

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 5:08CVO0240-BO**

**SPARC ACADEMY, a North Carolina
Non-Profit Corporation, R. L., a student
enrolled in January of 2008, by his
mother, CHANTE ELLIOT and D. D., a
student enrolled in January of 2008, by
his next friend, CAROLYN DAVIS,**

Plaintiffs,

v.

**NORTH CAROLINA STATE BOARD OF
EDUCATION,**

Defendant.

**DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS AND
DENIAL OF REQUEST FOR INJUNCTIVE
RELIEF AS MOOT**

STATEMENT OF THE CASE

This case arises from a decision of the State agency, Defendant State Board of Education ("SBE"), not to renew a charter held by SPARC Academy ("SPARC") to operate a charter school in North Carolina.

Part 6A of Article 16 of the North Carolina General Statutes authorizes,

a system of charter schools to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently of existing schools, as a method to accomplish all of the following:

- (1) Improve student learning;
- (2) Increase learning opportunities for all students, with special emphasis on expanded learning experiences for students who are identified as at risk of academic failure or academically gifted;
- (3) Encourage the use of different and innovative teaching methods;
- (4) Create new professional opportunities for teachers, including the opportunities to be

responsible for the learning program at the school site;

(5) Provide parents and students with expanded choices in the types of educational opportunities that are available within the public school system; and

(6) Hold the schools established under this Part accountable for meeting measurable student achievement results, and provide the schools with a method to change from rule-based to performance-based accountability systems.

N.C.G.S. § 115C-238.29A.

Upon receipt of an application seeking to establish a charter school, the State Board must determine if granting a charter would meet one or more of the above purposes. N.C.G.S. § 115C-238.29C(b). The SBE must also determine if granting the school a charter would “improve student learning.” *Id.* A school that is awarded a charter must conduct student assessments as required by the SBE and must design its program so as to meet the student performance standards adopted by the SBE.

N.C.G.S. § 115C-238.29F(d)(2) and (3).

The State Board of Education, as the agency authorized to issue charters, is also authorized to revoke or non-renew charters upon certain enumerated grounds found in N.C.G.S. § 115C-238.29G. One of those grounds is the failure of the charter school to meet the requirements for student performance.

In January 2008, the SBE voted to non-renew the charter of SPARC Academy, effective at the termination of its charter term on June 30, 2008. The grounds for non-renewal were the consistently poor test scores and downward trend of the student academic performance at SPARC.

SPARC's charter has in fact expired as of June 30, 2008.

Plaintiffs purport to bring § 1983 claims against the SBE for monetary damages arising from alleged deprivations of due process and equal protection, **Comp., Prayer for Relief ¶¶ 4 & 5**; State claims for monetary damages under the State's Public

Meetings law, *id.*, ¶ 6; and damages for alleged slander and alleged tortious interference with prospective contractual relations *id.*, ¶¶ 7 & 8.

Plaintiffs also seek declaratory and injunctive relief, attorney's fees and costs. One of the prayers for injunctive relief, requesting that the SBE be ordered to provide technical assistance to SPARC on a priority basis, is brought pursuant to the No Child Left Behind Act, 20 U.S.C. § 6303(c)(1), and an associated federal regulation. **Prayer, ¶ 11.** The Complaint fails to make clear the alleged substantive statutory bases for other prayers for equitable relief.

Defendant SBE has moved to dismiss the entire action pursuant to Rules 12(b)(1) and 12(b)(6). Because that motion to dismiss will likely be dispositive of plaintiffs' request for injunctive relief, defendant SBE asks the Court to resolve the motion to dismiss prior to consideration of the request for preliminary injunction.

SUMMARY OF ARGUMENT

At the threshold, this Memorandum demonstrates that the Court does not have subject matter jurisdiction over any of plaintiffs' claims, as the federal claims are barred by the Eleventh Amendment and the State law claims are barred by sovereign immunity. Therefore, plaintiffs' motion for injunctive relief is rendered moot and must be denied.

STATEMENT OF FACTS

The allegations of the Complaint may be summarized as follows:

SPARC has operated as a Charter School located in Wake County, North Carolina, since about 1998. **Comp. ¶ 6** Ninety-seven per cent of the students enrolled at SPARC are African-American. **Comp. ¶¶ 43-44; 80** Both R.L. and D.D. enrolled at SPARC in January 2008. **Comp. ¶¶ 2-3** Charter Schools are permitted increased flexibility in curriculum and teaching methodology in order to reach all students, including at-risk students. **Comp. ¶ 6; N.C.G.S. 115C-238.29A(2)**

From 1998 through June 2008, SPARC and its staff had the goal and mission "of

improving student learning for all enrolled students.” **Comp. ¶ 8** In January, 2008, as SPARC came up for renewal of its charter, the SBE decided that the school had failed to meet the student accountability standards expected of charter schools, as reflected in very poor student test scores. On that ground, the SBE announced, at the beginning of the spring 2008 semester that SPARC’s charter would not be renewed. **Comp. ¶¶ 143; 94**

North Carolina receives federal funding under the No Child Left Behind Act (“NCLBA”); and the SBE has the responsibility for allocating such federal funds consistent with State and federal law, including giving priority on technical assistance “for those schools classified as ‘low achieving’ under 20 U.S.C. 6303(c)(1).” **Comp. ¶¶ 11-12** SPARC was the “lowest achieving” school in Wake County between June 2007 and January 2008. **Comp. ¶ 13**

Separate and apart from the NCLBA, North Carolina has its own School-Based Management and Accountability Program. N.C.G.S. §§ 115C-105.20 - 105.41 (popularly known as the “ABCs”). Under this program, which pre-dates the NCLBA, and by federal law, the State is permitted to have requirements even more stringent than those set out in the NCLBA, the SBE has established procedures for identifying so-called “low-performing” schools pursuant to its authority under N.C.G.S. § 115C-105.37. SPARC was identified as a “low performing” school under State law. **Comp. ¶ 79** Consistent with State law, SPARC participated in the State’s ABC Accountability Model.

All charter schools in North Carolina are subject to special statutory provisions set out in State education law, including N.C.G.S. § 115C-238.29G, setting out the SBE’s authority to terminate or not renew a school’s charter. Pursuant to N.C.G.S. § 115C-238.29D(d), the SBE may grant an initial charter for a period of up to 10 years and the SBE “**may** renew the charter upon the request of the chartering entity for subsequent periods.” (Emphasis added.) In addition, in N.C.G.S. § 115C-238.29G, the legislature provides that the SBE “**may** terminate or not renew a charter upon any of the

following points:

(1) Failure to meet the requirements for student performance contained in the charter;”

Notably, nowhere in the Complaint does SPARC challenge the SBE’s factual determination that it “[fails] to meet the expected requirements for student performance contained in the charter.”

SPARC was notified by letter dated late January 2008 of the SBE’s 10 January 2008 decision not to renew its charter. **Comp. ¶ 50** The SBE’s reasons for not renewing SPARC’s charter are not provided in any detail in the Complaint, other than the fact that its students had performed very poorly on Statewide testing. **Comp. ¶¶ 60, 65** Of the 39 out of 99 charter schools in North Carolina which are predominantly African-American, only six (or 6%) were classified as low performing for 2006. **Comp. ¶ 87** While SPARC is not permitted under State law to continue its operation as a public charter school, upon the automatic expiration of its charter, nothing prevents SPARC from continuing to operate as a private school, should it so choose.

In its Complaint, SPARC consistently fails to distinguish between the requirements of the federal NCLBA and the requirements in the State’s educational “ABC” laws.

SPARC correctly alleges that the SBE decided on 10 January 2008 that the charter for SPARC would be permitted to expire on its own terms in June 2008. **Comp. ¶¶ 20 & 27**

DISMISSAL STANDARD

In the case of a Rule 12(b)(1) challenge to subject matter jurisdiction, the allegations in a pleading are merely evidence on the issue of jurisdiction and are not taken as presumptively true. The party asserting subject matter jurisdiction has the burden to prove its existence, regardless of the allegations in its complaint. *E.g., KVOS v. Associated Press*, 299 U.S. 269, 277-78, 57 S. Ct. 197, 200-201, 81 L. Ed. 183, 187-

88 (1936). To determine whether jurisdiction exists, the district court may consider evidence outside the pleadings without converting the proceeding into one for summary judgment. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

Defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim tests the legal sufficiency of plaintiffs' complaint. See, e.g., *Papasan v. Allain*, 478 U.S. 265, 283, 106 S. Ct. 2932, 2943, 92 L. Ed. 2d 209, 230 (1986); *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994), *cert. denied*, 514 U.S. 1107, 115 S. Ct. 1956, 131 L. Ed. 2d 849 (1995). Legal insufficiency may be found, of course, from an absence of facts sufficient to make a good claim. "[I]t is not . . . proper," in considering a motion to dismiss under Rule 12(b)(6), "to assume that plaintiff[] can prove facts that [it has] not alleged or that defendants have violated the . . . law[] in ways that have not been alleged." *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994) (citation omitted).

For the purposes of a motion to dismiss under Rule 12(b)(6), a plaintiff's factual allegations, as set forth in the complaint, are to be taken as true. *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992), *cert. denied*, 510 U.S. 828, 114 S. Ct. 93, 126 L. Ed. 2d 60 (1993). The Court is, however, **not** required to accept as true the legal conclusions in the complaint. "Were it otherwise, Rule 12(b)(6) would serve no function, for its purpose is to provide a defendant with a mechanism for testing the legal sufficiency of the complaint." *District 28, United Mine Workers, Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083, 1085-86 (4th Cir. 1979). Thus, on a motion to dismiss under Rule 12(b)(6), the Court need not accept "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). See also *Evans v. Technologies Applications*, 80 F.3d 954, 959 (4th Cir. 1996)(quoting *Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1988)).

To survive a motion to dismiss pursuant to Rule 12(b)(6), in other words, the Complaint in this case must have provided sufficient notice of the particular events and

exact circumstances from which plaintiffs' purported claims arise; and it must have provided allegations sufficient to satisfy **all** the substantive elements of at least some cognizable claim. *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991); *Stanley v. Continental Oil Co.*, 536 F.2d 914 (10th Cir. 1976); *Bolding v. Holshouser*, 575 F.2d 461, 464 (4th Cir.), *cert. denied*, 439 U.S. 837, 99 S. Ct. 121, 58 L. Ed. 2d 133 (1978).

As will be shown in the following, plaintiffs have stated no cognizable claims in the Complaint in this action; and the Complaint must be dismissed with prejudice.

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER EACH OF PLAINTIFFS' "CLAIMS" IN THIS ACTION. ON THAT GROUND ALONE, THE COURT LACKS ANY AUTHORITY TO ISSUE RELIEF.

A. THE ELEVENTH AMENDMENT BARS PLAINTIFFS' FEDERAL CIVIL RIGHTS CLAIMS FOR MONETARY DAMAGES AGAINST THE SOLE DEFENDANT IN THIS ACTION, A STATE AGENCY.

Plaintiffs' claims for compensatory damages pursuant to 42 U.S.C. § 1983, see Second Claim, **Comp. ¶¶ 59-74**, and Third Claim, **Comp. ¶¶ 75-96**, cannot be brought against the SBE, which as a State entity enjoys the protection of Eleventh Amendment immunity from liabilities that must be paid from public funds. *Quern v. Jordan*, 440 U.S. 332, 342, 99 S. Ct. 1139, 1146, 59 L. Ed. 2d 358, 367-68 (1979); *Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982), *cert. denied*, 464 U.S. 932, 104 S. Ct. 335, 78 L. Ed. 2d 305 (1983); *Sessions v. Rusk State Hosp.*, 648 F.2d 1066, 1069 (5th Cir. 1981). See also *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (no monetary damages payable against State and officials in § 1983 action).

It is well established that Congress did not intend federal civil rights law, such as 42 U.S.C. § 1983, to abrogate the states' immunity. *Quern v. Jordan*, 440 U.S. at 341, 99 S. Ct. at 1145, 59 L. Ed. 2d at 367; *Edelman v. Jordan*, 415 U.S. 651, 672, 94 S. Ct. 1347, 1360, 39 L. Ed. 2d 662, 678, (1974); *Jacobs v. Coll. of William & Mary*, 495 F.

Supp. 183, 188 (E.D. Va. 1980), *aff'd*, 661 F.2d 922 (4th Cir. 1981), *cert. denied*, 454 U.S. 1033, 102 S. Ct. 572, 70 L. Ed. 2d 477 (1981).

A judgment against the SBE, an agency of the State, would be a judgment against the State. *Huang v. Bd. of Governors of UNC*, 902 F.2d 1134, 1138 (4th Cir. 1990). Accordingly, for purposes of this action the SBE is an alter ego of the State of North Carolina, the real party in interest; and the Eleventh Amendment operates to bar plaintiffs' federal claims for monetary damages "in excess of \$100,000.00" (**Comp., ¶¶ 96 & 99, but see Prayer ¶¶ 4-5**) under 42 U.S.C. § 1983 against the SBE. *E.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S. Ct. 900, 919, 79 L. Ed. 2d 67, 92 (1984); *Wilson v. Univ. of Virginia*, 663 F. Supp. 1089, 1092 (W.D. Va. 1987).

A State may waive the protection of the Eleventh Amendment by unequivocal State statute or State constitutional provision. *Edelman v. Jordan*, 415 U.S. at 673, 94 S. Ct. at 1361, 39 L. Ed. 2d at 678. However, the State of North Carolina has **not** waived its Eleventh Amendment immunity by either of these means as to 42 U.S.C. § 1983. *Huang*, 902 F.2d at 1139; *Stewart v. Hunt*, 598 F. Supp. 1342, 1350-51 (E.D.N.C. 1984). Therefore, plaintiffs' purported federal statutory claims for monetary damages against the SBE must be dismissed.

B. THERE IS NO INDIVIDUAL RIGHT OF ACTION UNDER THE NO CHILD LEFT BEHIND ACT.

Numerous federal courts have now held, based upon scrupulous statutory analysis, that the NCLBA does not create a private right of action. In reaching this conclusion, courts have noted that the Act does not contain "rights-creating language"; it considers children as a whole or in the aggregate, as opposed to any specific child or any particular educational service provider; and it provides for enforcement by the federal Secretary of Education. The undersigned counsel for defendant SBE has found no authority to the contrary.

On that basis, neither SPARC, nor the two adults appearing as plaintiffs in this action on behalf of minor children, can seek declaratory or injunctive relief under the NCLBA. See, e.g., *Alliance for Children, Inc. V. City of Detroit Public Schools*, 475 F. Supp. 2d 655, 658-63 (E.D. Mich. 2007)(involving requests for declaratory and injunctive relief and declaring such relief not available individually under the NCLBA); *Fresh Start Academy v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910 (N.D. Ohio 2005)(dismissing NCLBA claims under Rules 12(b)(1) and 12(b)(6), on basis that the NCLBA neither provides an individual right of enforcement for purposes of § 1983 nor does it contain an implied private right of action); *ACORN v. New York City Dept. of Educ.*, 269 F. Supp. 2d 338 (S.D.N.Y. 2003) (ruling that the NCLBA does not create individual rights in students or parents and therefore dismissing plaintiff's cause of action under § 1983 to enforce the NCLBA); *Stokes v. United States Dept. of Educ.*, 2006 U.S. Dist. LEXIS 46838, * 5 (D. Mass. 2006) (dismissing parent's claim predicated on alleged violation of the NCLBA on ground that the Act "did not create individually enforceable rights"); *Blanchard v. Morton Sch. Dist.*, 2006 U.S. Dist. LEXIS 59417 (W.D. Wash. 2006)(parent has no rights under the NCLBA which are enforceable under § 1983), *aff'd in part & rev'd in part on another ground*, 260 Fed. Appx. 992 (9th Cir. 2007); *Coachella Valley Unified Sch. Dist. v. California*, 2005 U.S. Dist. LEXIS 44825 (N.D. Cal. 2005) (holding that plaintiffs' allegations that State education agencies and officers had failed to comply with the NCLBA did not raise a substantial federal question); see also *Dunleavy v. New Jersey*, 251 Fed. Appx. 80, 82 (3rd Cir. 2007) (concluding that Congress did not intend to create any individual rights under the NCLBA and therefore dismissing teacher applicant's claim under the Act); *Marinnie v. Palmyra Bd. of Educ.*, 2007 U.S. Dist. LEXIS 20038, ** 14-15 (D. N.J. 2007) (no private right of action under the NCLBA); *Holder v. Gienapp*, 2007 U.S. Dist. LEXIS 22804 (D.N.H. 2007); *Catapult Learning, Inc. v. Bd. of Educ.*, 2007 U.S. Dist. LEXIS 68658 (E.D. Mo. 2007).

This Court should join all other federal courts to have considered this matter, and hold that there is no private right of action under the NCLBA, either by implication or by virtue of § 1983.

C. APPLICABLE LAW REQUIRES SUMMARY DISMISSAL OF PLAINTIFFS' STATE LAW CLAIMS AGAINST THE SBE FOR SLANDER AND INTERFERENCE WITH CONTRACTUAL RELATIONS.

In the Fifth Claim, plaintiffs allege slander of SPARC by the SBE “concerning the continued right of Sparc Academy to operate.” **Comp. ¶ 121** SPARC alleges that the SBE has tortiously interfered with its contracts with teachers, staff and a lessor. **Comp. ¶¶ 129-130** Such claims, predicated as they are on a theory of tort liability and alleging that certain, unnamed SBE members violated State law in carrying out their official responsibilities, is exactly the sort of claim from which states are granted immunity by the Eleventh Amendment. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S. Ct. 900, 919, 79 L. Ed. 2d 67 (1984).” *Ji-Da Dai v. University of North Carolina, at Chapel Hill*, 2003 U.S. Dist. LEXIS 15880, at *15 (M.D.N.C. 2003). As also observed by Judge Beaty in *Ji-Da Dai*, “[u]nlike the State of Georgia in *Lapides [v. Bd. of Regents of Univ. Sys. of Georgia]*, 535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002)], North Carolina has **not** waived its underlying sovereign immunity from suit for common law tort claims in its own state courts.” *Ji-Da Dai*, at *18 (emphasis added). *See, e.g., Jones v. Pitt County Memorial Hosp.*, 104 N.C. App. 613, 617, 410 S.E.2d 513, 515 (1991).

Because North Carolina has not waived its immunity from tort actions in State courts, both State law claims in plaintiffs' complaint are jurisdictionally barred by the Eleventh Amendment; and the claims for slander and tortious interference with prospective contractual relations must therefore be dismissed.

CONCLUSION

On the basis of the foregoing authorities and argument demonstrating the existence of critical jurisdictional bars and the lack of legal basis for plaintiffs' claims, defendant SBE respectfully requests that the Complaint in its entirety be dismissed, with prejudice, and that the Court declare moot plaintiffs' motion for injunctive relief.

Respectfully submitted, this the 8th day of July, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2008, I electronically filed the foregoing:
DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND DENIAL OF REQUEST
FOR INJUNCTIVE RELIEF AS MOOT with the Clerk of the Court using the CM/ECF system
and I hereby certify that I have mailed the document to the following non CM/ECF
participant:

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This the 8th day of July, 2008.

/s/ Laura E. Crumpler
Laura E. Crumpler
Assistant Attorney General