

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. )

**BRIEF IN SUPPORT OF DEFENDANT  
STATE OF NORTH CAROLINA'S  
MOTION TO DISMISS**

**INTRODUCTION**

Article IX, section 2 of the North Carolina Constitution requires the General Assembly to create a uniform system of free public schools (hereafter "the Uniform System") that is available to every child in North Carolina. The General Assembly has done so - establishing a general and uniform public school system operating through local school districts that has been in existence for the past 140 years.

Fourteen years ago, the General Assembly enacted legislation authorizing the provision of limited public funding to a set of experimental schools known as charter schools. The General Assembly intended these charter schools to be experiments in education in which an applicant would apply for a charter that - if granted - would authorize a private, nonprofit corporation to receive limited public money to be used for the purpose of operating a school free from much of the governmental oversight applicable to public schools operated by local school boards. Since that time, pursuant to the General Assembly's plan, the State Board of Education has issued a limited number of charters to private corporations to operate charter schools in North Carolina.

The State creates, administers, and funds charter schools differently from traditional public schools (hereafter "Uniform Public Schools") that are part of the constitutionally mandated Uniform System. Charter schools are not operated by the State or by local school boards but rather by the board of directors of a private corporation. The corporation hires teachers and staff, determines the curriculum and policies of the school, and controls the day-to-day functioning of the school. This private organizational structure permits charter schools to provide a different type of learning experience flowing from those unique and non-traditional features that the corporation desires to implement in its charter schools. This is in direct contrast to Uniform Public Schools, which are strictly governed by local school boards subject to the uniformity mandated by the General Statutes and the policies of the State Board of Education.

The statutes authorizing charter schools allow them to receive two of the three categories of funding available to the Uniform Public Schools. The only source of money available to schools in the Uniform System that is not available to charter schools is the capital outlay fund, which is used to purchase buildings and is allocated by local school boards for the Uniform Public Schools within their districts.

In this lawsuit, Plaintiffs (1) demand a declaration that charter schools are entitled to receive *all* of the funds available to Uniform Public Schools despite the General Assembly's clearly expressed intent that charter schools receive only certain specified categories of funding; and (2) simultaneously seek to maintain the exemption that they (unlike Uniform Public Schools) enjoy from the strict control by the General Assembly, State Board of Education and local school boards over fundamental aspects of school operation. In short, Plaintiffs seek to have their cake and eat it too.

As shown below, Plaintiffs' legal arguments lack merit. For the same reasons that charter schools can constitutionally be exempted from curriculum-related and other constraints imposed on Uniform Public Schools, charter schools can likewise be lawfully exempted from eligibility for capital funding. Plaintiffs' arguments are, in actuality, simply an expression of dissatisfaction with the policy choice made by the General Assembly on this subject.

### **STATEMENT OF THE CASE AND FACTS**

Plaintiffs<sup>1</sup> filed this declaratory judgment action pursuant to N.C. GEN. STAT. § 1-253. The Complaint names as Defendants the State of North Carolina (hereafter "the State") along with several local school boards and counties. All of the Defendants have filed motions to dismiss. The State now submits the present memorandum of law in support of its Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

### **OVERVIEW OF CHARTER SCHOOLS IN NORTH CAROLINA**

Charter schools are publicly funded, locally controlled educational institutions free from most governmental constraint. They are created by statute and are run by private bodies. They were originally envisioned as educational laboratories that could test new methods of instruction and provide a much-needed complement to traditional public education . . . [C]harter schools' primary appeal is their freedom from traditional state controls . . .

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<sup>1</sup> While the Complaint purports to include several charter schools as named Plaintiffs, it is important to note that the real parties in interest in this lawsuit are not the schools themselves (which are not legal entities) but rather the private corporations that operate these schools. Under the laws establishing charter schools in North Carolina, only the board of directors of a charter school (a private body) is given the capacity to sue and be sued. *See* N.C. GEN. STAT. § 115C-238.29F(c)(1). Thus, this lawsuit, properly characterized, is a demand by the governing boards of a group of private corporations for more public money than they are entitled to receive pursuant to the terms of the charters they applied for and were issued.

Comment, *Charter Schools and Education Reform: How State Constitutional Challenges Will Alter Charter School Legislation*, 79 N.C. L. REV. 493, 494-95 (2001).

Chapter 115C of the North Carolina General Statutes contains over 500 statutes that are binding in all respects on Uniform Public Schools in North Carolina. Conversely, the operation of charter schools is governed by a separate group of eleven statutes that comprise a small and discrete subset of Chapter 115C. These eleven statutes are contained in Article 16, Part 6A of Chapter 115C and are codified as N.C. GEN. STAT. §§ 115C-238.29A- K.<sup>2</sup> The Charter School Statutes provide in pertinent part as follows:

*Except as provided in this Part and pursuant to the provisions of its charter, a charter school is exempt from statutes and rules applicable to a local board of education or local school administrative unit.*

N.C. GEN. STAT. § 115C-238.29E(f) (emphasis added). Thus, except where otherwise expressly noted in the Charter School Statutes,<sup>3</sup> the private corporations that operate charter schools are exempted from compliance with the remaining hundreds of statutes contained in Chapter 115C.

Charter schools are formed when an applicant submits an application for a charter containing certain specified information about the proposed school. N.C. GEN. STAT. § 115C-238.29B. Assuming that (1) one of the statutorily authorized charters is available; (2) the State Board of Education finds the application worthy; and (3) the State Board of Education grants the applicant a charter, the private nonprofit corporation may then operate its school as a charter school. N.C. GEN. STAT. § 115C-238.29E(b). The charter is statutorily limited to a period of no longer than ten years

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<sup>2</sup> These eleven statutes are hereafter collectively referred to as “the Charter School Statutes.”

<sup>3</sup> For example, N.C. GEN. STAT. § 115C-238.29F(d)(5) states that charter schools are subject to the five statutes contained in Article 27 of Chapter 115C dealing with student discipline.

at which point the chartering entity may apply for renewal of the charter. N.C. GEN. STAT. § 115C-238.29D(d). The charter can be revoked, or not renewed, for any of the reasons set out in N.C. GEN. STAT. § 115C-238.29G(a).

Enrollment of a child in a charter school is purely voluntary. *See* N.C. GEN. STAT. § 115C-238.29F(g)(2). Limits exist on the number of charter schools that can be approved; no more than 100 charter schools are allowed statewide. N.C. GEN. STAT. § 115C-238.29D(b). Limitations also exist on the ability of a charter school's board of directors to increase the school's student population. N.C. Gen. Stat. § 115C-238.29D(d). In cases where the number of applications for admission to a charter school exceeds the number of available slots, students are admitted randomly by lot. N.C. Gen. Stat. § 115C-238.29F(g)(6).

By statute, neither the State Board, any other chartering entity, nor any of their members or employees can be held liable for any acts or omissions of a charter school. N.C. GEN. STAT. § 115C-238.29F(c)(2). Instead, the private corporation that holds the charter is expressly given the capacity to be sued. N.C. GEN. STAT. § 115C-238.29F(c)(1).

The General Assembly has further mandated that “[n]o indebtedness of any kind incurred or created by the charter school shall constitute an indebtedness of the State or its political subdivisions, and no indebtedness of the charter school shall involve or be secured by the faith, credit, or taxing power of the State or its political subdivisions.” N.C. GEN. STAT. § 115C-238.29H(a1).

Teachers for a charter school are hired by the school's board of directors and may be terminated by that board. N.C. GEN. STAT. § 115C-238.29F(e)(1). By statute, only a certain specified subset of a charter school's teachers must hold teacher certificates, and not every teacher at a charter school is required to be a college graduate. *Id.* Employees of a charter school are not

deemed to be employees of the local school board for the district in which the charter school is physically located. *Id.*

## ARGUMENT

In their Complaint, Plaintiffs essentially make two contentions. First, they argue that the statute governing funding for charter schools (N.C. GEN. STAT. § 115C-238.29H) should be construed as rendering them eligible to receive capital funding. Second, they argue, in the alternative, that a contrary construction of this statute would be unconstitutional. For the reasons set out below, each of these contentions fails as a matter of law.

### **I. THE GENERAL ASSEMBLY HAS NOT AUTHORIZED CHARTER SCHOOLS TO RECEIVE CAPITAL FUNDING.**

The General Assembly has mandated differing funding approaches for Uniform Public Schools and charter schools. An examination of the differences in the funding statutes for these two categories of schools demonstrates the legal invalidity of Plaintiffs' statutory interpretation argument.

#### **A. FUNDING FOR THE UNIFORM PUBLIC SCHOOLS.**

By statute, the Uniform Public Schools receive funding from three sources: (1) the State Public School Fund; (2) the local current expense fund; and (3) the capital outlay fund. N.C. GEN. STAT. § 115C-426(c)(1)-(3).

The State Public School Fund consists of monies provided to local school administrative units by the State Board of Education. N.C. GEN. STAT. § 115C-426(d). The "local current expense fund" consists of money from several sources, including county supplemental school taxes and county budgetary appropriations. *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), *disc. review denied*, 356 N.C. 670, 577 S.E.2d 117 (2003). Finally, capital outlay funding consists of funding by counties for facilities and capital improvements such as real property, buildings, furniture, and school buses. *See* N.C. GEN. STAT. § 115C-426(f).

North Carolina General Statute § 115C-429 sets out the budget process applicable to the Uniform Public Schools. Every year, each local school board drafts a budget containing its cost estimates for the upcoming year for providing educational services within its jurisdiction. The school board then submits that budget to its local board of county commissioners. N.C. GEN. STAT. § 115C-429(a). At that point, the board of county commissioners determines the amount of funds it will appropriate to the school board for that budget year. N.C. GEN. STAT. § 115C-429(b). If the school board is dissatisfied with the amount of the county's proposed appropriation, a statutory mediation process is provided for. N.C. GEN. STAT. § 115C-431(a)-(b). In the event that a dispute still remains after mediation, the school board may file a lawsuit against the county in superior court to secure the funding it deems necessary. N.C. GEN. STAT. § 115C-431(c).

#### **B. FUNDING FOR CHARTER SCHOOLS.**

The General Assembly's statutory funding mechanism regarding charter schools is contained in N.C. GEN. STAT. § 115C-238.29H. Pursuant to that statute, the General Assembly has provided charter schools with only two sources of public funding.

First, the State Board of Education must allocate to each charter school "[a]n 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..."

N.C. GEN. STAT. § 115C-238.29H(a)(1).<sup>4</sup> Second, the local school board for the county in which a charter school student resides must give 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). These two categories of funding are identical to the first two types of funding available to the Uniform Public Schools under N.C. GEN. STAT. § 115C-426 (as described above).

These are the *only* two types of funding the General Assembly has authorized for charter schools. Conspicuously absent from N.C. GEN. STAT. § 115C-238.29H is any indication whatsoever that charter schools are eligible to receive the third type of funding available to the Uniform Public Schools – capital funding. To the contrary, N.C. GEN. STAT. § 115C-238.29D(c) reinforces the notion that charter schools are not meant to receive capital funding by making clear that an applicant for a charter is responsible for obtaining space, equipment, and facilities for the school.

In their Complaint, *Plaintiffs admit that no statutory authority exists for charter schools to receive capital funding.* (See, e.g., Compl., ¶¶ 71-72) Given that admission, it is unclear how Plaintiffs can nevertheless proceed to ask this Court to interpret the statutes at issue as authorizing such funding. In any event, for the reasons set out below, even if Plaintiffs had not made such an admission, the interpretation sought by them is inconsistent with well settled North Carolina law.

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<sup>4</sup> Additional amounts must be allocated by the State Board for charter school students with disabilities and limited proficiency in English. N.C. GEN. STAT. § 115C-238.29H(a)(2)-(3).

**C. BECAUSE THE GENERAL ASSEMBLY HAS MADE CLEAR THAT CHARTER SCHOOLS CANNOT RECEIVE CAPITAL FUNDING, COUNTIES DO NOT POSSESS THE LEGAL AUTHORITY TO PROVIDE SUCH FUNDING TO THEM.**

The seminal case establishing the inability of counties to allocate money for a purpose not authorized by the General Assembly is the Supreme Court's decision in *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979). In *Hughey*, a taxpayer challenged the county's appropriation of money to a nonprofit school treating students with dyslexia on the ground that no statutory authority existed for the county's appropriation. The Supreme Court began its analysis by setting out the well-established limits on a county's ability to appropriate funds:

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.

*Id.* at 88, 253 S.E.2d at 900. As the Court noted, this rule stems from the basic tenet that counties are merely "creatures of the General Assembly and constituent parts of the State government," possessing only those powers the Legislature has conferred upon them. *Id.*

In applying this principle, the Court concluded that the county in *Hughey* lacked sufficient legal authority to allocate funds for the nonprofit school. While the county contended that its appropriation of funds was authorized by a statute allowing the use of county funds for a sheltered workshop or other private charitable organizations providing training to handicapped persons, the Court rejected this request for a broad interpretation of that statute. The Supreme Court held that the types of health problems contemplated by that statute were materially different from those associated with dyslexic children. *Id.* at 88-91, 253 S.E.2d at 900-01. The Court further ruled that a pair of separate statutes authorizing appropriations for public assistance or social service programs

similarly failed to constitute adequate legislative authorization for the challenged appropriation. *Id.* at 92-93, 253 S.E.2d at 902-03.

The Supreme Court concluded that a “board of county commissioners, absent statutory authority, cannot on its own initiative devise and fund programs for the school system.” *Id.* at 94, 253 S.E.2d at 903. Instead, “county commissioners are delegated the power to fund only those school-related programs proposed by the board of education.” *Id.*

It is well established that the role of the board of county commissioners in the funding of the school budget is not to interfere with the general control of the schools vested in the board of education . . . Thus, under the scheme for public education devised by the General Assembly, the board of commissioners is empowered to appropriate funds only for items that are included by the board of education in its annual school budget.

*Id.* See also *Watauga County Bd. of Educ. v. Town of Boone*, 106 N.C. App. 270, 416 S.E.2d 411 (1992) (resolution by town council agreeing to appropriate funds to county school board was unenforceable because such appropriations were outside the statutory authority of towns in North Carolina).

A plain reading of N.C. GEN. STAT. § 115C-238.29H demonstrates that the General Assembly has consciously omitted capital funding as a permissible source of funds for charter schools. North Carolina recognizes the statutory interpretation doctrine of *inclusio unius est exclusio alterius*, meaning that the “inclusion of one is exclusion of another.” *In Re Spivey*, 345 N.C. 404, 412, 480 S.E.2d 693, 697 (1997). The present case presents a textbook application of that doctrine.

Two categories of funding for charter schools are expressly listed in N.C. GEN. STAT. § 115C-238.29H. Had the General Assembly wanted charter schools to receive an *additional* category of monies (such as capital funding) that are available to schools in the Uniform System, it

could have easily added language to this effect in the statute. Because the General Assembly did not add any additional funding sources for charter schools in N.C. GEN. STAT. § 115C-238.29H, however, this omission is deemed to have been deliberate. *See Bd. of Educ. of Buncombe County v. Walter*, 198 N.C. 325, 330, 329-30, 151 S.E. 718, 720-21 (1930) (applying *inclusio unius est exclusio alterius* doctrine to reject county's argument that statute at issue encompassed board of education despite the law's failure to mention the board; "If intended to apply to the board of education, how easily so important a function of government as the school system could have been mentioned.").

It is also worth noting that the Charter School Statutes have now been in existence for fourteen years and have been amended on several occasions. Had the General Assembly wanted to reverse its original decision that charter schools be ineligible to receive capital funding, it could have done so at any time. Moreover, on April 15, 1998, the North Carolina Attorney General's Office issued an advisory opinion stating that boards of county commissioners lack the legal authority to appropriate funds to charter schools for capital outlay projects. (*See Ex. A*) Once again, the General Assembly could easily have amended the Charter School Statutes if it disagreed with this advisory opinion, but it has not enacted any such amendment.

In sum, based on the clear omission of capital funding from N.C. GEN. STAT. § 115C-238.29H, as well as the language in N.C. GEN. STAT. § 115C-238.29D(c) stating that an applicant for a charter is responsible for obtaining space, equipment, and facilities for the school, the General Assembly has not authorized charter schools to receive capital funding. Based on the unambiguous ruling in *Hughey v. Cloninger*, the absence of such authorization means that counties cannot appropriate capital funds to the private corporations who operate charter schools.

Because the General Assembly's policy decision on this subject is well within its legislative discretion, it is entitled to deference. *See Mebane Graded Sch Dist., et al v. Alamance County*, 211 N.C. 213, 223, 189 S.E.2d 873, 880 (1937) (noting that the financing of public schools is in the discretion of the General Assembly). *See also City of Asheville v. State*, 192 N.C. App. 1, 43-44, 665 S.E.2d 103, 132-33 (2008) (“[I]t is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures . . . [J]udges have not been entrusted by the people of this State to be legislators.”), *disc. review denied and appeal dismissed*, 363 N.C. 123, 672 S.E.2d 685 (2009).

**II. NOTHING IN THE NORTH CAROLINA CONSTITUTION PROHIBITS THE GENERAL ASSEMBLY FROM MAKING A POLICY DECISION THAT CHARTER SCHOOLS ARE INELIGIBLE TO RECEIVE CAPITAL FUNDING.**

**A. LEGISLATIVE ENACTMENTS IN NORTH CAROLINA ARE PRESUMED TO BE CONSTITUTIONAL.**

A bedrock principle of North Carolina law is the strong presumption that enactments of the General Assembly are constitutional. Courts must resolve all doubts in favor of the constitutionality of a legislative act. *In re Denial of Approval to Issue \$30,000,000.00 of Single Family Housing Bonds*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982). “[A] statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground.” *Guilford County Bd. of Educ. v. Guilford County Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993). In cases where two different interpretations of a law are possible, one being constitutional and the other being unconstitutional, a court must adopt the former and not the latter. *Wayne County Citizens Ass’n for Better Tax Control v. Wayne County Bd. of Comm’rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991).

Our Supreme Court has emphasized that courts “have no power to review a statute with respect to its political propriety as long as it is within the legislative discretion and has a reasonable relation to the end sought to be accomplished.” *Greensboro-High Point Airport Auth. v. Johnson*, 226 N.C. 1, 8, 36 S.E.2d 803, 809 (1946). “It is not the role of this Court to pass judgment on the wisdom and expediency of a statute.” *Emerald Isle v. State*, 320 N.C. 640, 647, 360 S.E.2d 756, 761 (1987).

**B. THE GENERAL ASSEMBLY’S DETERMINATION AS TO THE APPROPRIATE METHOD FOR FUNDING CHARTER SCHOOLS IS FULLY CONSTITUTIONAL.**

If, as Plaintiffs contend, charter schools were constitutionally entitled to receive capital funding simply because the Uniform Public Schools receive such funding, then the logical implication of that argument would be that charter schools must be treated like the Uniform Public Schools *in all other respects as well*. However, such a notion is contrary to the General Assembly’s entire rationale for allowing charter schools to exist in the first place – as a means of providing experimental educational opportunities *independent of* the Uniform System. For the same reasons that charter schools can constitutionally be exempted from curriculum requirements, teacher tenure, and a host of other obligations that are binding on the Uniform Public Schools, so too can they be funded differently.

**1. Nothing in the North Carolina Constitution Prohibits the General Assembly from Creating Experimental Schools as an Alternative to the Uniform System.**

The provision of the North Carolina Constitution establishing the Uniform System is article IX, section 2(1), which states in pertinent part that “[t]he 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).

The General Assembly has complied with this constitutional mandate by creating the Uniform System – a system of public schools in each of the 117 local school administrative districts, controlled by local school boards subject to strict compliance with the myriad of statutes contained in Chapter 115C and with State Board of Education policies. *See, e.g.*, N.C. GEN. STAT. § 115C-1 (requiring uniform system of free public schools throughout State); N.C. GEN. STAT. § 115C-66 (schools in uniform system are under supervision and control of county, or city, boards of education, headed by superintendent). The constitutional adequacy of this Uniform System has been recognized by our appellate courts. *See Guilford County Bd. of Educ. v. Guilford County Bd. of Elections*, 110 N.C. App. 506, 516, 430 S.E.2d 681, 688 (1993) (“North Carolina presently has an overall uniform statewide school system as is required by its Constitution.”).

In this lawsuit, Plaintiffs are not challenging the constitutional validity of North Carolina’s Uniform System. Rather, they are making the entirely different argument that the North Carolina Constitution forbids the General Assembly from creating an optional set of experimental schools that are funded differently than the Uniform Public Schools. This argument is incorrect for several reasons.

In asserting this contention, Plaintiffs misunderstand the expansive scope of the General Assembly’s constitutional authority as set out in the North Carolina Constitution.

Unlike the federal Constitution, which is a grant of power to Congress, the . . . [North Carolina] Constitution is a limitation or restriction on the powers of the Legislature. *Thus, the courts do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited.* Further, [i]f there is any doubt as to the Legislature’s

power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used. Consequently, *the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms.*

*Baker v. Martin*, 330 N.C. 331, 338, 410 S.E.2d 887, 891 (1991) (citation and quotation marks omitted and emphasis added).

Thus, the General Assembly is free to enact a law on any subject unless doing so is directly prohibited by a specific provision of the Constitution. There is no language in the Constitution prohibiting the creation of experimental public schools or providing that the General Assembly can establish such schools only if they are made part of the Uniform System. Rather, the Constitution is satisfied as long as every student in this State retains the right to attend a school in the Uniform System, a right which Plaintiffs do not – and cannot – contend has been denied.

Several conclusions logically follow from these principles: First, there is no constitutional impediment to the General Assembly's ability to establish charter schools. Second, since there is no requirement that the General Assembly create charter schools in the first place, there is certainly no requirement that the General Assembly include them in the Uniform System or that the General Assembly fund them a certain way. Third, because charter schools are not mentioned in the North Carolina Constitution, no one can possess a constitutional right to receive a charter to operate a school. Fourth, if there is no constitutional right to receive a charter at all, then there can likewise be no constitutional right to receive capital funding to support the operation of a school once a charter has been issued.

Charter schools are purely creatures of the General Assembly and, for this reason, the General Assembly has complete discretion as to how such schools shall operate and how they are to be funded. As such, the policy decisions of the General Assembly on this subject must be accorded deference.

Furthermore, it is important to note that Plaintiffs' logic – if adopted – would have the perverse effect of rendering unconstitutional the provisions of the Charter School Statutes exempting charter schools from compliance with the requirements in Chapter 115C that are binding on the Uniform Public Schools. Either the General Assembly has the constitutional authority to create an optional and experimental set of schools such as charter schools that are governed by a separate set of rules or it does not. The implicit foundation of Plaintiffs' argument is that the General Assembly does not have this power.

Plaintiffs, however, ignore this fact, seeking instead to have their cake and eat it too by *preserving* the freedom that they (unlike the Uniform Public Schools) enjoy from compliance with the bulk of Chapter 115C while simultaneously demanding that their funding be *identical* to that received by the Uniform Public Schools. Such an argument is internally inconsistent. Plaintiffs simply cannot explain how it can be constitutional for charter schools (but not Uniform Public Schools) to be exempt from strict control over their operation by the State (and its political subdivisions) yet somehow be unconstitutional for those same charter schools to be funded differently than Uniform Public Schools. Charter schools cannot choose to be part of the Uniform System when it suits their purposes but outside that Uniform System when it does not.

## 2. Charter Schools Are Not Part of the Uniform System.

As shown above, there is no constitutional restriction on the General Assembly's authority to establish a set of experimental schools that operate outside the Uniform System. This is precisely what the General Assembly has done in authorizing charter schools.

Charter schools do not meet the criteria articulated by our appellate courts in defining the constitutionally mandated Uniform System:

[I]t is to be a "system"; it is to be "general," and it is to be "uniform." It is not to be subject to the caprice of localities, but *every locality, yea, every child, is to have the same advantage and be subject to the same rules and regulations.*

*Lane v. Stanly*, 65 N.C. 153, 157-58 (1871) (emphasis added).

The Supreme Court further explained the meaning of the term "uniform" in this context in *Bd. of Educ. v. Bd. of Commiss'rs*, 174 N.C. 469, 473, 93 S.E. 1001, 1002 (1917). In that case, the Court ruled that the requirement of uniformity is "sufficiently complied with where . . . provision is made for establishment of 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." *Id.* (emphasis added). The Court likewise established that such schools are "*under the regulation and control of the public-school authorities . . .*" *Id.* (emphasis added)

Charter schools do not possess these defining characteristics of Uniform Public Schools. First, charter schools are *not* subject to the same rules and regulations as Uniform Public Schools. As noted above, charter schools are expressly exempted from literally hundreds of statutes in Chapter 115C that are binding on the Uniform System. Among the numerous subjects addressed by statutory provisions in Chapter 115C that are binding on all of the Uniform Public Schools but to which

charter schools are exempted are the following: (1) standard course of study and curriculum requirements (N.C. GEN. STAT. §115C-81); (2) teacher tenure provisions (N.C. GEN. STAT. §115C-325); (3) procedures for hiring school administrators (N.C. GEN. STAT. §115C-287.1); and (4) procedures for teacher evaluations (N.C. GEN. STAT. §115C-333). For the same reasons that the General Assembly has the constitutional authority to allow the corporations who operate charter schools to make their own decisions on these fundamental aspects of the schools' operation, the General Assembly is likewise empowered to prohibit such corporations from receiving capital funds.

Moreover, this is merely a representative list. There are many additional provisions in Chapter 115C that simply do not apply to charter schools. As a commentator has noted, this type of flexibility is the hallmark of a charter school:

[F]reedom from curricular control allows charter schools more flexibility to determine the substance of its students' education. Charter schools are not required to follow state-mandated unit plans or to coordinate their textbooks with the state department of public instruction.

*See Comment, Charter Schools and Education Reform: How State Constitutional Challenges Will Alter Charter School Legislation, 79 N.C. L. REV. 493, 514 (2001).*

Furthermore, the curriculum and rules applicable to one charter school can differ markedly not only from those of the Uniform Public Schools, but also from those of other charter schools. For all of these reasons, it simply cannot be said that charter schools and the Uniform Public Schools are "subject to the same rules and regulations." *See Lane, 65 N.C. at 158.*

Second, charter schools are operated on a day-to-day basis *not* by a local school board or by the State Board of Education, but rather by the board of directors of the *private* corporation that has obtained the charter. *See N.C. GEN. STAT. § 115C-238.29E(d)* ("The board of directors of the

charter school shall decide matters related to the operation of the school, including budgeting, curriculum, and operating procedures.”). As shown above, fundamental decisions about the school and the quality of the education received by its students are made by private actors rather than by the public bodies who control every aspect of the Uniform Public Schools’ operation. Local school boards – which administer the Uniform System – lack any semblance of day-to-day oversight over the operation of charter schools. As long as a charter school continues to operate in compliance with the conditions of its charter and with the Charter School Statutes, the entity issuing the charter has no involvement in its actual operations.<sup>5</sup>

Third, as noted above, our appellate courts have held that the term “uniform” in article IX, section 2(1) means that “a statewide system [must] be established and *made available to all children in North Carolina.*” *Guilford County*, 110 N.C. App. at 515, 430 S.E.2d at 687 (emphasis added). While every child in North Carolina has the right to attend a Uniform Public School, the vast majority of students in North Carolina are *not* able to attend a charter school – even if they desire to do so. The Charter School Statutes do not require that a charter school be located in every county or, for that matter, in every area of the State. North Carolina General Statute § 115C-238.29D(b) provides that there can be no more than one hundred charter schools statewide authorized by the State Board of Education, and the Charter School Statutes do not set out a minimum number of charter schools that must be approved. Moreover, because there is no requirement that such schools be located in (or even in close proximity to) every county in North

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<sup>5</sup> The charter school’s board of directors is accountable to the chartering entity *only* to ensure compliance with the Charter School Statutes and the fulfillment of the conditions specified in the charter itself. *See* N.C. GEN. STAT. § 115C-238.29E(a).

Carolina, the locations of charter schools can be dictated to a great extent by the geographic choices made by the private corporations that apply for a charter.

Limitations also exist on the ability of a charter school to increase the school's student population. N.C. GEN. STAT. § 115C-238.29D(d). In addition, where the number of applications for admission to a charter school exceeds the number of available slots, students are admitted randomly by means of a lottery. N.C. GEN. STAT. § 115C-238.29F(g)(6).

The effect of these statutory provisions is that only a small fraction of the children in North Carolina can actually attend charter schools. This is in direct contrast to the Uniform System, which is legally required to make room for every student in North Carolina who wishes to attend a Uniform Public School.

Other aspects of the Charter School Statutes likewise demonstrate that charter schools were never intended to be part of the Uniform System. Most basically, North Carolina General Statute § 115C-238.29A, which sets out the purposes underlying the creation of charter schools, expressly states that charter schools "*operate independently of existing schools.*" N.C. GEN. STAT. § 115C-238.29A (emphasis added). Other statutory provisions compel this same conclusion by drawing clear distinctions between charter schools and Uniform Public Schools. For example, the General Assembly has provided that the acts or omissions of a charter school cannot subject the State Board of Education, any other chartering entity, or any of their members or employees to civil liability. N.C. GEN. STAT. § 115C-238.29F(c)(2). Likewise, by statute, any indebtedness incurred by a charter school cannot be deemed to be an indebtedness of the State or its political subdivisions. N.C. GEN. STAT. § 115C-238.29H(a1). None of these statutory provisions would make sense if charter schools were intended to be part of the Uniform System.

Finally, it is important to note that charter schools are merely one example of experimental public schools created by the General Assembly for the purpose of offering unique educational opportunities. Examples of additional special schools in this category that receive taxpayer funds (and are, therefore, classified as “public schools”) yet are not considered part of the Uniform System include the North Carolina School of Science and Mathematics (hereafter “the School of Science and Math”) (N.C. GEN. STAT. § 116-230.1 *et seq.*), the North Carolina School of the Arts (N.C. GEN. STAT. § 116-63, *et seq.*), the State School for Sight Impaired Children (N.C. GEN. STAT. § N.C. GEN. STAT. § 143B-164.10 *et seq.*), and the State School for Hearing-Impaired Children ( N.C. GEN. STAT. § 143B-216.40 *et seq.*).

All of these schools (like charter schools) represent legislative efforts to provide specialized and creative alternatives to the Uniform System. They are all characterized as “public” rather than “private” because they receive public funds. This classification, however, does not change their purely experimental nature or somehow make them part of the Uniform System. Like charter schools, they are exempt from the standardized curriculum requirements and a myriad of other regulations set out in Chapter 115C to which Uniform Public Schools are required to follow. Moreover, these other experimental schools, like charter schools, do not exist in every county and are not available to every child in North Carolina.<sup>6</sup>

By Plaintiffs’ logic, the School of Science and Math, for example, would presumably be entitled to receive capital funding from Durham County because the school is physically located in Durham. Obviously, this is not the case. Rather, because the School of Science and Math (like the

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<sup>6</sup> Indeed, charter schools are even further removed from the Uniform System than the other examples of experimental public schools listed above since those entities are operated by public bodies while, conversely, charter schools are run by private corporations.

other examples listed above) exists solely as a matter of legislative discretion, it can be operated and funded any way the General Assembly sees fit. The same is true for charter schools. Unlike the constitutionally mandated Uniform System, charter schools, the School of Science and Math, and the other experimental schools mentioned above could be abolished by the General Assembly any time it wishes without implicating article IX, section 2(1) of the Constitution.

**C. THE INELIGIBILITY OF CHARTER SCHOOLS TO RECEIVE CAPITAL FUNDING IS NEITHER ARBITRARY NOR CAPRICIOUS.**

In their remaining claims for relief, Plaintiffs assert that the difference in the funding mechanisms for Uniform Public Schools and charter schools is arbitrary and capricious as well as a denial of the right to an equal opportunity for a sound, basic education. Most basically, these arguments fail because, as discussed in detail above, charter schools are not part of the Uniform System and are instead entirely optional – for the students who choose to attend them, for the teachers who choose to teach at them, and for the private corporations who choose to apply for charters to operate them. Accordingly, any student who believes that a school's receipt of capital funding out of public monies is necessary in order to provide an equal opportunity for a sound, basic education to students is free to attend a Uniform Public School rather than to apply for admission to a charter school.

Furthermore, it is important to note that even if charter schools were somehow deemed to be part of the Uniform System, Plaintiffs' claims would still lack merit because they simply cannot demonstrate that the General Assembly's decision to exempt charter schools from eligibility for the receipt of capital funding was arbitrary or capricious.

**1. Sound Reasons Exist for Deeming Charter Schools Ineligible to Receive Capital Funding.**

In asserting an “arbitrary and capricious” claim, Plaintiffs are apparently relying on the following language from *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997):

Because we conclude that the General Assembly, under Article IX, Section 2(1), has the duty of providing the children of every school district with *access* to a sound basic education, we also conclude that it has inherent power to do those things reasonably related to meeting that constitutionally prescribed duty. This power would include the power to create a supplemental state funding program which has as its purpose the provision of additional state funds to poor districts so that they can provide their students access to a sound basic education. However, a funding system that distributed state funds to the districts in an arbitrary and capricious manner unrelated to such educational objectives simply would not be a valid exercise of that constitutional authority and could result in a denial of equal protection or due process.

*Id.* at 353, 488 S.E.2d at 258 (emphasis added).

This language has no application here. Unlike *Leandro*, the present case is not concerned with *access* to a sound, basic education. As explained above, every single student enrolled in a charter school can transfer to a Uniform Public School – which receives capital funding and is subject in every respect to the requirements of *Leandro* – any time he or she wishes. Accordingly, the Charter School Statutes (including the funding provisions therein) have nothing to do with the type of access to a sound, basic education that was the focus of *Leandro*.

Nor does the present case involve the issues which consumed the *Leandro* decision concerning the problem of lesser school funding in poor counties as opposed to affluent counties. The issue raised by Plaintiffs in the present lawsuit has nothing to do with the relative wealth of the various counties in which charter schools are located. Rather, the issue raised in the Complaint is

whether charter schools, wherever they may be located, have a constitutional right to be eligible for capital funding simply because Uniform Public Schools are eligible for such funding.

In any event, Plaintiffs' claims are further doomed by the fact that they cannot make a credible argument that the General Assembly's decision here was arbitrary or capricious. "A [legislative] decision is arbitrary and capricious if it was patently in bad faith, whimsical, or if it lacked fair and careful consideration." *Summers v. City of Charlotte*, 149 N.C. App. 509, 518, 562 S.E.2d 18, 25 (quotations omitted), *disc. review denied*, 355 N.C. 758, 566 S.E.2d 482 (2002).

There are a number of valid reasons supporting the General Assembly's decision that charter schools are not entitled to capital funding. First, and perhaps most fundamentally, the private control exercised over charter schools is incompatible with the provision of capital funding to them; counties would be giving taxpayer money to a private corporation for the direct purpose of funding the acquisition of a building.

The North Carolina Constitution does not mandate that *any* public funding be provided to private entities. Indeed, to the contrary, the Constitution places strict limits on the provision of taxpayer money to private actors. *See* N.C. CONST. art. V, § 7 (prohibiting appropriation of money to persons, corporations, or associations other than for accomplishment of public purposes); N.C. CONST. art. I, § 32 (forbidding exclusive emoluments unless paid in consideration of public services). Here, the private actor is a corporation whose governing board of directors (unlike the members of a local school board) operates the school without any accountability whatsoever to the voters in the area in which the school is located.

Second, capital funding is a huge monetary investment for counties, and Plaintiffs's arguments, if accepted, would require that counties make such an investment in schools as to which

they have no control or oversight and whose applications for a charter they had no role in approving. Indeed, the Charter School Statutes do not provide for a relationship of any kind between charter schools and a board of county commissioners.

Moreover, given the limits on their financial resources, it is difficult enough for counties to fulfill their obligation to provide capital funding to the Uniform Public Schools within their borders. A ruling that they are now required to *also* fund buildings for local charter schools would not only mean less funding would be available to meet the building needs of the county's Uniform Public Schools, but also that charter schools could expend taxpayer dollars to build schools in locations that are inconsistent or in competition with the county commissioners' and local school boards' plans for building new schools. Such a result would have the effect of diminishing the resources of schools in the constitutionally mandated Uniform System – the very schools which were the focus of *Leandro*.

Third, the lack of permanency surrounding charter schools also attests to the rationality of the General Assembly's decision on this issue. While land and buildings (like the Uniform Public Schools) are intended to last indefinitely, there is no guarantee that a charter school will even last for the entire period of its initial charter – much less be renewed. Each charter can last no more than ten years. *See* N.C. GEN. STAT. § 115C-238.29D(d). In addition, as noted above, a charter school is subject to having its charter revoked in the middle of the charter period (for noncompliance either with the conditions of its charter or with the Charter School Statutes) or to having its charter not be renewed at the end of the term. *See* N.C. GEN. STAT. § 115C-238.29G. This absence of permanency

surrounding the existence of a charter school is incompatible with that school's receipt of public funding for a building.<sup>7</sup>

All of these reasons demonstrate the logic of the General Assembly's decision on this subject. Rather than being arbitrary or capricious, the Legislature's funding mechanism for charter schools is instead a well-thought-out policy experiment to see if schools that are, in all other respects, private can provide creative and flexible educational opportunities with limited public funding for students seeking an alternative to the Uniform System.

**2. North Carolina Courts Have Rejected the Argument That All Schools Must Receive Equal Funding.**

It is also important to note that by arguing every public school must be given identical funding, Plaintiffs are advocating a position that has been rejected by North Carolina courts. Our appellate courts have upheld funding variances even among schools that are all part of the Uniform System. For example, in *Britt v. North Carolina State Bd. of Educ.*, 86 N.C. App. 282, 357 S.E.2d 432, *appeal dismissed and disc. review denied*, 530 N.C. 790, 361 S.E.2d 71 (1987), the plaintiffs alleged that the statutory system for financing public schools established by the General Assembly was unconstitutional because of the discrepancy between the various counties in North Carolina regarding local funding for school systems. The Court of Appeals upheld the constitutionality of the General Assembly's statutory approach to funding, ruling that strict uniformity throughout the State's schools was not constitutionally mandated and that no requirement existed that each student

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<sup>7</sup> The great variance in the size of student populations among charter schools also militates against their eligibility to receive capital funding. The number of students enrolled in some charter schools is so small that they lack the ability to fill an entire building.

be provided identical educational opportunities. *Id.* at 289, 357 S.E.2d at 436. The court further noted that the issue raised by the plaintiffs was really one of policy.

Since no constitutional infirmity appears from the complaint, the only questions which it raises relate to the wisdom of the Legislature in providing for the present method of funding public education . . . These are matters of purely legislative concern.

*Id.* at 290, 357 S.E.2d at 437. This language is equally applicable here.

Similarly, *Banks v. Buncombe County*, 128 N.C. App. 214, 494 S.E.2d 791, *aff'd* 348 N.C. 687, 500 S.E.2d 666 (1998), involved a challenge to a county's method of allocating funds to the two school districts contained within it. Among the plaintiffs' claims was an assertion that their due process rights under article I, section 19 of the North Carolina Constitution had been violated by the county's distribution of residual sales tax revenue to local schools on an ad valorem, as opposed to on an average daily membership, basis. The plaintiffs argued that, as a result, students in one part of the county received superior resources than those received by students in a different portion of the county.

The Court of Appeals rejected this argument, holding that such a funding discrepancy did not amount to a deprivation of due process. *Id.* at 224, 494 S.E.2d at 797. *See also Kiddie Korner Day Schs, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 55 N.C. App. 134, 138-39, 285 S.E.2d 110, 113 (1981) (holding that article IX, section 2 "does not require every school within every county or throughout the State to be identical in all respects. . . There is no requirement that [a school board] provide identical opportunities to each and every student."), *disc. review denied and appeal dismissed*, 305 N.C. 300, 201 S.E.150 (1982).

North Carolina courts have likewise upheld the constitutionality of a statute imposing school funding requirements on a single county that differed from those applicable to the remaining counties. In *Guilford County Bd. of Educ. v. Guilford County Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993), a challenge under article IX, section 2 of the Constitution was brought regarding a law consolidating the city and county school systems in Guilford County. The plaintiffs alleged that the law mandated a system of public schools in Guilford County that exceeded the requirements applicable throughout the rest of North Carolina and required the taxpayers in Guilford County to assume a heavier burden of funding the school system than that existing for taxpayers in other counties. While conceding that school funding can constitutionally vary from county to county, the plaintiffs argued that the General Assembly lacked the authority to “selectively provide piecemeal public education.” *Id.* at 515-16, 430 S.E.2d at 687-88.

The Court of Appeals rejected the plaintiffs’ contentions, noting that North Carolina courts had previously held that differences in funding between schools in various counties resulting from differing local tax bases do not violate the Constitution. The court further held that the plaintiffs had failed to show how non-uniform funding resulting from a law aimed at one particular county violates the Constitution given that non-uniform funding stemming from a statewide law is constitutionally permissible. *Id.* at 516-17, 430 S.E.2d at 688.

In summarizing its ruling, the Court of Appeals stated the following:

We agree with defendants’ contention that . . . nothing in the Constitution requires that funding of public schools in all counties in the State be identical or addressed through a single uniform law.  
*Id.* at 517, 430 S.E.2d at 688.<sup>8</sup>

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<sup>8</sup> In support of their argument, the plaintiffs in *Guilford County* attempted to rely on the 1890 decision in *Greensboro v. Hodgin*, 106 N.C. 182, 11 S.E. 586 (1890), but the Court of Appeals

Similarly, there is nothing unconstitutional about the statutory funding process for charter schools. Even if charter schools were part of the Uniform System (which they are not), the cases cited above aptly demonstrate that no constitutional violation exists merely because public school funding is not identical throughout the State. Moreover, in the present context, those differences are neither arbitrary nor capricious and are instead fully rational.

### CONCLUSION

For the reasons set out herein, Plaintiffs' claims in this action lack merit. The State respectfully requests that its Motion to Dismiss be granted and that this action be dismissed.

Respectfully submitted, this the 9<sup>th</sup> day of April, 2010.

ROY COOPER  
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rejected the notion that *Hodgin* supported their argument. In their Complaint in the present case, Plaintiffs similarly purport to be relying on *Hodgin* in support of their claims. (Comp. ¶ 87) As in *Guilford County*, however, their reliance is misplaced.

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this day served the foregoing **BRIEF IN SUPPORT OF DEFENDANT STATE OF NORTH CAROLINA'S MOTION TO DISMISS** in the above titled action upon all other parties to this cause by:

- Hand-delivering a copy hereof to each said party or to the attorney thereof;
- Transmitting a copy hereof to each said party via electronic mail; or
- Depositing a copy hereof, first-class postage pre-paid, in the United States mail, properly addressed to:

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This the 9<sup>th</sup> day of April, 2010.



Mark A. Davis  
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# **EXHIBIT A**



State of North Carolina

MICHAEL F. EASLEY  
ATTORNEY GENERAL

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27602-0629

REPLY TO: Laura Crumpler  
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April 15, 1998

Thomas B. Griffin, Esq.  
Griffin & Griffin  
P. O. Box 3062  
Kinston, NC 28502-3062

Re: Advisory Opinion; Capital Outlay Funding for Charter Schools; G.S. 115C-238.29H

Dear Mr. Griffin:

You have requested the opinion of this office regarding whether a board of county commissioners may appropriate funds to charter schools for capital outlay projects. In our opinion boards of county commissioners do not have that authority.

It is well-settled that counties possess only those "powers and delegated authority as the General Assembly may deem fit to confer upon them." Harris v. Board of Commissioners, 274 N.C. 343, 163 S.E. 2d 387 (1968); Hughey v. Cloninger, 297 N.C. 86, 89, 253 S.E. 2d 898, 900 (1979). The Charter School Act, G.S. 115C-238.29A et seq., provides that the State Board shall allocate certain State funds to charter schools and that 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 appropriations unit for the fiscal year." G.S. 115C-238.29H (emphasis added). There 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. A review of Chapter 153A likewise discloses no specific authorization for a board of county commissioners to fund a charter school. Thus under well-settled case law, the commissioners lack the authority to allocate funds to charter schools for capital outlay.

This does not mean that public funds may not be used to support charter schools. The Charter School Act, as amended during the 1997 session, specifically provides that "a local board of education may provide a school facility to a charter school free of charge" provided the

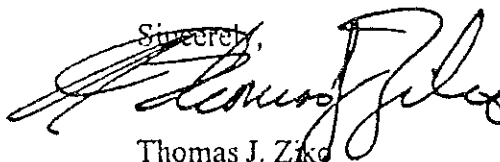


Thomas B. Griffin, Esq.  
April 15, 1998  
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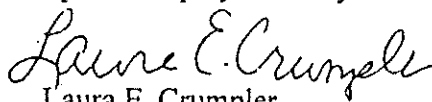
charter school assumes responsibility "for the maintenance of and insurance for the school facility." G.S. § 115C-238.29E(e) (emphasis added). The Act goes on to permit local boards to contract with charter schools to provide bus transportation and to charge or not charge a fee for this service. G.S. 115C-238.29F(h).

We hope this response adequately addresses your inquiry. Please do not hesitate to contact us should you have further questions.

Sincerely,



Thomas J. Zigo  
Special Deputy Attorney General



Laura E. Crumpler  
Assistant Attorney General

cc: Dr. Grova Bridgers  
Michael Fedewa  
Allison Schaefer  
Jim Blackburn