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NO. COA11-1300
NORTH CAROLINA COURT OF APPEALS

Filed: 20 November 2012

UNION ACADEMY, METROLINA REGIONAL
SCHOLARS ACADEMY, SOCRATES ACADEMY
CHARTER SCHOOL, CHARLOTTE
SECONDARY CHARTER SCHOOL and
QUEENS GRANT CHARTER SCHOOL,
Plaintiffs,

v.

Union County
No. 11 CVS 554

UNION COUNTY PUBLIC SCHOOLS,
Defendant.

Appeal by defendant from order entered 25 July 2011 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 15 August 2012.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot, Scott W. Gaylord, and Matthew F. Tilley, for plaintiffs-appellees.

Schwartz & Shaw, P.L.L.C., by Brian C. Shaw, for defendant-appellant.

GEER, Judge.

Defendant Union County Public Schools ("UCPS") appeals from an order granting summary judgment to plaintiffs Union Academy, Metrolina Regional Scholars Academy, Socrates Academy Charter

School, Charlotte Secondary Charter School, and Queens Grant Charter School ("Charter Schools"). This appeal involves another dispute between charter schools and a public school district regarding the funds shared under N.C. Gen. Stat. § 115C-238.29H(b) (2011).

UCPS primarily argues on appeal that the trial court's order in this case is contrary to this Court's subsequent decision in *Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd. of Educ.*, ___ N.C. App. ___, 715 S.E.2d 625 (2011), *disc. review denied*, ___ N.C. ___, 724 S.E.2d 531 (2012). Because the trial court's reasoning cannot be reconciled with *Thomas Jefferson*, and because the motion for summary judgment was argued without benefit of that decision, we reverse and remand for reconsideration in light of *Thomas Jefferson*.

The General Assembly has provided that for each student attending a charter school in a particular school district, the "local school administrative unit" must transfer to the charter school "an amount equal to the per pupil *local current expense appropriation* to the local school administrative unit for the fiscal year." N.C. Gen. Stat. § 115C-238.29H(b) (emphasis added). This Court, in *Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 347, 563

S.E.2d 92, 98 (2002), held that the local current expense appropriation is synonymous with the "local current expense fund" provided for in N.C. Gen. Stat. § 115C-426.

This Court has now, in a series of cases, considered what funds must be shared with charter schools. See *Thomas Jefferson*, ___ N.C. App. at ___, 715 S.E.2d at 635; *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 360-61, 673 S.E.2d 667, 675-76 (2009) (*Sugar Creek II*); *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 188 N.C. App. 454, 460-61, 655 S.E.2d 850, 854 (2008) (*Sugar Creek I*); *Francine Delany New Sch.*, 150 N.C. App. at 347, 563 S.E.2d at 98.

As this Court explained in *Thomas Jefferson*, the holdings of *Sugar Creek I* and *Sugar Creek II* established that if "funds are placed in the 'local current expense fund' and not in a 'special fund,' they must be considered when calculating the per pupil amount due the charter schools." ___ N.C. App. at ___, 715 S.E.2d at 631. Drawing on the holding implicit in *Sugar Creek I* and *Sugar Creek II* that a public school could create separate funds to hold funds for special programs or funds restricted in purpose, the Department of Public Instruction and Local Government Commission exercised their authority under N.C. Gen. Stat. § 115C-426(a) (2011) to authorize the creation of a

new fund called Fund 8, in which school boards could, according to a memo circulated to public school systems, "separately maintain funds that are restricted in purpose and not intended for the general K-12 population" in the local school administrative unit.

Following the issuance of that guidance, school boards proceeded to attempt not only to amend their budgets for the current fiscal year to establish separate funds, such as Fund 8, but also to amend budgets for prior fiscal years and purportedly to transfer funds from the local current expense fund to the separate funds even though the fiscal year had already been concluded. This Court addressed those amendments in *Thomas Jefferson*.

The Court rejected the charter school's claim that "'restricted funds' cannot be placed in a fund separate from the 'local current expense fund' without the specific direction from the donor of the funds." ___ N.C. App. at ___, 715 S.E.2d at 634. Instead, the Court held that *Sugar Creek I* and *II* "clearly indicate" that the local school administrative unit may place restricted funds into a separate fund, but "[i]f the funds are left in the 'local current expense fund,' then they are to be considered in computing the per pupil amount to be allocated to the charter school." *Id.* at ___, 715 S.E.2d at 634.

With respect to the validity of the amendments establishing the special funds and purportedly transferring funds from the local current expense fund into the special fund, the Court concluded:

Under our prior holdings in *Delany* and *Sugar Creek I* and *II*, funds placed into the "local current expense fund" must be considered in computing the amounts due to a charter school. During the current fiscal year, a local administrative unit may amend its budget to place restricted funds into special funds. However, it may not retroactively amend the budget of a fiscal year that has already ended and the funds expended.

Id. at ___, 715 S.E.2d at 635.

In this case, on 8 December 2009, 2 February 2010, and 13 April 2010, UCPS amended the budget for fiscal year 2009-2010 to transfer funds in the amount of \$3,639,768.62 out of its local current expense fund and into a newly-created Fund 8. An audit for fiscal year 2009-2010 by UCPS' independent auditor, Anderson Smith & Wike, PLLC, indicated that UCPS' Fund 8 ultimately contained \$7,295,888.00.

On 16 February 2011, the Charter Schools filed suit seeking a declaratory judgment that UCPS had violated its duty under N.C. Gen. Stat. § 115C-238.29H(b) to transfer to the Charter Schools an amount equal to the per pupil local expense allocation for the 2009-2010 school year. UCPS filed its answer

on 18 March 2011, alleging that it had attempted in good faith to comply with the requirements of N.C. Gen. Stat. § 115C-238.29H(b) and that the Charter Schools were not entitled to a share of any restricted use funds. UCPS also asserted as affirmative defenses that (1) the Charter Schools' claims should be offset by revenues they received from sources of funding other than their pro rata share of state and local funding, and (2) in the event that the Charter Schools were entitled to a share of the funds received by UCPS for the operation of preschool programs, the number of preschool students should be included in calculating the per pupil amount of funding under N.C. Gen. Stat. § 115C-29H(b).

On or about 14 June 2011, the Charter Schools filed a motion for summary judgment. On 25 July 2011, the trial court entered an order granting summary judgment to the Charter Schools. The trial court's order stated "that the applicable statutory and decisional law for the fiscal year 2009-2010 continues to require that all monies made available or accruing to the defendant in the 2009-2010 operating expense appropriation are to be allocated to the plaintiffs in an amount equal to the per pupil amount of *all* such monies" (Emphasis original.) The court then concluded that the local current expense appropriation required to be shared with the

Charter Schools was \$87,832,216.00, a figure that included the \$7,295,888.00 in funds placed in Fund 8. Although the trial court, in a footnote, acknowledged that "[d]efendant purported to create a separate 2009-2010 'Fund 8,' . . . Fund 8 represents \$7,295,888.00 received by the defendant in its 2009-2010 operating expense appropriation." The court appears to have concluded that the law applicable to the 2009-2010 fiscal year did not allow transfer of funds into a Fund 8. The trial court, therefore, ordered UCPS to pay the Charter Schools an additional \$253,751.00. UCPS timely appealed to this Court.

Discussion

The parties agree that the trial court's summary judgment order is inconsistent with the opinion in *Thomas Jefferson*. The trial court concluded that the Charter Schools were entitled to a share of "all monies made available or accruing to the defendant in the 2009-2010 operating expense appropriation," apparently without regard to whether the monies were restricted in use. This Court in *Thomas Jefferson*, however, held "that the provisions of Chapter 115C as construed by *Sugar Creek I* and *II* do not require that all monies provided to the local administrative unit be placed into the 'local current expense fund'" ___ N.C. App. at ___, 715 S.E.2d at 633.

As *Thomas Jefferson* clarified, UCPS was permitted, during fiscal year 2009-2010, to "amend its budget to place restricted funds into special funds." *Id.* at ___, 715 S.E.2d at 635. See also *Learning Ctr. v. Cherokee Cnty. Bd. of Educ.*, No. COA11-1270, ___ N.C. App. ___, ___ S.E.2d ___ (November 20, 2012) (applying *Thomas Jefferson* to uphold trial court's summary judgment order holding that [CC - add "the"] school board properly amended 2009-2010 budget during the 2009-2010 fiscal year to create special fund and to transfer restricted funds from the local expense fund into special fund). Because the trial court concluded that UCPS did not have authority, during the 2009-2010 fiscal year, to create Fund 8 or transfer funds from the local current expense fund into Fund 8, we must reverse the trial court's order granting the Charter Schools summary judgment.

The Charter Schools argue, however, that some of the funds in UCPS' Fund 8 were transferred after the end of the fiscal year and, therefore, under *Thomas Jefferson*, must be deemed part of the local current expense fund. See *Thomas Jefferson*, ___ N.C. App. at ___, 715 S.E.2d at 635 (holding that school board "may not retroactively amend the budget of a fiscal year that has already ended and the funds expended"). UCPS argues, in response, that some funds were placed directly into Fund 8

rather than transferred and, therefore, no additional budget amendments were necessary. We do not believe that the record is adequate to make a determination on this issue. The trial court, therefore, must decide on remand what funds were effectively placed in Fund 8 as provided in *Thomas Jefferson*, assuming no genuine issue of material fact exists.

In addition, the Charter Schools argue that certain of the funds in Fund 8 were not actually restricted funds and, therefore, must be included in the calculation of the amounts to be shared with the Charter Schools. We note that this Court has rejected the Charter Schools' argument that only those funds required to be kept separate by the donor can be placed into a separate fund. *Id.* at ____, 715 S.E.2d at 634. In order to decide if funds are properly considered restricted, a court must instead look at the nature of the funds and whether "the local administrative unit . . . place[d] restricted funds into a separate fund." *Id.* at ____, 715 S.E.2d at 634.

In this case, the record requires further development regarding the nature of the funds in UCPS' Fund 8. Without specific evidence as to what the funds in UCPS' Fund 8 actually were, any attempt by this panel to define "restricted funds" would amount to an improper advisory opinion. *See In re Wright*, 137 N.C. App. 104, 111-12, 527 S.E.2d 70, 75 (2000) (holding

that "'courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, . . . deal with theoretical problems, give advisory opinions, . . . provide for contingencies which may hereafter arise, or give abstract opinions'" (quoting *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960))).

UCPS, on the other hand, contends that the trial court erred in rejecting its affirmative defenses. First, UCPS argues that *if* it is required to share funds intended for pre-kindergarten programs, then the number of pre-kindergarten pupils should also be considered when calculating the Charter Schools' share of funds. Because we do not know whether, on remand, the trial court will determine that UCPS must share pre-kindergarten funds with the Charter School, it is not yet apparent that resolution of this issue is necessary in this case.

Additionally, UCPS contends that since the school system must share with the Charter Schools unrestricted funding that it receives from sources other than the per pupil allocation from the State and the local current expense allocation, the school system should receive an equitable offset for any funds that the Charter Schools receive from other sources. Otherwise, UCPS argues, there will not be equality of funding between the

regular public schools and the Charter Schools -- the Charter Schools will have an advantage.

This Court has held that the provisions of N.C. Gen. Stat. § 115C-238.29H are "'unambiguous, direct, imperative and mandatory.'" *Sugar Creek II*, 195 N.C. App. at 357, 673 S.E.2d at 673 (quoting *Williams v. Alexander Cnty. Bd. of Educ.*, 128 N.C. App. 599, 604, 495 S.E.2d 406, 409 (1998)). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990).

The statute sets out a specific method for calculating the Charter Schools' share of funding. That method does not include consideration of funding separately received by the Charter Schools. To add in such a consideration -- in the guise of equitable relief -- would amount to judicial amendment of the statute. As our Supreme Court explained long ago in *Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525, 528 (1950):

We have no power to add to or subtract from the language of the statute. The province of the Court is to interpret statutes conformable to the language in which they are expressed, and to declare the law in accord with the will of the law-making power, when exercised within constitutional limits. The question of the wisdom or propriety of statutory provisions is not a

matter for the courts, but solely for the legislative branch of the state government.

Indeed, "so long as an act is not forbidden, its wisdom and expediency are for legislative, not judicial, decision." *Maready v. City of Winston-Salem*, 342 N.C. 708, 714, 467 S.E.2d 615, 619 (1996). UCPS' argument should be addressed to the legislature.

Accordingly, we reverse and remand for reconsideration in light of *Thomas Jefferson*. On remand, the trial court must determine, based on the rules set out in *Thomas Jefferson*, the amount of restricted funds properly placed in UCPS' Fund 8. Those funds, once identified, may not be included in the calculation of the Charter Schools' pro rata share of the local current expense appropriation. Of course, in the event that the trial court decides that a genuine issue of material fact exists as to any issue, summary judgment should be denied.

Reversed and remanded.

Judges ROBERT C. HUNTER and BEASLEY concur.

Report per Rule 30(e).