

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 CVS 23289

SUGAR CREEK CHARTER)
SCHOOL, INC.; THE COMMUNITY)
CHARTER SCHOOL; THE METROLINA)
REGIONAL SCHOLARS' ACADEMY, INC.;)
ROCKY MOUNT PREPARATORY)
SCHOOL, INC.; SOCRATES)
ACADEMY, INC.; THOMAS JEFFERSON)
CLASSICAL ACADEMY; AND UNION)
ACADEMY; DEBORAH HOPKINS,)
INDIVIDUALLY AND AS GUARDIAN)
AD LITEM OF SLOANE HOPKINS,)
KILLIAN HOPKINS, AND SKYLAR HOPKINS;)
GILBERT BAILEY, INDIVIDUALLY AND)
AS GUARDIAN AD LITEM OF)
VIRGINIA L. BAILEY;)
CHERYL DRAKE-BOWERS, INDIVIDUALLY)
AND AS GUARDIAN AD LITEM OF)
ANNIKA BOWERS; JAMES BARNHILL)
AND SHARON BARNHILL, INDIVIDUALLY)
AND AS GUARDIANS AD LITEM OF)
AUSTIN BARNHILL AND)
JAMES CODY BARNHILL, ANGELA HALE,)
INDIVIDUALLY AND AS GUARDIAN)
AD LITEM OF MATHEW PERRY,)
ZACHARY PERRY, AND DUSTIN LEE;)
KAY CRICKMORE AND DAVID CRICKMORE,)
INDIVIDUALLY AND AS GUARDIANS)
AD LITEM OF EMILY CRICKMORE,)
REBECCA CRICKMORE,)
RACHEL CRICKMORE, AND)
KATHERINE CRICKMORE;)
PANSY FLANAGAN, INDIVIDUALLY AND)
AS GUARDIAN AD LITEM OF)
WILLIAM L. OVERTON;)
WILLIAM E. DAVIS, III AND)
APHRODITE DAVIS, INDIVIDUALLY AND)
AS GUARDIANS AD LITEM OF)
ELIANA M. DAVIS; SHAWN L. JONES,)
INDIVIDUALLY AND AS GUARDIAN)
AD LITEM OF KATHERINE JONES;)
PATRICIA SEGUINE AND DANIEL SEGUINE,)
INDIVIDUALLY AND AS GUARDIANS)

COUNTY DEFENDANTS' BRIEF
IN SUPPORT OF MOTION TO
DISMISS

AD LITEM OF COURTNEY SEGUINE,)
 CARTER SEGUINE, AND JONAH SEGUINE;)
 TAWANDA D. BLOUNT, INDIVIDUALLY)
 AND AS GUARDIAN AD LITEM OF)
 BRYSON BLOUNT; TODD BENNET AND)
 WENDY BENNETT, INDIVIDUALLY AND)
 AS GUARDIANS AD LITEM OF)
 HANNAH BENNETT, VICTORIA BENNETT,)
 AND OLIVIA BENNETT; JAMES SMITH AND)
 SUSAN SOULE-SMITH, INDIVIDUALLY AND)
 AS GUARDIANS AD LITEM OF EVAN SMITH)
 AND MOLLY SMITH; LYNN KROEGER)
 AND KEN KROEGER, INDIVIDUALLY AND)
 AS GUARDIANS AD LITEM OF)
 PETER KROEGER, CHRISTINA KROEGER,)
 AND JOSEPH KROEGER; TODD HAVICAN,)
 INDIVIDUALLY AND AS GUARDIAN)
 AD LITEM OF KAITLYN HAVICAN AND)
 KELSEY HAVICAN; RON L. BROWN,)
 INDIVIDUALLY AND AS GUARDIAN AD)
 LITEM OF VICTORIA A. BROWN AND)
 DANIEL S. BROWN;)

Plaintiffs,)

v.)

STATE OF NORTH CAROLINA;)
 COUNTY OF MECKLENBURG;)
 CHARLOTTE-MECKLENBURG COUNTY)
 BOARD OF EDUCATION; COUNTY OF)
 UNION; UNION COUNTY BOARD OF)
 EDUCATION; COUNTY OF NASH;)
 NASH-ROCKY MOUNT BOARD OF)
 EDUCATION; COUNTY OF HALIFAX;)
 HALIFAX COUNTY BOARD OF)
 EDUCATION; COUNTY OF EDGEcombe;)
 EDGEcombe COUNTY BOARD OF)
 EDUCATION; COUNTY OF RUTHERFORD;)
 RUTHERFORD COUNTY BOARD OF)
 EDUCATION; COUNTY OF CLEVELAND;)
 CLEVELAND COUNTY BOARD OF)
 EDUCATION)

Defendants.)

This brief is submitted in support of the Rule 12(b)(6) Motion to Dismiss filed by defendants Mecklenburg, Union, Nash, Halifax, Edgecombe, Rutherford and Cleveland Counties (hereinafter, "County Defendants").

STATEMENT OF THE CASE

Plaintiffs filed this declaratory judgment action in Mecklenburg County Superior Court on September 8, 2009. It was subsequently designated an exceptional case under Rule 2.1 of the General Rules of Practice, the Honorable F. Donald Bridges was appointed to preside over it, and all of the defendants, including the County Defendants, have filed Rule 12(b)(6) Motions to Dismiss.

STATEMENT OF FACTS

The County Defendants hereby adopt and incorporate by reference the Introduction and Statement of Facts sections of the briefs submitted by the School Board Defendants and the State of North Carolina in support of their respective Motions to Dismiss.

ARGUMENT

Plaintiffs have asked this court to declare that the statutes for the funding of charter schools are unconstitutional, either facially or as applied, under the theory that they are inconsistent with North Carolina constitutional provisions granting the right to an education. At the heart of plaintiffs' Complaint is their claim that the funding scheme for charter schools enacted by the General Assembly is different from, and not equal to, the funding scheme for traditional public schools, thereby violating the Equal Protection Clauses of the United States and North Carolina Constitutions. The legal issues before this court arise in the context of plaintiffs' allegation that they are entitled to a declaratory judgment that (1) North Carolina's charter school funding statutes are unconstitutional on their face or to the extent that they have

been applied so as to prevent the counties of this state from providing capital outlay funds to charter schools; (2) because the charter school funding statutes do not permit the plaintiff charter schools to be considered for capital outlay funds, those statutes are unenforceable to the extent that they do not grant such access; (3) the charter school funding scheme discriminates on an arbitrary, capricious, and irrational basis and the plaintiff charter schools should be uniformly considered for capital outlay funds; and (4) the charter school funding scheme denies the individual plaintiffs an equal opportunity for a sound basic education.

A careful analysis of plaintiffs' allegations reveals that they are legally baseless and should be dismissed.

I. THE NORTH CAROLINA GENERAL STATUTES DO NOT ALLOW COUNTIES TO PROVIDE MONIES FROM THE CAPITAL OUTLAY FUND TO CHARTER SCHOOLS.

The North Carolina Constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I § 15. In reaching that end, the Constitution likewise provides for a general and uniform educational system with equal access to education. It states, in pertinent part:

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

N.C. Const. art. IX § 2(1).

Discussing the counties' role in school funding, the North Carolina Supreme Court has stated that:

It is axiomatic that a county has no power to appropriate funds unless authorized to do so by the General Assembly. The General Assembly determines the purposes for which a county may

appropriate funds, which funds shall be utilized, and the manner in which appropriations are to be made.

Hughey v. Cloninger, 297 N.C. 86, 88, 253 S.E.2d 989, 900 (1979).

Both charter schools and traditional public schools are organized and funded under various provisions encompassed in Chapter 115C and elsewhere within the North Carolina General Statutes.

A. Public School Funding

As required by the North Carolina Constitution, the General Assembly has enacted statutes which provide for a free and publicly funded educational system.

To insure a quality education for every child in North Carolina, and to assure that the necessary resources are provided, it is the policy of the State of North Carolina to provide from State revenue sources the instructional expenses for current operations of the public school system as defined in the standard course of study. 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.G.S. § 115C-408(b) (2007).

The statutory funding scheme for traditional public schools enacted by the General Assembly establishes a tripartite revenue source.

The General Assembly has codified the responsibilities for educational funding in section 115C-426 of the General Statutes, entitled "Uniform budget format." Three funds are identified: the State Public School Fund, the local current expense fund, and the capital outlay fund. N.C.G.S. § 115C-426(c) (2007). The State Public School Fund includes "appropriations for the current operating expenses of the public school system from moneys made available to the local school administrative unit by the State Board of Education." *Id.* § 115C-426(d) (2007). *The capital outlay fund is used for facilities and capital improvements.* *Id.* § 115C-426(f) (2007).

Beaufort County Bd. of Educ., v. County Bd. of Commissioners, 363 N.C. 500, 509, 681 S.E.2d 278, 285 (2009) (Newby, J. concurring) (emphasis added).

Every year local school boards submit to their county board of commissioners a proposed budget. N.C.G.S. § 115C-429(a) The county commissioners then determine the amount of funds to appropriate for the school board for that year. N.C.G.S. § 115C-429(b)

B. Charter School Funding

North Carolina's charter schools were created to be different from the traditional public schools. See N.C.G.S. § 115C-238.29A. Charter schools were created to serve as a semi-autonomous, free-market substitute, operating under a charter from the State Board of Education. See Meghan Knight, Note, *Cyber Charter Schools: An Analysis of North Carolina's Current Charter School Legislation*, 6 N.C. J. L. & Tech. 395, 396-397 (2005); see also North Carolina Dept. of Pub. Instruction, Division of School Business, Information Analysis, Highlights of the North Carolina Pub. School Budget (2009). There are approximately 97 charter schools in North Carolina with an average student enrollment of about 137. Knight, supra at 399. Charter schools are smaller, less numerous, and by statutory mandate, serve a different function than the traditional public schools. Charter schools have different capital needs than traditional public schools. The funding system currently enacted by the General Assembly addresses these unique needs.

Plaintiffs argue that charter school children's constitutional rights have been violated by different or unequal funding. However, charter schools benefit from a number of different streams of financing which equal, or exceed, those available for traditional public schools and which do not include access to the capital outlay fund. Although, "[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 operating expenses . . . [t]his does not mean that public funds may not be used to support charter schools.” Op.Att’y.Gen., Easley, April 15, 1998.

Historically, the State has provided to the local school systems funding for the salaries of its employees and the costs of operations for public schools while the local governments have maintained the responsibility for providing facilities. Charter schools are allotted state funds based upon the number of students represented in their Average Daily Membership. Average Daily Membership is a figure used for calculating enrollment.¹ These funds may be used for any purpose other than purchasing a building. Local funds are used to supplement the state funds and are based on the local current expense appropriations in the applicable county. Further, federal funds are typically available and are targeted towards specific at-risk student populations.

The statutorily prescribed funding for charter schools is outlined, in part, in N.C.G.S. § 115C-238.29H(a)(1). That section mandates that charter schools shall be funded by the State Board of Education with respect to operating expenses in an “amount equal to the average per pupil allocation for average daily membership from the local school administrative unit allotments in which the charter school is located for each child attending the charter school.” *Id.* Additionally, subsection (a1) of that section provides that the

Funds allocated by the State Board of Education may be used to enter into operational and financing leases for real property or mobile classroom units for use as school facilities for charter schools and may be used for payments on loans made to charter schools for facilities or equipment. However, State funds shall not

¹ Average Daily Membership (ADM) for each school month is calculated based on the sum of the days in membership for all students in a Local Education Agency. This sum is divided by the number of days in the school month. Students must be enrolled in a class schedule that is at least half of an instructional day to be included in the ADM. The allotted ADM for purposes of calculating funds is based on the higher figure of the actual ADM from the prior year of the projected ADM for the current year. See North Carolina Dept. of Pub. Instruction, Division of School Business, Information Analysis, Highlights of the North Carolina Pub. School Budget (2009).

be used to obtain any other interest in real property or mobile classroom units.

N.C.G.S. § 115C-238.29H(a1). As in traditional public schools, the state and local boards of education may provide for a charter school's facilities.

The [charter] school may lease space from a local board of education or as is otherwise lawful in the local school administrative unit in which the charter school is located . . . [a]t the request of the charter school, the local board of education . . . shall lease any available building or land to the charter school unless the board demonstrates that the lease is not economically or practically feasible.

N.C.G.S. § 115C-238.29E(e). Also, under this subsection, a local board of education may provide a facility to the school free of charge so long as the school maintains and insures the facility. *Id.* Pursuant to N.C.G.S. § 115C-238.29J(b), charter schools are encouraged to seek funding from private persons and organizations. Thus, the differentiation, to the extent that one can be made, between charter and traditional public schools is that charter schools, due to a myriad of reasons, are provided with the means to acquire existing brick and mortar buildings rather relying on new construction using state funds.² Plaintiffs' Complaint concedes this point.

(Complaint ¶¶ 72-73 and 90)

² While charter schools do not have access to state funds through the capital outlay fund, additional revenues are available. One such additional source of funding is obtainable through the Private Capital Facilities Finance Act pursuant to N.C.G.S. Article 2 Chapter 159D. *See* Op.Att'y.Gen., Cooper, Oct. 2, 2001. This Act allows educational institutions access to certain bond proceeds for purposes of capital assistance. Funds designated for the Private Capital Facilities Finance Act are intended for nonprofit elementary and secondary institutions that are authorized by law and duly engaged in providing education. *See id.*; *see also* N.C.G.S. § 159D-37(4a). Because charter schools are operated by nonprofit private corporations, N.C.G.S. § 115C-238.29E(b), and their nonprofit board is not answerable to the general public, charter schools fall within the purview of this funding stream.

Additionally, pursuant to N.C.G.S. § 115C-238.29A, charter schools are permitted to supplement the state funds they receive with local expense appropriations for local schools. This includes any supplemental taxes levied for purposes of bolstering the public school coffers. Thus, charter schools have access to *all* funds budgeted for and through the local school system on a pro rata basis, including funds contained in the local school board's current expense fund. *See* Op.Att'y.Gen., Easley, Sep. 23, 1998; *see also* N.C.G.S. § 115C-430.

II. THE FUNDING STATUTES FOR CHARTER SCHOOLS ARE PRESUMPTIVELY CONSTITUTIONAL.

Plaintiffs argue that the school funding statutes enacted by the General Assembly are facially unconstitutional. This argument fails because: (1) plaintiffs have failed to identify exactly which of the funding statutes they claim are facially unconstitutional; and (2) plaintiffs have failed to clear the very high hurdle of showing that there are no circumstances under which the funding statutes could be constitutional.

A. Standard of Review

Plaintiffs allege that the funding scheme for charter schools is facially unconstitutional, but as the North Carolina Supreme Court recently recognized in Beaufort County Bd. of Educ., 363 N.C. 500, 681 S.E.2d at 280:

We observe that a facial challenge to a statute is a “most difficult challenge to mount successfully.” A party must show that there are no circumstances under which the statute might be constitutional. We seldom uphold facial challenges because it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them.

(quoting State v. Bryant, 359 N.C. 554, 564, 614 S.E.2d 479, 485 (2005) (quoting United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)) (emphasis added)).

Moreover, “when considering the constitutionality of a statute or act there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act.” State v. Whitaker, ___ N.C.App. ___, 689 S.E.2d 395, 396 (2009) (quoting Row v. Row, 185 N.C.App. 450, 454-455, 650 S.E.2d 1, 4 (2007)).

B. The North Carolina Constitution Allows the General Assembly to Create Experimental Schools Different from the Uniform System of Public Schools.

The County Defendants adopt by reference and incorporate herein the arguments on this point made in Section II(B)(1)-(2) of the Brief filed by the State of North Carolina.

C. Plaintiffs' Facial Constitutional Challenge Fails.

Plaintiffs have failed to articulate which of the many statutes that relate to the funding of charter schools they contend should be stricken as unconstitutional on their face. As such, plaintiffs' Complaint is insufficient under Rule 9(b) of the North Carolina Rules of Civil Procedure. When a complaint fails to state with particularity how and in what manner a contested statute is unconstitutional it has, as a matter of law, failed to adequately state a claim upon which relief may be granted should be dismissed.

A facial challenge to the constitutionality of a statute is one of the most difficult burdens to meet under law. Here, Plaintiffs cannot overcome the very strong presumption of constitutionality that is afforded to all statutes, including the statutes funding schools. The express terms of the North Carolina Constitution establish that the General Assembly has a Constitutional obligation to enact statutes creating and funding the public school system. The Court of Appeals has held that a party making a facial challenge to the constitutionality of a statute must prove beyond any reasonable doubt that it is unconstitutional. Guildford County Bd. of Education v. Guilford County Bd. of Elections, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993). Plaintiffs have failed to meet this heavy burden.

III. THE CHARTER SCHOOL FUNDING STATUTES ARE CONSTITUTIONAL AS APPLIED.

Plaintiffs argue that the statutes pertaining to charter school funding are unconstitutional in their application because charter schools are not afforded access to the capital outlay fund.

Plaintiffs' allegations fail because: 1) any difference in funding provisions between traditional public schools and charter schools does not give rise to unequal access to educational opportunities resulting in a constitutional violation; and 2) capital facilities (buildings) are not part of the consideration in determining what constitutes equal access to a sound basic education.

A. Charter School Funding Does Not Violate the Constitutional Guarantee to Uniform Access to Public Education.

The North Carolina General Assembly created a school funding system that has separate revenue sources for instructional expenses and for the construction and maintenance of buildings. The former are provided directly from state revenues, while funding for the latter comes largely from the capital outlay fund through the counties. In enacting this system, the General Assembly recognized that while the Constitution requires that it provide the opportunity for all students to receive sound educational instruction, it also explicitly refers to local governments the responsibility for supplemental funding for facilities. As such, the Constitution guarantees the right to access to educational instruction, not access to equal funding or access to identical educational facilities:

These statements of policy [expressed in N.C.G.S. § 115C-408(b)] recognize the significant variations in the counties' educational needs (due to differences in population, for example) and that those variations will be most manifest in the counties' "facilities requirements." The General Assembly has therefore expressed a preference to permit the counties to tend to their capital needs as their individual circumstances dictate. "[T]he instructional expenses for current operations of the public school system," meanwhile, should be substantially equal on a per-student basis, especially since all students are provided the same "standard course of study." Thus, by opting against county-based funding of instructional expenses for current operations in order "[t]o insure a quality education for every child in North Carolina," this statute underscores the constitutional policy that a sound basic education should be funded equally throughout the State.

Beaufort County Bd. of Educ. v. County Bd. of Commissioners, 363 N.C. at 513, 681 S.E.2d at 287 (Newby, J. concurring) (quoting N.C.G.S. § 115C-408(b) (internal citations omitted) (emphasis added)).

Plaintiffs suggest that because charter schools are not afforded access to the capital outlay fund they are being denied their constitutional right to free and equal public education under N.C. Const. Art. I, §§ 15, 19 and Art. IX, § 2. But in Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 357 S.E.2d 432 (1987), the Court of Appeals recognized that disparate funding for facilities was not the harm against which the framers of this state's Constitution sought to safeguard when they guaranteed equal educational opportunities to its citizens:

The question remains, then, of what the mandate that "equal opportunities shall be provided for all students" does, in fact, guarantee. In our view, the only plausible way to interpret that provision is to relate it to the "separate but equal" phrase of the 1868 Constitution that it replaced. In Brown v. Board of Education, *supra*, the United States Supreme Court held that "segregation of children in public schools solely on the basis of race . . . deprive[s] the children of the minority group of equal educational opportunities." It is a fact of history, although a shameful one, that despite the Supreme Court's ruling in Brown, racial integration of the public schools in this State occurred neither quickly nor wholeheartedly. By mandating equal opportunities for all students, the framers of the Constitution and the voters that adopted it were emphasizing that the days of "separate but equal" education in North Carolina were over, and that the people of this State were committed to providing all students with equal access to full participation in our public schools, regardless of race or other classifications. Any other interpretation, we believe, would require drawing inferences and conclusions that not only cannot be supported, but are, in fact, contradicted by the history surrounding the adoption of the Constitution.

Id. at 289-290, 357 S.E.2d at 436 (internal citations omitted). Simply put, Britt held that the right to an education means the right to non-discriminatory access to, and participation in, educational opportunities.

Plaintiffs contend their being denied access to the capital outlay fund necessarily impinges upon the right to equal education, but it is well-settled that “the equal opportunities clause of Article IX, Section 2(1) does not require substantially equal funding or educational advantages in all school districts.” Leandro v. State, 346 N.C. 336, 349, 488 S.E.2d 249, 256 (1997). Thus, it cannot be credibly suggested that each school must be identical in its facilities in order to provide an a constitutionally appropriate education.

Article IX, §§ 2(1) and (2) and N.C.G.S. § 115C-408(b) outline the policy that each child in this state be afforded an equal opportunity to receive an education provided for by taxes and disbursed from state and local funds. “The very complexity of the problems of financing and managing a statewide public school system suggests that ‘there will be more than one constitutionally permissible method of solving them,’ and that, within the limits of rationality, ‘the legislature's efforts to tackle the problems’ should be entitled to respect.” Independent School District v. Rodriguez, 411 U.S. 1, 42 (1972) (quoting Jefferson v. Hackney, 406 U.S. 535, 546-547 (1972)).

Equal access to educational opportunity does not require access to identical opportunity. In Britt, 86 N.C.App. at 289, 357, S.E.2d at 436, the Court of Appeals rejected an argument similar to that being advanced by plaintiffs here. In considering whether a purported funding deficiency denied their right to a uniform education, the court held the following:

The fundamental right that is guaranteed by our Constitution, then, is to equal *access* to our public schools – that is, every child has a fundamental right to receive an education in our public schools. Furthermore, the State is given responsibility for overseeing the public schools of this State in order to ensure that every student in the State receives the education to which he or she is entitled. Lane v. Stanley, 65 N.C. 153 (1871). In the present case, plaintiffs have not alleged that they are being denied an education, but only that they are not receiving the same educational opportunities as students in some other places in the State. *The State is required to*

provide a general and uniform education for the students in its charge. "There is no requirement that it provide identical opportunities to each and every student."

(quoting Kiddie Komer v. Board of Educ., 55 N.C.App. 134, 138-139, 285 S.E.2d 110, 113 (1981) (emphasis original in part added in part)). In Britt, the Court went on to note that:

if our Constitution demands that each child receive equality of opportunity in the sense argued by plaintiffs [i.e., in that each student has a right to an education substantially identical to other students in the state], only absolute equality between all systems across the State will satisfy the constitutional mandate. Any disparity between systems results in opportunities offered some students and denied others. *Our Constitution clearly does not contemplate such absolute uniformity across the State.*

Id. (emphasis added).

The parallels between the argument advanced by the plaintiffs in this case and those rejected by the Court in Britt are clear. The plaintiffs in Britt were essentially mounting a constitutional challenge to the validity of the public school funding structure under the premise that the schools were unequal because wealthier counties were able to provide more funding to their schools than poorer counties arguing that:

[r]esponsibility for building, maintaining and improving facilities, as well as the responsibility for other costs involved in providing educational resources and services, is placed upon the local school boards, resulting in disparities in the educational opportunities which might be offered by counties with a large tax base, as opposed to those offered in counties such as Robeson which may not have an adequate tax base to adequately fund the facilities required by the statute. [Plaintiffs] also contend that the multiple school systems in Robeson County fragment the pupil population to such an extent that educational programs available to some students in the county are not available to others who are in a different school system.

Id. at 285-286, 357 S.E.2d at 434. However, the Court of Appeals held that the Constitution did not require uniformity of schools; merely uniform access to an education. Id. Therefore, as in Britt, plaintiffs' allegations have no merit and should be dismissed.

B. The Right to a Sound Basic Education Mandates Access to Educational Opportunities, Not School Facilities.

In Leandro, our Supreme Court clearly defined the elements of a "sound" education as follows:

For purposes of our Constitution, a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Id. at 347, 488 S.E.2d at 255.

Notably absent in the factors articulated by the Supreme Court in Leandro is any mention of the facilities in which an education is provided. The fact that the Supreme Court did not include a facilities requirement in its description of the components of a sound education only serves to underscore and reaffirm the fact that the constitutional right to an education guaranteed by the Constitution is encompassed by an equality of access in the Brown sense and an equality of access in the instructional sense. Leandro expressly stated that the right to a sound basic education is not impacted by a disparity in funding among schools. ("[W]e conclude that Article IX, Section 2(1) of the North Carolina Constitution requires that all children have the

opportunity for a sound basic education, *but it does not require that equal educational opportunities be afforded students in all of the school districts of the state.*") Id. at 351, 488 S.E.2d at 257. The claims being made in plaintiffs' Complaint are precisely the type of litigation which Leandro rejected and sought to curtail.

IV. THE CHARTER SCHOOL FUNDING STATUTES DO NOT VIOLATE STATE OR FEDERAL EQUAL PROTECTION GUARANTEES.

Plaintiffs' argument that the funding scheme for charter schools violates equal protection under the state and federal constitutions fails because the State has a rational basis for funding public schools in the manner established by the General Assembly.

A. Standard of Review - Federal

In a challenge alleging a violation of the Equal Protection Clause under the Fourteenth Amendment to the United States Constitution, one of three applicable standards of review will apply, depending on the classification of the persons and rights involved. Those standards are strict scrutiny, intermediate scrutiny or a rational basis review. As demonstrated more fully below, the rational basis review applies in this case.

In Vacco v. Quill, 521 U.S. 793, 799 (1997), the United States Supreme Court recognized that:

The Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This provision creates no substantive rights. Instead, it embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly. If a legislative classification or distinction "neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end."

(internal citations omitted).

The United States Supreme Court, in Rodriguez, explicitly set forth the appropriate analytical framework applicable in a challenge to public school financing under an equal protection claim. "A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review [to the right to education], which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." Rodriguez, 411 U.S. at 40. The Court then went on to consider whether the strict scrutiny test should be applied and concluded that it should not. The Court further stated that:

It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action," it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

The foregoing considerations buttress our conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny.

Id. at 44 (footnote omitted).

Intermediate scrutiny also does not apply. The United States Supreme Court has only acknowledged classifications based upon gender or distinctions involving the legitimacy of children as invoking intermediate scrutiny.

Therefore, under the Federal Constitution, a rational basis review of the charter school funding legislation applies. Under such an analysis, the constitutionality of North Carolina's

school funding legislation must be upheld unless it is established that its purposes and goals are wholly unrelated to any possible interest the government has, or could have, in drafting the legislation. As discussed below, because North Carolina has a rational basis for not providing capital outlay funds to private corporations which only exist through ten year charters, a sufficient basis exists to defeat Plaintiffs' Equal Protection challenge under the United States Constitution.

B. Standard of Review - State

The North Carolina Supreme Court has held that "North Carolina courts apply the same test" for challenges under the Equal Protection Clause of article I § 19 of the North Carolina Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. DOT v. Rowe, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001). Thus, rational basis review applies to Plaintiffs' challenge to charter school funding on state equal protection grounds as well.

The North Carolina Supreme Court has articulated the requisite burden for a plaintiff's challenge to a child's right to receive a sound basic education, stating:

The courts of the state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education[,] and "a clear showing to the contrary must be made before the courts may conclude that they have not." "Only such a clear showing will justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education.

Hoke County Bd. of Educ. v. State, 358 N.C. 605, 622-623, 599 S.E.2d 365, 381 (2004) (quoting Leandro, 346 N.C. at 357, 488 S.E.2d at 261). The Court in Hoke clearly articulated a rational basis review. Under the Supreme Court's holding in Hoke, the plaintiffs here must overcome

every deference to the government and expressly show that the legislation is not related to the government's interest in providing a sound basic education.³

C. The State Clearly Has A Rational Basis for the Funding Structure It Enacted.

There are numerous practical reasons why the General Assembly chose not to allow the charter schools access to the capital outlay fund. First, charter schools are only given a ten year charter and experience has shown that they can, and do, fail and dissolve. N.C.G.S. § 115C-238.29D(d). The charter can be revoked, or not renewed, for any of the reasons set out in N.C.G.S. § 115C-238.29G(a). The charters are granted to, and the schools are operated by, private non-profit corporations. N.C.G.S. § 115C-238.29E(b). Further, the local school boards and the county boards of commissioners have no say in where to locate charter schools and no control or oversight over their operations. School buildings costs millions to tens of millions of dollars to construct and are designed to last for decades. The General Assembly's decision not to provide capital outlay funds to charter schools, which are of very limited duration and run by private corporations, is eminently rational.

In addition to the practical reasons why the General Assembly's decision was rational, it is also fair. Charter schools are only subject to a very small portion of the requirements placed on public schools under Chapter 115C and therefore have far more flexibility in how they spend the funds which they are provided. N.C.G.S. § 115C-238.29E(f). For instance, the uniform public schools are required to provide cafeteria services to their pupils.

³ The Court of Appeals also applied what appears to be a rational basis review in the context of the right to access an education (in the school discipline context) in re Jackson, 84 N.C.App. 167, 176, 352 S.E.2d 449, 455 (1987), wherein it stated, "A student's right to an education may be constitutionally denied when outweighed by the school's interest in protecting other students, teachers, and school property, and in preventing the disruption of the educational system." See also King ex rel. Harvey-Barrow v. Beaufort County Bd. of Educ., --- N.C.App.---, 683 S.E.2d 767, 769 (2009).

As part of the function of the public school system, local boards of education shall provide food services in the schools under their jurisdiction. All school food services made available under this authority shall be provided in accordance with standards and regulations recommended by the Superintendent of Public Instruction and approved by the State Board of Education.

N.C.G.S. § 115C-263.

Cafeteria service is one of the most expensive parts of the operation of a public school and the charter schools are not required to provide it and frequently do not. Instead, the charter schools are allowed great freedom in allocating the funds provided to them spending them on other priorities such as higher teacher salaries, innovate programming and other novel ideas. The freedom to spend the funds given to them largely as they see fit both emphasizes the experimental nature of the charter schools and buttresses the rationality of the General Assembly's policy decision in not making the capital outlay fund available to the charter schools. North Carolina's funding structure for public charter schools is rationally related to and necessary in promoting the government's interest in providing for the free and equal funding of smaller, alternative educational institutions. The system for funding charter schools reflects the particularities of their make-up and individual needs.

A leading treatise on constitutional law has noted that:

The Equal Protection Clause of the Fourteenth Amendment requires impartial governance: it does not require uniformity. When the government has a rational basis for treating dissimilar entities dissimilarly, there can be no constitutional infringement.

16B Am. Jur. 2d, Constitutional Law, § 784 (2008) (footnotes omitted).

CONCLUSION

The funding structure for charter schools in this state does not violate plaintiffs' constitutional right to access a sound basic education, nor does it deny the children attending

charter schools equal protection of the laws. The General Assembly has enacted a rational and reasonable system whereby each and every student receives access to a sound basic education. For this reason, and all the reasons set out previously in this brief, plaintiffs' claims should be dismissed.

This the 9 day of April, 2010.

TEAGUE CAMPBELL DENNIS & GORHAM, L.L.P.

By:



George W. Dennis III

N.C. Bar No.: 6589

J. Matthew Little

N.C. Bar No.: 20032

John L. Kubis, Jr.

N.C. Bar No.: 36881

Attorneys for County Defendants

Post Office Box 19207

Raleigh, North Carolina 27619-9207

(919) 873-0166 telephone

(919) 873-1814 facsimile

CERTIFICATE OF SERVICE

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

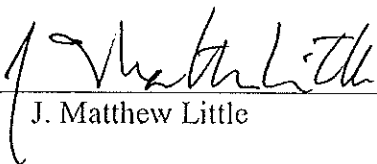
Mr. Jason B. Kay
Mr. Robert F. Orr
333 Six Forks Road, Suite 180
Raleigh, North Carolina 27609

Mr. Mark A. Davis
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

Mr. Robert J. King, III
Ms. Julia C. Ambrose
Brooks Pierce Mclendon Humphrey & Leonard, LLP
Post Office Box 26000
Greensboro, North Carolina 27420

This the 9 day of April, 2010.

TEAGUE CAMPBELL DENNIS & GORHAM, L.L.P.

By: 
J. Matthew Little