

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

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

SUGAR CREEK CHARTER SCHOOL, )  
INC., et al., )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
STATE OF NORTH CAROLINA, et al., )  
 )  
Defendants. )  
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 )

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**REPLY IN SUPPORT OF  
SCHOOL BOARD DEFENDANTS' MOTION TO DISMISS**

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April 30, 2010

## INTRODUCTION

According to Plaintiffs: the State of North Carolina, dozens of counties, and dozens of local boards of education have uniformly and consistently misinterpreted both the North Carolina Constitution and a variety of statutes governing public funding for charter schools, resulting in millions of dollars in lost funding to charter schools. Moreover, according to Plaintiffs, this unanimous error somehow went unnoticed from the time of the creation of the first charter schools in 1996 until now. In their opposition to Defendants' opening briefs, Plaintiffs cling to both their statutory and constitutional arguments, but in both instances, Plaintiffs' arguments are as insubstantial as Defendants predicted.

On the statutory issue, Plaintiffs claim that, because the General Statutes do not affirmatively and explicitly *prohibit* counties from providing capital funding to charter schools, local governments not only are allowed, but in fact are *required*, to provide capital funding. That argument ignores the fundamental legal principle that local units of government can do only what they are clearly authorized to do by the General Assembly. The Charter School Act confers no authority on local governments to provide capital outlay funding to (privately owned and operated) charter schools. Plaintiffs' argument that the Act nevertheless should somehow be read not only to permit but to require that charter schools be given access to capital funding is simply unsupportable.

Plaintiffs' constitutional argument fares no better. It is, in fact, a three-story house of cards, built on a series of interdependent legal propositions, each of which is fundamentally flawed. Specifically, Plaintiffs argue: 1) the General Assembly is authorized to create only one type of public school, *i.e.*, "general and uniform" schools; 2) because charter schools are

considered public schools, they are *necessarily* part of the general and uniform system; and 3) all schools in the general and uniform system are entitled to equal funding, including equal capital funding. At each step, Plaintiffs' argument is not simply wrong but is directly contrary to settled law.

The General Assembly is required by our State Constitution to create a general and uniform system of free public schools. Plaintiffs do not dispute that the General Assembly has done exactly that through the creation of the statewide system of traditional public schools. Plaintiffs make an unsupported leap from that constitutional mandate to a flat prohibition against creating any other type of public school. If Plaintiffs' argument is correct (that is, if every public school must be "uniform" in the respects outlined by the Supreme Court in *Leandro v. State*), then the statutory authorization not only for charter schools but also for such institutions as the North Carolina School of the Arts and the State School for Sight Impaired Children would have to be struck down as unconstitutional.

Even if Plaintiffs are correct that charter schools are part of the "uniform system," they base their constitutional claims to "uniform" and "equal" access to capital funding on cases that frequently date back to the 19th century and that have long since ceased to be controlling law. Current law regarding constitutional rights to educational opportunity is found in *Leandro*, which established beyond any doubt that North Carolina public school students are *not* entitled to equal funding; they are entitled only to an "opportunity" to obtain a "sound, basic education." Nowhere in their forty-two-page brief do Plaintiffs claim that they are being denied such an opportunity. Plaintiffs make no such claim because they cannot: If the charter schools are not providing the student-Plaintiffs with an opportunity for a sound, basic education, the students can

simply return to their traditional public schools, where they are guaranteed to receive such an opportunity.

The creation and maintenance of the “uniform system” of traditional public schools is all the Constitution requires. The General Assembly has fulfilled that obligation. Every student-Plaintiff, like every other child of school age in the State, has access to a sound, basic education at his or her assigned traditional public school. Unlike most students in North Carolina, however, the student-Plaintiffs also have gained admission to charter schools and have *chosen* not to attend their traditional public schools. For the student-Plaintiffs to now complain that their charter schools are unconstitutionally underfunded is both legally baseless and unseemly.

### ARGUMENT AND LEGAL AUTHORITY

#### **I. THE CHARTER SCHOOL ACT DOES NOT ALLOW LOCAL GOVERNMENTS TO PROVIDE CAPITAL FUNDING TO CHARTER SCHOOLS**

Although they now ask this Court to read the Charter School Act to authorize capital funding for charter schools, Plaintiffs opened this litigation with an unavoidable concession: The Act confers *no* authority on counties to allocate capital outlay funding to charter schools. *See* Compl. ¶ 72. Although Plaintiffs have amended their Complaint to remove that concession<sup>1</sup> and now assert that the statute “*expresses no statement* whether or not counties or local school administrative units may provide to charter schools monies from the capital outlay fund or for other capital purposes” (Am. Compl. ¶ 72 (emphasis added)), the import of the statute remains inescapable. The Act directs that “[i]f a student attends a charter school, the local school

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<sup>1</sup> On April 28, 2010, just days before the hearing on Defendants’ Motions to Dismiss (and more than six months after the original Complaint was filed), Plaintiffs filed and served a First Amended Complaint. The Amended Complaint removed Plaintiffs’ prior concession that the Charter School Act “omits authority” for counties or local school boards to provide capital outlay funding for charter schools and replaced it with the suggestion that it is Defendants’ “interpretation and enforcement scheme” (Am. Compl. ¶ 90; *see also id.* ¶ 75), rather than the language of the Act itself, that deprives charter schools of capital funding.

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. Nowhere in the language of that (or any other) section is there provision for capital expenditure funding for charter schools. Local governments are not directed – and, thus, are not authorized – to provide any other funding whatsoever, capital or otherwise, to charter schools.

The absence of such an express conferral of authority puts an end to Plaintiffs’ statutory argument. It is a fundamental precept of North Carolina law that local units of government can do only what they have been expressly authorized to do by the General Assembly. *See, e.g., Hughey v. Cloninger*, 297 N.C. 86, 88, 253 S.E.2d 898, 900 (1969) (“a county has no power to appropriate funds unless authorized to do so by the General Assembly”); *Harris v. Bd. of Commissioners*, 274 N.C. 343, 346, 163 S.E.2d 387, 390 (1968) (local units of government possess only those “powers and delegated authority as the General Assembly may deem fit to confer upon them”). Plaintiffs’ assertion that “the Constitution also permits *counties* to fund any school properly deemed a public school, without any restriction as to facilities or capital expenses” (Opp. at 23 (emphasis in original)) is simply a misstatement of law: The Constitution does not empower counties to do *anything*; only an express conferral of authority by the General Assembly does so.

Plaintiffs’ citation to article IX, section 7(a) (Opp. at 24) does not advance their argument. That provision directs that all moneys in a county school fund should be “used exclusively for maintaining free public schools.” The courts have interpreted section 7(a) not to confer limitless authority on counties to make funding decisions without authorization from the legislature but instead (as its plain language suggests) to prevent counties from using school

funds for non-school purposes: Section 7(a) is intended to “set aside property and revenue to support the public school system and to prevent the diversion of such property and revenue to other purposes.” *Cauble v. City of Asheville*, 66 N.C. App. 537, 544, 311 S.E.2d 889, 894 (1984), *aff’d*, 314 N.C. 598, 336 S.E.2d 59 (1985). And in all events, contrary to Plaintiffs’ unsupported assertion that “counties require[] [no] authority in addition to the Constitutional authority already existing” (Opp. at 24), the North Carolina courts have made clear that section 7(a) “is not self-executing” but “requires legislation to give it effect and a means for its enforcement.” *N.C. Sch. Bds. Ass’n v. Moore*, 160 N.C. App. 253, 265, 585 S.E.2d 418, 426 (2003), *aff’d in part, rev’d in part on other grounds*, 359 N.C. 474, 614 S.E.2d 504 (2005).

The specific provisions that govern funding for charter schools belie Plaintiffs’ claim that there has not been “a clear determination by the General Assembly that public charter schools are not entitled to receive funding which may be used for facilities or other permissible capital projects.” Opp. at 8. The charter school funding provision (§ 115C-238.29H) spells out precisely which kinds and categories of funding charter schools are eligible to receive. The legislature has clearly determined that they are entitled to the specified funding *and nothing more*.<sup>2</sup> And the courts have agreed: *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ. (Sugar Creek I)* declared that charter schools “are *only* entitled to a *pro rata* share of all money in the local current expense fund” – and are *not* entitled to share in the other appropriations made by the county to the local school board, including monies allocated to

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<sup>2</sup> Plaintiffs make much of the statutory restriction on the State’s authority to provide certain capital expenditure funding to charter schools. See Opp. at 26-27 (quoting N.C. Gen. Stat. §.115C-238.29H(a) (no State funds can be used to obtain interest in real property)); *id.* at 28-29. That argument misses the point: The General Assembly expressly limited the use of State funds for certain capital expenditures because the State has broader discretion to act than do local governments. An explicit *limitation* on the State is necessary to *prevent* funding; explicit *authorization* to the counties is necessary to *allow* the same funding.

special funds and for capital expenditures. 188 N.C. App. 454, 462, 655 S.E.2d 850, 856 (2008) (emphasis added). “[N]ot *all* appropriations from the Board to [the local school board] are included in the current local expense fund and thus subject to apportionment” to charter schools. *Id.* (emphasis in original).

Plaintiffs’ suggestion that the authority to provide capital outlay funding to charter schools is nevertheless somehow lurking in the statutory scheme flatly ignores the text of the Charter School Act.<sup>3</sup> Put simply, because the General Assembly has not authorized counties to provide capital outlay funding to charter schools, no such authority can be found, implied, or read into the Act.

## II. THE NORTH CAROLINA CONSTITUTION DOES NOT MANDATE “EQUALITY” OR “UNIFORMITY” IN CAPITAL OUTLAY FUNDING FOR CHARTER SCHOOLS

Plaintiffs’ three step constitutional argument is, essentially, that (1) all “public” schools in North Carolina are necessarily part of the constitutionally mandated “uniform system of public schools” because the General Assembly can create no other kind of “public” school; (2) because charter schools are labeled “public,” they are *ipso facto* part of the “uniform system” of public schools; and (3) all schools that are part of the “uniform system,” including charter schools, are constitutionally entitled to insist upon “uniformity” of funding – including capital outlay funding. Plaintiffs’ argument misses the mark at every step.

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<sup>3</sup> Plaintiffs’ argument that the statutory “uniform budget format” (and its application to charter schools) somehow reflects or embodies a statutory (if not constitutional) mandate for uniformity, either generally or specifically with respect to funding matters (*see* Opp. at 1, 11, 24-26, 35-36, 41), is nonsensical. As the title of the statute indicates, the “uniform budget *format*” simply directs local boards of education to maintain financial records in a prescribed arrangement. *See* N.C. Gen. Stat. § 115C-426(a) (“The State Board of Education . . . shall cause to be prepared and promulgated a standard budget format for use by local school administrative units throughout the State.”). The statute says nothing, either explicitly or implicitly, about how monies are to be allocated; separate statutory provisions (of particular relevance here, § 115C-238.29H) are expressly directed to funding (as opposed to recordkeeping) issues.

*First*, Plaintiffs insist that the General Assembly is only authorized to create one type of public school: those that are part of the “uniform system.” *See, e.g.*, Opp. at 12-15. Plaintiffs cite no authority for their remarkable argument that the General Assembly’s powers are so limited. To the contrary, it is a fundamental and long-settled principle that the General Assembly’s powers are not *conferred* but only *limited* by the State Constitution. *See, e.g., Baker v. Martin*, 330 N.C. 331, 338-39, 410 S.E.2d 887, 891-92 (1991) (“Unless the Constitution *expressly* or by *necessary implication* restricts the actions of the legislative branch, the General Assembly is free to implement legislation as long as that legislation does not offend some specific constitutional provision.”) (emphasis in original); *Guilford County Bd. of Educ. v. Guilford County Bd. of Elections*, 110 N.C. App. 506, 510, 430 S.E.2d 681, 684 (1993) (“Because the Constitution is a restriction of powers, and those powers not surrendered are reserved to the people to be exercised by their representatives in the General Assembly, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision.”) (citation omitted).

To be sure, the Constitution directs the General Assembly to “provide by taxation and otherwise for a general and uniform system of free public schools.” N.C. CONST. art IX, § 2(1). The General Assembly did precisely that when it created and provided for the funding of the traditional public school system.<sup>4</sup> Nothing in the Constitution, however, *limits*, either expressly or by “necessary implication,” the legislature’s authority to create other public schools outside the “uniform system.” The General Assembly has done that as well, both when it provided for the creation of charter schools as well as when it created other non-traditional public schools

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<sup>4</sup> Notably, Plaintiffs do not argue that the “uniform system” does not exist or is not adequately funded in North Carolina. The uniform system of traditional schools obviously exists, and Plaintiffs make no complaints about it.

such as the North Carolina School of the Arts, the North Carolina School of Science and Mathematics, and the State School for Sight Impaired Children.

*Second*, Plaintiffs insist that because charter schools are considered to be public schools and because the General Assembly can create only one class of schools, charter schools must be part of the general and uniform system. *See* Opp. at 16-20. Plaintiffs' argument on this point (like the other component pieces of their constitutional argument) is entirely unsupported by authority. And it proves too much, as it would call into question the constitutionality of the entire Charter School Act. If charter schools are "the same as traditional public schools," as Plaintiffs suggest (Opp. at 9; *see also id.* at 19 ("[p]ublic charter schools are constitutionally indistinguishable from traditional public schools")), then the special attributes that distinguish them from traditional schools are necessarily unconstitutional. Put another way, if a charter school cannot be treated differently from a traditional public school for capital outlay funding purposes because it is part of the "uniform system," then the charter school cannot be treated differently in terms of ownership, curriculum, teacher selection, or any of the multitude of other defining attributes of public schools within the "uniform system."

Either charter schools are to be treated "uniformly" or they are not. If Plaintiffs truly believe that charter schools must be treated as part of the uniform system, then briefing is necessary to determine whether the entire charter school system must be struck down as unconstitutional. Plaintiffs cannot cherry-pick, however, and claim that some non-uniformity (want of capital funding) is unconstitutional but all other non-uniform aspects are perfectly fine.

*Third*, Plaintiffs posit that all schools in the "uniform system" are constitutionally entitled to equal funding and, therefore, the lack of capital funding for charter schools violates the constitutional rights of the student-Plaintiffs. *See* Opp. at 20. This proposition too is flawed

as a matter of settled law: Even if all “public” schools, including charter schools, are by definition a part of the “uniform system” (which they are not), there is *no* constitutional mandate for “equality” or “uniformity” in capital outlay (or other) funding. *Leandro* foreclosed that argument more than a decade ago.

Plaintiffs are simply wrong that the School Board Defendants and the State read *Leandro* inconsistently. *See* Opp. at 36. All of the Defendants read *Leandro* to say precisely the same thing: Equal funding between and among schools (or school systems) is not constitutionally compelled. Instead, the North Carolina Constitution guarantees students one (relevant) thing, and one thing only: the “opportunity” to obtain a “sound, basic education.” *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997). Plaintiffs do not claim that they are being deprived of that opportunity in their chosen charter schools (and, if such an opportunity were unavailable at the charter school, of course, it remains available at the student’s assigned traditional school).

What Plaintiffs demand, rather than an opportunity for a sound, basic education, is an equal, “uniform” opportunity “to be considered for capital funding.” Opp. at 3; *see also, e.g.*, Opp. at 4 (invoking unspecified “constitutional provisions requiring equality and uniformity in the general system of free public schools”). No such “fundamental” constitutional right exists. Nowhere in the North Carolina Constitution, and nowhere in any decision of any North Carolina court, is it suggested that our Constitution guarantees equality in or access to capital outlay funding. After *Leandro*, in fact, there can be no argument that there is a constitutional right to funding uniformity in any respect.

It must be noted that Plaintiffs’ “uniformity” authorities (Opp. at 30-35) are not relevant. Plaintiffs’ cases interpreted the then-existing construction of the *statutory scheme* for funding

public schools, and the disputes turned on a school's entitlement to demand the statutorily-required per capita (or other) allocation for each student who was *assigned* to attend a public school within the local school administrative unit in which they resided. *See, e.g., Board of Graded Sch. Comm'rs of City of Winston v. Bd. of Educ. of Forsyth County*, 163 N.C. 404, 79 S.E. 886, 887 (1913) (dispute "submitted without action to construe sections 4116 and 4124 of the Revisal of North Carolina" governing appropriation from fund "for building, repairing, and equipping schoolhouses"); *City of Greensboro v. Hodgin*, 106 N.C. 182, 11 S.E. 586, 589 (1890) ("where graded schools are or may be established in regular school-districts, with the sanction of law, and they are required to afford to the children therein substantially the same school opportunities and advantages as do the ordinary public schools, the legislature can provide by statute that the portion of the public school funds, county and state, going to such school-districts, respectively, shall be devoted to the support of such graded schools in the school district where they respectively exist").

Finally, it bears repeating that Plaintiffs' continual complaints about lack of "uniformity" and "equality" (*e.g.*, *Opp.* at 4) miss the simple and inarguable fact that the student-Plaintiffs have available to them precisely the same opportunity made available to every other child of school age in this State: the opportunity to attend their traditional "uniform" public schools, at which they are guaranteed by our Constitution to be offered an opportunity to obtain a sound, basic education – and at which their parents' tax dollars (*Opp.* at 3, 4) will be used to pay for the school's capital expenditures. That inarguable fact belies Plaintiffs' constant refrain that the Defendants believe the student-Plaintiffs have no constitutional rights. *See, e.g., Opp.* at 3 (ascribing to Defendants the view that "North Carolina's public charter school students are not constitutionally protected"). In fact, the student-Plaintiffs have precisely the same right as every

other school-age child in North Carolina (but no more): the right to an opportunity to obtain a sound, basic education in the traditional public schools. There is no allegation that the student-Plaintiffs are being denied that right at their charter schools. But even if Plaintiffs were to make such an allegation, the fact remains that the student-Plaintiffs have the same access to their traditional public schools as every other student in the State.<sup>5</sup>

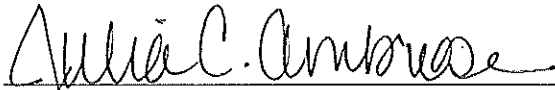
### CONCLUSION

For the reasons above as well as those set forth in the School Board Defendants' Memorandum of Law in support of their Motion to Dismiss, the School Board Defendants respectfully request that the Court dismiss Plaintiffs' First Amended Complaint for failure to state a claim upon which relief can be granted.

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<sup>5</sup> Plaintiffs' equal protection arguments (Opp. at 38-40) are groundless for that very reason, as more fully explained in the School Board Defendants' opening brief (at pp. 16-17). The North Carolina Constitution guarantees *only* an equal opportunity to obtain a sound, basic education in the public schools, *Leandro*, 346 N.C. at 345, 488 S.E.2d at 254, and that opportunity remains fully available to the student-Plaintiffs on precisely equal footing with every other school-age child in North Carolina. Put simply, there is no "unequal" treatment at all.

Respectfully submitted, this the 30th day of April, 2010.



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**CERTIFICATE OF SERVICE**

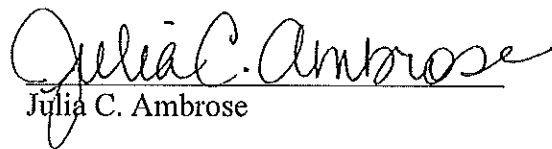
The undersigned hereby certifies that a copy of the foregoing **REPLY IN SUPPORT OF SCHOOL BOARD DEFENDANTS' MOTION TO DISMISS** was served upon all parties listed below by depositing a copy thereof in the United States Mail, first-class, postage pre-paid, addressed as follows:

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This the 30th day of April, 2010.

  
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