle yet again a generation later in Mebane Graded School District v. County of Alamance, 11 N.C. 213, 225, 189 S.E. 873, 881 (1937). There, 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.” Id. at 225, 189 S.E. at 881. There, the county made a similar defense that the Mebane school was not a part of the established public school system of the county by reason of its special charter, and therefore the county was without power to provide capital funding.

The court again rejected the argument, holding 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 held that the county should provide capital project financing to the Mebane school because it had funded other aspects of the school out of public funds in the past. Id. at 225, 189 S.E. at 881. The court capped its rejection of the county's ever-more-subtle attempts to categorize the Mebane school as falling outside county funding responsibility in stern and direct terms:

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 be inequitable and unconscionable for defendants to assume part and not all of the [capital] 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.

Contentions made by a county today would fare no better. It would be inequitable and unconscionable for it not to provide public charter schools a uniform opportunity to receive capital funding on the same basis as other public schools.

B. LEANDRO ASSUMED THAT COUNTIES COULD PROVIDE PUBLIC SCHOOL STUDENTS A UNIFORM OPPORTUNITY TO OBTAIN SCHOOL FUNDING WITHIN THEIR COUNTIES.

The North Carolina Supreme Court's landmark decision in Leandro v. State offers guidance on the Constitutional requirement that students have a uniform opportunity to receive funding within their counties. In Leandro, the plaintiffs asserted that children in poorer counties were not receiving equal educational opportunities compared to children in wealthier counties. 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 counties, thus resulting in substantial inter-county inequality of actual 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 even out the inter-county funding discrepancies and provide

better educational advantages, “the equal opportunities 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. That decision did not contemplate categorical disenfranchisement of some schools from mere funding opportunity within their own county.

In fact, 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. Id. at 349-50, 488 S.E.2d at 256. It was not disputed that counties had the requisite authority under state law to give all public schools uniform opportunity for county funding. Rather, the Leandro court appears to have assumed that such intra-county funding opportunity discrimination was resolved under previous cases (as illustrated above in this Brief) interpreting the Uniformity Clause.

C. THE GENERAL STATUTES CONSISTENTLY EVIDENCE THE REQUIREMENT OF UNIFORM ACCESS TO CAPITAL FUNDING OPPORTUNITIES FOR PUBLIC CHARTER SCHOOLS.

The legislature 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: “[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); see also N.C. Gen. Stat. § 115C-1 (stating the purpose of the Act was to establish a uniform system of free public schools pursuant to the Constitution). 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 legislature’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.

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 are 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. That reasoning holds here as well.

VI. THE DEFENDANTS’ RELIANCE ON THE ATTORNEY GENERAL’S OPINION TO SUPPORT THEIR POSITION IS FATALLY FLAWED.

The only piece of positive law supporting the defendants’ position is a 1998 Attorney General’s Opinion which concludes in less than two pages of legal analysis that counties are prohibited from considering public charter schools’ requests for capital outlay funding. See 1998 Op. Att’y Gen. 20. That opinion is incorrect.³

The Attorney General’s office opined that “[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. On this basis, the Attorney General concluded that no law existed under which counties were authorized to provide funding to public charter schools to receive funds for capital expenses. Id.

³ An Attorney General’s opinion is “advisory only”; even a corresponding determination by a county based on that opinion is “not authoritative.” Lawrence v. Shaw, 210 N.C. 352, 361, 186 S.E. 504, 509 (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, 43 S.E.2d 73,76 (1947) (“[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, 643 S.E.2d 70,72 n.1 (2007) (Attorney General Opinions have an inherent “non-binding nature.”).

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 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 legal authorization. See Hughey, 297 N.C. at 88-89, 253 S.E.2d at 900.

However, 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. Furthermore, as plaintiffs have previously demonstrated both factually and legally, numerous sources of legal authority exist under which the State or counties may provide funds to public charter schools for capital projects. Not only does the Attorney General’s opinion fail to reach a constitutionally permissible conclusion, it founds its entire view of the law on a negative proposition (i.e. that there is an absence of legal authority), which is incorrect. As demonstrated above in this Brief, there are replete, positive, express statements of law which demonstrate that public charter schools may and must have access to a uniform opportunity at least to be permitted to request funding from their counties for

capital expenses uniformly with other public schools. If the legislature had wished to foreclose the mere opportunity for capital funding, it could have said so.

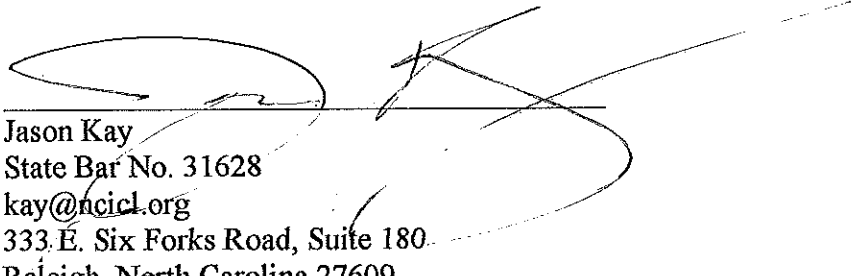
As a more troubling matter, the defendants' positions lay kindling for a constitutional flashpoint. If, as they argue, public charter schools and their students are not entitled to the uniformity rights of Article IX, section 2(1) because they are not part of the general and uniform system of free public schools, there are other constitutional rights to which public charter school students would not be entitled. For example, the same Article, section, sub-section, and clause of the North Carolina Constitution, guarantees the right to an equal opportunity for a sound basic education. Surely any Article IX, section 2(1) school must provide these rights. The defendants' position in this case is untenable for many reasons, one of which is that constitutional rights are not optional for citizens; the Constitution commands government, restrains government, and is the ultimate expression of the will of the people. See N.C. Const. Art. 1, §§ 2 and 3. The defendants cannot accept the authority granted by the Constitution and reject the responsibilities it lays upon their shoulders.

CONCLUSION

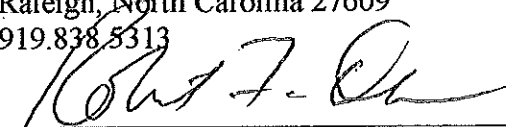
For the foregoing reasons, the Plaintiffs-Appellants respectfully request that the trial court's dismissal be reversed and remanded to the trial court with instructions to conduct proceedings not inconsistent with the opinion of this Court.

Respectfully submitted this 22nd day of September, 2010.

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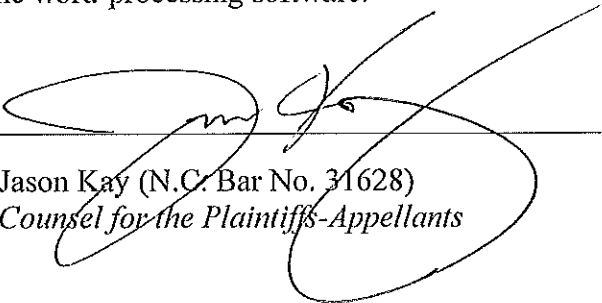


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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the appellant certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.



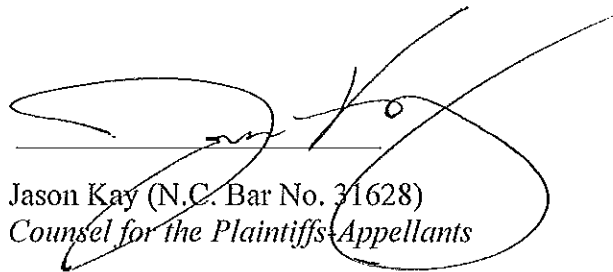
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above Plaintiffs-Appellants' Brief has been duly served upon Defendant-Appellee's counsel by depositing a copy, contained in a first-class, postage prepaid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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This the 22nd day of September, 2010.



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