

No. COA 15-1229

TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

NORTH CAROLINA STATE
BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH
CAROLINA and THE NORTH
CAROLINA RULES REVIEW
COMMISSION,

Defendants.

From Wake County

14 CVS 14791

FILED
2015 NOV 12 P 12:19
CLERK COURT OF APPEALS
OF NORTH CAROLINA

RECORD ON APPEAL

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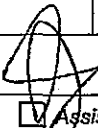
STATEMENT OF ORGANIZATION OF TRIAL COURT

Defendants State of North Carolina and North Carolina Rules Review Commission appeal from the 2 July 2015 Order granting Plaintiff's Motion for Summary Judgment and denying Defendants' Motion to dismiss, issued by the Honorable Paul G. Gessner, judge presiding, Superior Court of Wake County. Defendants filed and served written notice of appeal on 27 July 2015.

The record on appeal was filed with the Court of Appeals on 12 November 2015 and was docketed on 12 November, 2015.

STATEMENT OF JURISDICTION

This action was commenced by the filing of a Verified Complaint for Declaratory and Injunctive Relief and the issuance of a summons on 7 November 2014.

STATE OF NORTH CAROLINA		File No. <u>14CV014791</u>	
<u>WAKE</u> County		In The General Court of Justice <input type="checkbox"/> District <input type="checkbox"/> Superior Court Division	
Name of Plaintiff NORTH CAROLINA STATE BOARD OF EDUCATION Address City, State, Zip		CIVIL SUMMONS <input type="checkbox"/> ALIAS AND PLURIES SUMMONS (ASSESS FEE)	
VERSUS		G.S. 1A-1, Rules 3, 4	
Name of Defendant(s) THE STATE OF NORTH CAROLINA and THE NORTH CAROLINA RULES REVIEW COMMISSION		Date Original Summons Issued Date(s) Subsequent Summon(es) Issued	
To Each of The Defendant(s) Named Below:			
Name And Address of Defendant 1 THE NORTH CAROLINA RULES REVIEW COMMISSION c/o Eugene J. Cella General Counsel Office of Administrative Hearings 1711 New Hope Church Road Raleigh, NC 27699-1711		Name And Address of Defendant 2 THE NORTH CAROLINA RULES REVIEW COMMISSION c/o Grayson Kelley, Chief Deputy Attorney General North Carolina Department of Justice 114 W. Edenton Street P.O. Box 629 Raleigh, NC 27602-0629	
A Civil Action Has Been Commenced Against You! You are notified to appear and answer the complaint of the plaintiff as follows:			
1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and 2. File the original of the written answer with the Clerk of Superior Court of the county named above.			
If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.			
Name And Address of Plaintiff's Attorney (If None, Address of Plaintiff) Robert F. Orr and Andrew H. Erteschik Poyner Spruill LLP, P.O. Box 1801, Raleigh, NC 27602 919.783.2895 / aerteschik@poynerspruill.com / rorr@poynerspruill.com		Date Issued <u>11/17/14</u> Time <u>9</u> <input checked="" type="checkbox"/> AM <input type="checkbox"/> PM Signature  <input checked="" type="checkbox"/> Deputy CSC <input checked="" type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk of Superior Court	
<input type="checkbox"/> ENDORSEMENT (ASSESS FEE) This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.		Date of Endorsement _____ Time _____ <input type="checkbox"/> AM <input type="checkbox"/> PM Signature _____ <input type="checkbox"/> Deputy CSC <input type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk of Superior Court	
NOTE TO PARTIES: Many counties have MANDATORY ARBITRATION programs in which most cases where the amount in controversy is \$15,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.			

RETURN OF SERVICE

I certify that this Summons and a copy of the complaint were received and served as follows:

DEFENDANT 1

<i>Date Served</i>	<i>Time Served</i> <input type="checkbox"/> AM <input type="checkbox"/> PM	<i>Name of Defendant</i>
--------------------	--	--------------------------

- ☐ By delivering to the defendant named above a copy of the summons and complaint.
- ☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.
- ☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service (*specify*)

☐ Defendant WAS NOT served for the following reason:

DEFENDANT 2

<i>Date Served</i>	<i>Time Served</i> <input type="checkbox"/> AM <input type="checkbox"/> PM	<i>Name of Defendant</i>
--------------------	--	--------------------------

- ☐ By delivering to the defendant named above a copy of the summons and complaint.
- ☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.
- ☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to person named below.

Name And Address of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service (*specify*)

☐ Defendant WAS NOT served for the following reason.

<i>Service Fee Paid</i> \$	<i>Signature of Deputy Sheriff Making Return</i>
<i>Date Received</i>	<i>Name of Sheriff (Type or Print)</i>
<i>Date of Return</i>	<i>County of Sheriff</i>

NORTH CAROLINA

WAKE COUNTY

NORTH CAROLINA STATE
BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA and
THE NORTH CAROLINA RULES
REVIEW COMMISSION,

Defendants.

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14-CVS-14791

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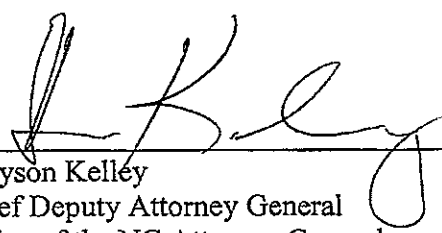
ACCEPTANCE OF SERVICE
FOR DEFENDANTS

Chief Deputy Attorney General Grayson Kelley, counsel for Defendants State of North Carolina and the North Carolina Rules Review Commission (collectively, "Defendants") in the above-captioned action, shows the Court the following:

1. Defendants are parties to be served with the Civil Summonses issued and the Verified Complaint for Declaratory and Injunctive Relief filed in this civil action.
2. By execution hereof, the undersigned accepts service of the Civil Summonses and Verified Complaint for Declaratory and Injunctive Relief on behalf of the Defendants and acknowledges receipt of a copy of each Civil Summons issued to each Defendant, along with a copy of the Complaint filed in this action.
3. This acceptance of service does not waive any defenses that Defendants may have except for the defense of insufficiency of process and insufficiency of service of process. Defendants reserve the right to assert any other defenses that may apply.

This the 13th day of November, 2014.

By: _____


Grayson Kelley
Chief Deputy Attorney General
Office of the NC Attorney General
9001 Mail Service Center
Raleigh, NC 27699-9001
Telephone: (919) 716-6400
Fax: (919) 716-6750

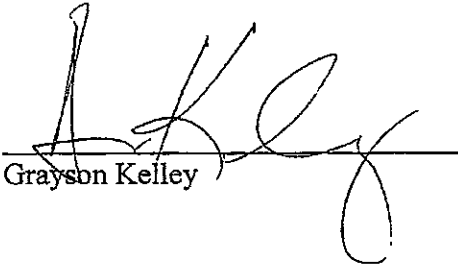
COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following person at the following address which is the last address known to me:

Robert F. Orr
Andrew H. Erteschik
Poyner Spruill LLP
P.O. Box 1801
Raleigh, NC 27602-1801
Counsel for Plaintiff

This the 13 day of November, 2014.


Grayson Kelley

14CV014791

NORTH CAROLINA

WAKE COUNTY

NORTH CAROLINA STATE
BOARD OF EDUCATION,

2014 NOV -7 AM 9:56

WAKE COUNTY, C.S.C.

BY Plaintiff,

v.

THE STATE OF NORTH CAROLINA and
THE NORTH CAROLINA RULES
REVIEW COMMISSION,

Defendants.

FILED

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

14-CVS-_____

**VERIFIED COMPLAINT
FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Plaintiff the North Carolina State Board of Education ("Plaintiff" or "the Board"), complaining of the Defendants the State of North Carolina ("the State") and the North Carolina Rules Review Commission ("the RRC") (collectively, "Defendants"), alleges and states the following:

INTRODUCTION

1. This declaratory judgment action seeks a judicial determination as to whether the North Carolina Constitution precludes the RRC, a statutorily-created administrative agency, from exercising authority over the Board, a constitutional body.

2. In 1986, the General Assembly created an administrative review process through which rules adopted by virtually all executive branch agencies would be reviewed by an administrative agency, the RRC. Because the Board is not expressly named as an exempt entity under the law, the RRC has taken the position that the Board is subject to its authority.

3. Article IX, Section 4 of the North Carolina Constitution creates the Board as a constitutional fixture in its own right. The "[p]owers and [d]uties of the Board" are set forth in Article IX, Section 5 of the North Carolina Constitution, which provides:

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

4. Notwithstanding the Board's constitutional authority, the RRC since its creation in 1986 has purported to exercise authority over the Board. The RRC has done so by determining the limits of the Board's constitutional authority, objecting to the Board's rules, and striking down the Board's rules. In essence, the RRC deems its rules review process to be a substitute for the built-in state constitutional review process under which the Board's rules can only be revised or repealed by the General Assembly.

5. Having now made the decision to exercise the full extent of its constitutional authority, the Board brings this action for declaratory and injunctive relief to enjoin the RRC from exercising authority over the Board.

6. The Board seeks the following relief in this action:

- (a) a declaration that the legislation triggering the RRC's review process does not apply to the Board because the Board is not an agency within the executive branch;
- (b) a declaration that the RRC's exercise of authority over the Board violates Article IX, Section 5 of the North Carolina Constitution because it subverts the Board's general supervisory and administrative rulemaking authority on matters concerning North Carolina's free public schools;
- (c) a declaration that the RRC's exercise of authority over the Board violates the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution because it unconstitutionally delegates to the RRC the authority to

review, revise, or repeal rules of the Board, which are acts that only the General Assembly is authorized to take;

- (d) a declaration that the RRC's enabling statutes are facially unconstitutional because they allow the RRC to improperly exercise legislative power by striking down agency rules without bicameral passage and presentment of a bill as required by Article II, Section 22 of the North Carolina Constitution;
- (e) a declaration that the RRC's enabling statutes are facially unconstitutional and unconstitutional as applied to the Board because they permit the RRC to encroach on the judicial function in violation of the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution;
- (f) a declaration that the RRC's enabling statutes are facially unconstitutional because even if the General Assembly could constitutionally delegate its authority to the RRC, which it cannot, it failed to provide adequate guiding standards in violation of the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution;
- (g) a declaration, if the Court concludes that the Board is an agency within the executive branch, that the RRC's enabling statutes are facially unconstitutional because they permit the RRC to encroach on the executive function in violation of the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution; and
- (h) a permanent injunction enjoining the RRC from exercising authority over the Board.

PARTIES

7. The Board is a constitutional body created by Article IX of the North Carolina Constitution with the power and duty to “supervise and administer the free public school system and the educational funds provided for its support.” N.C. Const. Art. IX, § 5.

8. The State through its General Assembly enacts legislation, including the legislation described herein.

9. The RRC is a state administrative agency charged with reviewing rules adopted by virtually all executive branch agencies.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action because the Board seeks declaratory and injunctive relief pursuant to the North Carolina Constitution, the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253, *et seq.*, and N.C. Gen. Stat. § 7A-245.

11. Venue with respect to Counts 1, 2, 3, and the as-applied challenge in Count 5 lies in Wake County Superior Court pursuant to N.C. Gen. Stat. § 1-77 because the legislation described herein was enacted by the 1986 General Assembly in Wake County.

12. Venue with respect to Counts 4, 6, 7, and the facial challenge in Count 5 lies with a three-judge panel of the Wake County Superior Court pursuant to N.C. Gen. Stat. § 1-81.1 because these claims seek a declaration that the RRC’s enabling legislation is facially unconstitutional under the North Carolina Constitution.

FACTUAL ALLEGATIONS

Overview of the Board’s Constitutional Powers and Duties

13. The Board is unique among state government entities in North Carolina because it is a constitutional body that derives its broad powers directly from the people of North Carolina through the North Carolina Constitution.

14. The 1868 North Carolina Constitution established the framework of our present system of education by creating the Board as a constitutional entity responsible for governing our free public schools. Article IX, Section 9 of the 1868 North Carolina Constitution conferred broad powers on the Board, including the power "to legislate" with respect to North Carolina's public schools:

The Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to Free Public Schools, and the Educational Fund of the State; but all acts, rules and regulations of said Board may be altered, amended or repealed by the General Assembly, and when so altered, amended or repealed, they shall not be re-enacted by the Board.

15. In 1942, the voters ratified an amendment to further centralize power in the Board by expressly listing additional areas in which the Board -- as opposed to other administrative agencies existing at the time -- had constitutional authority. The amendment expressly stated that the Board retained all the powers that it held prior to the amendment -- i.e., the powers given to the Board by the 1868 North Carolina Constitution. Thus, as amended in 1942, Article IX, Section 8 of the North Carolina Constitution provided:

The State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted. The State Board of Education shall have power to divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the text books to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly.

16. In 1971, the North Carolina Constitution was rewritten to reflect a number of editorial -- as opposed to substantive -- revisions. As adopted in 1971, revised Article IX, Section 5 provides in its current form:

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

17. As in the 1942 amendment, the framers of the 1971 North Carolina Constitution expressly intended that the powers of the Board remain as extensive as they were since the 1868 Constitution. In the 1968 Report of the State Constitutional Study Commission, the Commission wrote that "[Article IX, Section 5] restates in much abbreviated form the duties of the State Board of Education, but without any intention that its authority be reduced."

18. The same year the 1971 North Carolina Constitution was adopted, the Supreme Court of North Carolina in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), held that the Board had "legislative power" under Article IX, Section 5, and that the Board's rules were "subject to limitation and revision" only "by acts of the General Assembly." The Supreme Court further recognized that when the General Assembly attempts to review, revise, or repeal the Board's rules, it must do so "specifically," otherwise the Board's rulemaking authority is "limited only by other provisions of the Constitution itself."

19. Thus, since the creation of the Board in 1868, no state constitutional amendment or decision of the Supreme Court of North Carolina has limited the Board's broad powers and duties as described above.

The RRC's Encroachment on the Board's Constitutional Authority

20. In 1986, the General Assembly created the RRC. Through its enabling legislation, the RRC is required to approve administrative rules before they can have the force and effect of law. The RRC is also authorized to strike down rules.

21. Under the RRC's enabling statutes, an agency that adopts a rule must file that rule with the RRC within 30 days pursuant to N.C. Gen. Stat. § 150B-21.2(g). Under N.C. Gen. Stat.

§ 150B-21.10, the RRC in its sole discretion can then take one of three actions: (1) approve the rule, if it determines that the rule meets certain criteria; (2) object to the rule, if it determines that the rule does not meet the criteria; or (3) extend the period for reviewing the rule, if it determines that additional information is necessary to decide whether the rule satisfies the criteria.

22. Unless and until the RRC approves the rule, N.C. Gen. Stat. § 150B-21.3(b)(2) dictates that the agency's adopted rule is of no force and effect. If the RRC objects to the agency's adopted rule, then under N.C. Gen. Stat. § 150B-21.19(4), the rule cannot be implemented unless and until the agency revises the rule to address the RRC's objections.

23. The RRC's enabling legislation requires it to exercise authority over any "agency," which is defined by N.C. Gen. Stat. § 150B-2(1a) as "an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch."

24. Notwithstanding the Board's unique status as a constitutional body, the RRC since 1986 has purported to exercise control over the Board, deeming the Board an "agency" within the meaning of N.C. Gen. Stat. § 150B-2(1a). Though historically the Board has stopped short of bringing a legal challenge, the Board has repeatedly questioned the constitutionality of this purported exercise of authority by the RRC over the Board, a constitutional body.

25. Since its inception in 1986, the RRC or its staff has objected to or modified every rule adopted by the Board and submitted to the RRC for approval. Moreover, the Board has declined to adopt a number of rules that it otherwise would have adopted but for the fact that the RRC would have objected to these rules or struck them down.

26. In addition, the RRC review process typically takes a minimum of six months and often longer. Thus, when the Board adopts rules, they do not have the force and effect of law until at least six months later. In the intervening months or, in some cases, years, statewide education policy is effectively enjoined by the RRC review process. In this regard, the RRC's exercise of authority over the Board's rulemaking erodes the Board's ability to timely address critical issues facing our State in the area of education.

The Board's Decision to Exercise the Full Extent of its Constitutional Authority

27. The Board as currently constituted has made the decision to exercise the full extent of its powers and duties under the North Carolina Constitution without unconstitutional interference by the RRC.

28. The Board has resolved that it will no longer voluntarily submit its rules for RRC approval. The Board will nevertheless deem its rules to have the immediate full force and effect of law.

29. The Board recognizes that its decision is in direct conflict with the RRC's interpretation and application of both N.C. Gen. Stat. § 150B-2(1a) and the RRC's enabling legislation. Accordingly, a declaratory judgment is necessary to determine the proper interpretation and application of the statutory and state constitutional provisions discussed herein.

COUNT 1 – DECLARATORY JUDGMENT
N.C. Gen. Stat. § 150B-2(1a)

30. The allegations contained in Paragraphs 1 through 29 of this Complaint are restated and incorporated herein by reference.

31. Under the North Carolina Administrative Procedure Act ("APA") N.C. Gen. Stat. §§ 150B-1, *et seq.*, only an "agency" is subject to the RRC.

32. For purposes of the APA, N.C. Gen. Stat. § 150B-2(1a) defines "agency" as "an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch."

33. The North Carolina Constitution does not create the Board as an agency within the executive branch. The Board is not named in Article II, III, or IV of the North Carolina Constitution. The Board's authority derives solely from Article IX of the North Carolina Constitution, which creates the Board as a constitutional entity of independent authority that, within the scope of its functions, is coordinate with and equal to that of the other branches of State government.

34. The fact that the Board is not an "executive branch agency" subject to the RRC is further evident within the APA. N.C. Gen. Stat. § 150B-21.9(a)(1) provides that the RRC's primary task is to "determine whether a rule . . . is within the authority delegated to the agency by the General Assembly." This statutory provision cannot apply to the Board. Unlike executive branch agencies falling within N.C. Gen. Stat. § 150B-2(1a), the General Assembly did not create the Board and the Board does not derive its authority from the General Assembly. The Board is a constitutional fixture in its own right that derives its powers directly from the people of North Carolina through Article IX, Sections 4 and 5 of the North Carolina Constitution.

35. For the foregoing reasons, the Board is not an "agency" within the meaning of N.C. Gen. Stat. § 150B-2(1a). Accordingly, the Board is not subject to the RRC.

COUNT 2 – DECLARATORY JUDGMENT
Article IX, Section 5 of the North Carolina Constitution

36. The allegations contained in Paragraphs 1 through 35 of this Complaint are restated and incorporated herein by reference.

37. Under Article IX, Section 5 of the North Carolina Constitution, the Board has general supervisory and administrative rulemaking authority with respect to public education unless the General Assembly enacts specific legislation revising or repealing a particular rule adopted by the Board.

38. Because the Board is not listed as an exempt entity under N.C. Gen. Stat. § 150B-2(1a), the RRC deems its rules review process to be a substitute for the built-in state constitutional review process under which the Board's rules can only be revised or repealed by the General Assembly. The RRC's position is contrary to Article IX, Section 5 of the North Carolina Constitution.

39. The RRC is not "the General Assembly" as that term is used in Article IX, Section 5 of the North Carolina Constitution. The RRC is neither representative of the people of North Carolina nor accountable to the people of North Carolina. It is comprised entirely of unelected individuals appointed to the RRC who are not members of the General Assembly.

40. Any attempt by the General Assembly to review, revise, or repeal the Board's rules must be done "specifically." The 1986 General Assembly's establishment of a rules review process through which an administrative agency would review all rules adopted by all agencies on all subjects at all times is not a "law enacted by the General Assembly" that "specifically" revises or repeals a particular rule of the Board within Article IX, Section 5.

41. Accordingly, the RRC's interpretation and application of N.C. Gen. Stat. § 150B-2(1a) to the Board violates Article IX, Section 5 of the North Carolina Constitution.

COUNT 3 – DECLARATORY JUDGMENT
Article I, Section 6, Article II, Section 1, and
Article IX, Section 5 of the North Carolina Constitution

42. The allegations contained in Paragraphs 1 through 41 of this Complaint are restated and incorporated herein by reference.

43. Only the General Assembly has the authority under Article IX, Section 5 to enact specific legislation revising or repealing a particular rule adopted by the Board. Nothing in the North Carolina Constitution permits the General Assembly to delegate that authority to the RRC or any other entity.

44. Accordingly, the RRC's interpretation and application of N.C. Gen. Stat. § 150B-2(1a) to the Board violates Article I, Section 6, Article II, Section 1, and Article IX, Section 5 of the North Carolina Constitution.

COUNT 4 – DECLARATORY JUDGMENT
Article I, Section 6, Article II, Section 1, and
Article II, Section 22 of the North Carolina Constitution

45. The allegations contained in Paragraphs 1 through 44 of this Complaint are restated and incorporated herein by reference.

46. The RRC improperly exercises legislative power by striking down agency rules without bicameral passage and presentment of a bill as required by Article II, Section 22 of the North Carolina Constitution.

47. Accordingly, the RRC's enabling legislation is facially unconstitutional because it violates Article I, Section 6, Article II, Section 1, and Article II, Section 22 of the North Carolina Constitution.

COUNT 5 – DECLARATORY JUDGMENT
Article I, Section 6 and Article IV, Section 1
of the North Carolina Constitution

48. The allegations contained in Paragraphs 1 through 47 of this Complaint are restated and incorporated herein by reference.

49. Deciding whether a rule falls within a rulemaking entity's authority is a judicial function. When the RRC purports to make such a determination, it violates the separation of powers because it unconstitutionally encroaches on the functions of the judicial branch.

50. As applied to the Board, the RRC's determination of whether a rule is within the Board's authority encroaches even further on the functions of the judicial branch. The judicial branch is the sole arbiter of the North Carolina Constitution. When the RRC under N.C. Gen. Stat. § 150B-21.9(a)(1) purports to determine the limits of the Board's constitutional authority, it violates the separation of powers because it unconstitutionally encroaches on the functions of the judicial branch.

51. Accordingly, the RRC's enabling legislation is facially unconstitutional and unconstitutional as applied to the Board because it violates Article I, Section 6 and Article IV, Section 1 of the North Carolina Constitution.

COUNT 6 – DECLARATORY JUDGMENT
Article I, Section 6 and Article II, Section 1
of the North Carolina Constitution

52. The allegations contained in Paragraphs 1 through 51 of this Complaint are restated and incorporated herein by reference.

53. Even if the General Assembly could constitutionally delegate its Article IX, Section 5 authority to the RRC, which it cannot, the General Assembly could only delegate such authority to the RRC with adequate guiding standards.

54. N.C. Gen. Stat. § 150B-21.9(a) provides the RRC with vague and open-ended standards to use in deciding whether to strike down rules. N.C. Gen. Stat. § 150B-21.9(a) charges the RRC with determining whether a rule is “within the authority delegated to the agency,” whether it is “clear and unambiguous,” and whether it is “reasonably necessary to implement or interpret an enactment” of the General Assembly, Congress, or a federal agency. These are not adequate guiding standards.

55. In addition to providing the RRC with inadequate guiding standards, the RRC lacks the requisite expertise for such delegation to be effective. Furthermore, no adequate procedural safeguards exist to ensure the RRC’s accountability.

56. Accordingly, the RRC’s enabling legislation is facially unconstitutional because it violates Article I, Section 6 and Article II, Section 1 of the North Carolina Constitution.

COUNT 7 – DECLARATORY JUDGMENT
Article I, Section 6 and Article III, Section 1
of the North Carolina Constitution

57. The allegations contained in Paragraphs 1 through 56 of this Complaint are restated and incorporated herein by reference.

58. In the alternative to Count 1, if the Court concludes that the Board is an agency “in the executive branch” under N.C. Gen. Stat. § 150B-2(1a), then the RRC violates the separation of powers because it unconstitutionally encroaches on the executive function of rulemaking.

59. Accordingly, the RRC’s enabling legislation is facially unconstitutional because it violates Article I, Section 6 and Article III, Section 1 of the North Carolina Constitution.

WHEREFORE, Plaintiff prays that this Court:

- (a) Declare that the legislation triggering the RRC's review process does not apply to the Board because the Board is not an agency within the executive branch;
- (b) Declare that the RRC's exercise of authority over the Board violates Article IX, Section 5 of the North Carolina Constitution because it subverts the Board's general supervisory and administrative rulemaking authority on matters concerning North Carolina's free public schools;
- (c) Declare that the RRC's exercise of authority over the Board violates the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution because it unconstitutionally delegates to the RRC the authority to review, revise, or repeal rules of the Board, which are acts that only the General Assembly is authorized to take;
- (d) Declare that the RRC's enabling statutes are facially unconstitutional because they allow the RRC to improperly exercise legislative power by striking down agency rules without bicameral passage and presentment of a bill as required by Article II, Section 22 of the North Carolina Constitution;
- (e) Declare that the RRC's enabling statutes are facially unconstitutional and unconstitutional as applied to the Board because they permit the RRC to encroach on the judicial function in violation of the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution;
- (f) Declare that the RRC's enabling statutes are facially unconstitutional because even if the General Assembly could constitutionally delegate its authority to the RRC, which it cannot, it failed to provide adequate guiding standards in violation

of the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution;

- (g) Declare, if the Court concludes that the Board is an agency within the executive branch, that the RRC's enabling statutes are facially unconstitutional because they permit the RRC to encroach on the executive function in violation of the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution;
- (h) Enter a permanent injunction enjoining the RRC from exercising authority over the Board;
- (i) Assess costs against the State pursuant to N.C. Gen. Stat. § 1-263;
- (j) Award reasonable attorneys' fees to the Board as permitted by law; and
- (k) Grant the Board any and all other relief which this Court deems just and proper.

Respectfully submitted the 7th day of November, 2014.

POYNER SPRUILL LLP

By: 

for Robert F. Orr *by HFE w/permission*
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**COUNSEL FOR PLAINTIFF
THE NORTH CAROLINA
STATE BOARD OF EDUCATION**

STATE OF NORTH CAROLINA

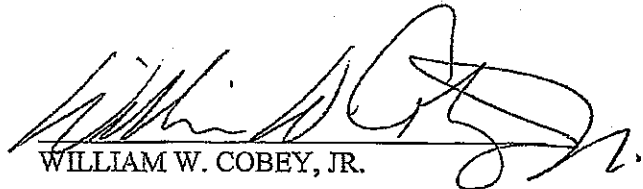
VERIFICATION

COUNTY OF WAKE

William W. Cobey, Jr., being first duly sworn, deposes and says:

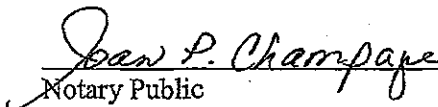
That he is the Chairman of the State Board of Education, the Plaintiff in this action; that he has read the foregoing Complaint and knows the contents thereof; that the allegations therein are true of his own knowledge, except as to those things therein stated upon information and belief; and that as to those matters and things stated upon information and belief, he believes them to be true.

This the 6 day of November, 2014.

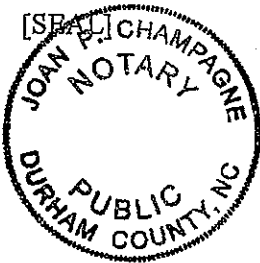

WILLIAM W. COBEY, JR.

WAKE COUNTY, NORTH CAROLINA

Sworn to and subscribed before me this the 6 day of November, 2014.


Notary Public

My commission expires: 1-9-2018



NORTH CAROLINA

WAKE COUNTY

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GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14 CVS 014791

NORTH CAROLINA STATE BOARD OF EDUCATION,)
C.S.C.)

Plaintiff,)

v.)

THE STATE OF NORTH CAROLINA)
and THE NORTH CAROLINA RULES)
REVIEW COMMISSION,)

Defendants.)

DEFENDANTS' MOTION TO
DISMISS PLAINTIFF'S
VERIFIED COMPLAINT

NOW COME DEFENDANTS, the State of North Carolina and the North Carolina Rules Review Commission, by and through its counsel, Roy Cooper, Attorney General of the State of North Carolina, Amar Majmundar, Special Deputy Attorney General, and Charles G. Whitehead, Special Deputy Attorney General, without waiving any motions or defenses not set out herein, and files their Motion to Dismiss Plaintiff's Verified Complaint in this matter.

Plaintiff seeks a Declaratory Judgment and avers generally that the North Carolina Administrative Procedure Act, N.C. Gen. Stat. §§ 150B-1, *et seq.*, are unconstitutional as applied to it, and that by extension, the North Carolina State Board of Education is excepted from the provisions of N.C. Gen. Stat. § 150B-21.2(g) of the Administrative Act that require the submission of proposed agency rules to the North Carolina Rules Review Commission for review and adoption. In conjunction, and in the alternative, Plaintiff contends that the enabling statutes crafted and enacted by the State of North Carolina that create, define and implement the Administrative Procedure Act, and further authorize the role and obligations of the North Carolina Rules Review Commission, N.C. Gen. Stat. § 150B-21.2, *et seq.*, are facially

unconstitutional, and are therefore inapplicable to not only to Plaintiff, but to any agency of the State.

In response, and light of Plaintiff's failure to abide by the applicable statute of limitations, failure to present a justiciable claim or controversy under the Declaratory Judgment Act, failure to abide by the principles of estoppel, failure to establish necessary jurisdictional predicates, and failure to otherwise state a claim upon which relief may be granted, Defendants make the following motions:

MOTION TO DISMISS-RULE 12(b)(1)

Defendants move this Court pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure to dismiss this action for lack of subject matter jurisdiction.

MOTION TO DISMISS-RULE 12(b)(2)

Defendants move this Court pursuant to Rule 12(b)(2) of the Rules of Civil Procedure to dismiss this action for lack of personal jurisdiction.

MOTION TO DISMISS-RULE 12(b)(6)

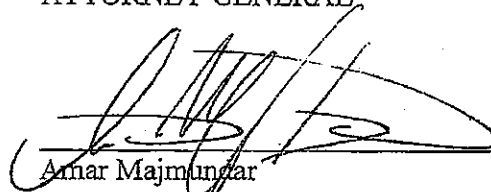
Defendants move this Court pursuant to Rule 12(b)(6) of the Rules of Civil Procedure to dismiss this action for failure to state a claim upon which relief can be granted.

WHEREFORE, Defendants, the State of North Carolina and the North Carolina Rules Review Commission, pray unto the Court that:

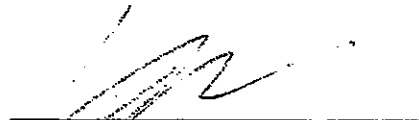
1. Plaintiff's Verified Complaint be dismissed with prejudice;
2. That the costs of this action be awarded to Defendants; and,
3. For such further relief the Court deems just and proper.

Respectfully submitted this the 12th day of January, 2015.

ROY COOPER
ATTORNEY GENERAL



Amar Majmundar
Special Deputy Attorney General
NC Department of Justice
NC Bar No. 24668
PO Box 629
Raleigh, NC 27602
(919) 716-6820
amajmundar@ncdoj.gov



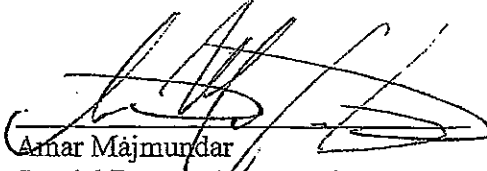
Charles G. Whitehead
Special Deputy Attorney General
NC Department of Justice
NC Bar No. 36222
PO Box 629
Raleigh, NC 27602
(919) 716-6840
cwhitehead@ncdoj.gov

CERTIFICATE OF SERVICE

I, Amar Majmundar, attorney for Defendants, hereby certify that a copy of the foregoing Motion to Dismiss was duly served upon the attorneys for the Plaintiff, by depositing a copy of the same in the United States mail, postage paid, addressed as follows:

Mr. Robert F. Orr
Mr. Andrew H. Erteschik
Poyner Spruill LLP
Post Office Box 1801
Raleigh, North Carolina
27602-1801

This the 12th day of January, 2015.


Amar Majmundar
Special Deputy Attorney General

NORTH CAROLINA
WAKE COUNTY

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14-CVS-14791

NORTH CAROLINA STATE
BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA and
THE NORTH CAROLINA RULES
REVIEW COMMISSION,

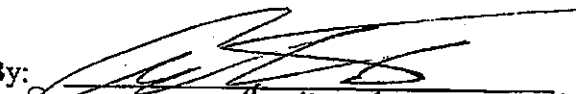
Defendants.

**PLAINTIFF'S NOTICE OF VOLUNTARY
DISMISSAL OF COUNTS 4-7**

Pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, Plaintiff North Carolina State Board of Education hereby gives notice of voluntary dismissal without prejudice of Counts 4, 5, 6, and 7 of the Verified Complaint.

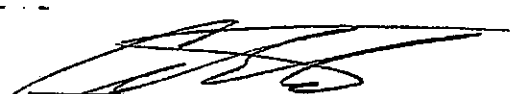
Respectfully submitted the 23rd day of February, 2015.

By:


for Robert F. Orr (by AHE w/express permission)
N.C. State Bar No. 6798
orr@rforrlaw.com
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COUNSEL FOR PLAINTIFF
NORTH CAROLINA STATE BOARD
OF EDUCATION

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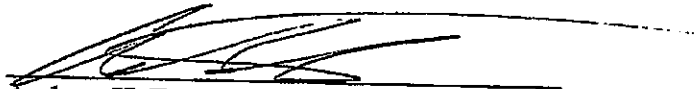
COUNSEL FOR PLAINTIFF
NORTH CAROLINA STATE BOARD
OF EDUCATION

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by e-mail and depositing a copy thereof in an envelope bearing sufficient postage in the U.S. mail, addressed to the following person at the following address which is the last address known to me:

Amar Majmundar
amajmundar@ncdoj.gov
Charles G. Whitehead
cwhitehead@ncdoj.gov
NC Department of Justice
P.O. Box 629
Raleigh, NC 27602
Counsel for Defendant

This the 23rd day of February, 2015.


Andrew H. Erteschik

NORTH CAROLINA

WAKE COUNTY

NORTH CAROLINA STATE
BOARD OF EDUCATION, WAKE COUNTY, C.S.C.

BY Plaintiff,

v.

THE STATE OF NORTH CAROLINA and
THE NORTH CAROLINA RULES
REVIEW COMMISSION,

Defendants.

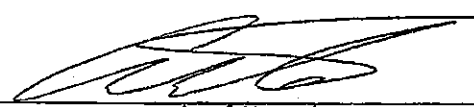
GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14-CVS-14791

**PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT ON
COUNTS 1, 2, AND 3
OF VERIFIED COMPLAINT**

Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, Plaintiff North Carolina State Board of Education ("the Board") moves for summary judgment on Counts 1, 2, and 3 of its Verified Complaint. The Board seeks summary judgment on the grounds that the pleadings, verification, and other materials on file with the Court show that there exists no genuine issues of material fact and that the Board is entitled to judgment on Counts 1, 2, and 3 as a matter of law.

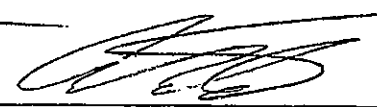
Respectfully submitted the 20th day of March, 2015.

By:


for Robert F. Orr *by AHE w/express permission*
N.C. State Bar No. 6798
orr@rforrlaw.com
3434 Edwards Mill Road
Suite 112-372
Raleigh, NC 27612
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COUNSEL FOR PLAINTIFF
NORTH CAROLINA STATE BOARD
OF EDUCATION

By:


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aerteschik@poyners.com
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Raleigh, NC 27602-1801
Telephone: 919.783.2895

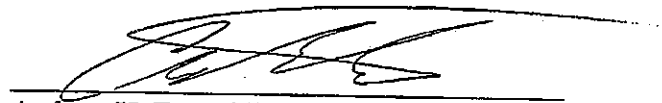
COUNSEL FOR PLAINTIFF
NORTH CAROLINA STATE BOARD
OF EDUCATION

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by e-mail and depositing a copy thereof in an envelope bearing sufficient postage in the U.S. mail, addressed to the following person at the following address which is the last address known to me:

Amar Majmundar
amajmundar@ncdoj.gov
Charles G. Whitehead
cwhitehead@ncdoj.gov
NC Department of Justice
P.O. Box 629
Raleigh, NC 27602
Counsel for Defendants

This the 20th day of March, 2015.



Andrew H. Erteschik

NORTH CAROLINA

WAKE COUNTY

FILED
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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14 CVS 14791

NORTH CAROLINA STATE BOARD OF
ELECTIONS,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA
and THE NORTH CAROLINA RULES
REVIEW COMMITTEE,

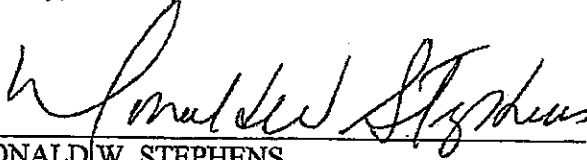
Defendants.

ORDER ASSIGNING CASE
UNDER LOCAL RULE 2.2

Pursuant to Tenth Judicial District Local Rule 2.2, the undersigned judge hereby designates the Honorable Paul G. Gessner to preside over all future trial court proceedings in this action, unless otherwise ordered by the Senior Resident Superior Court Judge.

Attorneys for the parties shall coordinate the scheduling of all matters through the Trial Court Administrator and Judge Gessner.

So ordered this the 11 day of May, 2015.


DONALD W. STEPHENS
SENIOR RESIDENT SUPERIOR COURT JUDGE

NORTH CAROLINA

WAKE COUNTY

NORTH CAROLINA STATE
BOARD OF EDUCATION,

FILED

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14-CVS-14791

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WAKE COUNTY, C.S.C.
Plaintiff,

v.

THE STATE OF NORTH CAROLINA and
THE NORTH CAROLINA RULES
REVIEW COMMISSION,

Defendants.

**PLAINTIFF'S NOTICE OF
VOLUNTARY DISMISSAL OF COUNT 1**


Pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, Plaintiff North Carolina State Board of Education hereby gives notice of voluntary dismissal without prejudice of Count 1 of the Verified Complaint.

Respectfully submitted the 19th day of June, 2015.

CAMPBELL SHATLEY, PLLC


POYNER SPRUILL LLP

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**COUNSEL FOR PLAINTIFF
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BOARD OF EDUCATION**

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Facsimile: 919-783-1075

**COUNSEL FOR PLAINTIFF
NORTH CAROLINA STATE
BOARD OF EDUCATION**

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by e-mail and depositing a copy thereof in an envelope bearing sufficient postage in the U.S. mail, addressed to the following person at the following address which is the last address known to me:

Amar Majmundar
amajmundar@ncdoj.gov
Charles G. Whitehead
cwhitehead@ncdoj.gov
NC Department of Justice
P.O. Box 629
Raleigh, NC 27602
Counsel for Defendant

This the 19th day of June, 2015.



Andrew H. Erteschik

WAKE COUNTY

NORTH CAROLINA STATE BOARD
OF EDUCATION,
Plaintiff,
v.
THE STATE OF NORTH CAROLINA
and THE NORTH CAROLINA RULES
REVIEW COMMISSION,
Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF
THEIR MOTION TO DISMISS, AND IN
OPPOSITION TO PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

COME NOW the State of North Carolina and the North Carolina Rules Review Commission, by and through its undersigned counsel, Attorney General Roy Cooper, and Special Deputy Attorneys General Olga E. Vysotskaya de Brito and Amar Majmundar, and pursuant to Rules 12(b)(1), (b)(2), (b)(6), and Rule 56 of the North Carolina Rules of Civil Procedure, submit this Brief in support of their Motions to Dismiss and in opposition to Plaintiff's Motion For Summary Judgment.

INTRODUCTION

Distilling the Verified Complaint into its most elemental form reveals the Board of Education's (the "Board") objective to be declared a "Constitutional body," with virtually unbridled authority to promulgate and implement rules that potentially yield a profound impact upon the public's right to primary and secondary education. In making its demand of this Court, Plaintiff further suggests that the rules it will adopt will be unfettered by any "check," save the convening of the General Assembly who may thereafter only revise or repeal a rule through the passage of specific legislation. In doing so, the Board has proclaimed that it shall hereinafter be

exempted from compliance with the terms of the Administrative Procedures Act, (the "APA"); that a declaratory judgment should be entered to specifically delineate that irrespective of the terms of the APA, the North Carolina Rules Review Commission (the "RRC") may not exert "legislative authority" over any of the rules promulgated by the Board; and, that any review of the Board's rules by the Commission constitutes a breach of the separation of powers, and specifically, encroachment upon the obligations of the legislative branch of government.

The APA was created to address the apparent difficulties of governance in the modern administrative state in the areas of rulemaking and administrative adjudicatory procedures. N.C.G.S. 150B-1(a). The Supreme Court "explicitly [] recognized the complexity of governing in the administrative state," Adams v. N.C. Dep't of Natural & Econ. Res., 295 N.C. 683 (1978), and noted that "strict adherence to ideal notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers," Id. at 696-97 (citations omitted). The General Assembly established the APA rulemaking framework to foster transparent governance with diffuse authority, and a structured mechanism to allow the public an opportunity to learn about and comment on pending rules. In turn, the RRC is a statutorily created, executive branch agency of State, N.C.G.S. § 143B-30.1(c), with the objective of reviewing administrative rules in accordance with APA. N.C.G.S. § 143B-30.2.

In essence, Plaintiff wishes to be viewed as a fourth branch of State government, with the authority to impact the educational opportunities of all the State's children, but without the encumbrances of sufficient checks and balances that the actual, three branches of government endure. Despite the assertions found in Plaintiff's Verified Complaint, the action filed by the Board is improperly pled, and otherwise reveals fatal defects that warrant dismissal under Rule 12.

Moreover, the Board's Motion for Summary Judgment under Rule 56, predicated solely upon the legal conclusions made in its Verified Complaint, is without merit and should be denied.

PROCEDURAL BACKGROUND

The Board filed its Verified Complaint on 7 November 2014, which featured seven various Counts. Pursuant to Rules 12(b)(1), (2) and (6). Defendants filed their Motions to Dismiss the Board's Verified Complaint on 12 January 2015. On 23 February 2015, and pursuant to Rule 41(a)(1), the Board filed a voluntary dismissal of Counts 4-7 of its Verified Complaint. Pursuant to Rule 56, on 20 March 2015 the Board filed a Motion for Summary Judgment on Counts 1-3. On or about 19 June 2015, the Board voluntarily dismissed Count 1 of its Verified Complaint.

ARGUMENT - DEFENDANT'S MOTION TO DISMISS

Article I, Section 6 of the North Carolina Constitution provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." There exists but three branches of government in this State. In re Alamance County Court Facilities, 329 N.C. 84, 96 (1991). By definition, the Board must fall within one of the three branches. Although Plaintiff has dismissed its pursuit of Count 1 of the Verified Complaint, this Court must still make a determination as to which branch of State government may lay claim to the Board. Assuredly, neither party contends that the Board falls within the parameters of the judicial branch. Consequently, the predicate question before this Court is whether the Board is an executive branch agency that is subject to the terms of the APA.

That preliminary question, if answered in the negative, subsequently serves to end this litigation. That is true because such a determination renders the remaining Counts 2 and 3 moot, and not properly subject to deliberation under the Declaratory Judgement Act. Morris v. Morris,

245 N.C. 30 (1956). If answered in the affirmative, then the Board is unquestionably subject to the laws of the General Assembly, including the procedural limitation found in the APA. In that sense, the Board's allegations that it is exempt because it is a "Constitutional fixture in its own right," (Verified Complaint ¶ 3), is too rendered inconsequential by virtue of the fact that although Article III founds and authorizes the executive branch of our State government (certainly a "Constitutional fixture"), the subordinate agencies of the executive branch are also subject to the terms of the APA. In this case, the recognition of the importance of education found in Article IX, Section 1 of the Constitution of North Carolina ("schools and means of education shall forever be encouraged."), and extended by Article IX, Section 5 of our State's Constitution, simply does not serve as a conduit to avoid the procedural safeguards of the APA. As described below, this conclusion is especially true in light of the Board's presentment of itself as an executive branch agency, and its repeated public acknowledgement that it is subject to the provisions of the APA.

Yet now, the Board seeks from this Court what it has failed to secure from the General Assembly: a full exemption from the terms of the APA. With its Verified Complaint, the Board takes the curious position of chastising Defendants for an alleged violation of the separation of powers, while simultaneously asking this Court to effectively amend what is otherwise unambiguous, proper, and necessary legislation. In doing so, the Board demands that this Court judicially intrude upon the General Assembly's exclusive authority to subject State agencies, like the Board, to the important review processes afforded through the APA that serve to protect the educational rights of all citizens with by unbiased and practical oversight.

Irrespective of its improper attempt to avoid legislative sanction, the Board has nevertheless failed to make the necessary legal and factual allegations necessary to survive

scrutiny under Rule 12(b). Instead, the Board offers generalized averments that present a collection of unsubstantiated and incorrect legal conclusions, worthy of dismissal.

I. STANDARD OF REVIEW.

A. N.C.G.S. § 1A-1, N.C. R. Civ. P. 12(b).

Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. Hardy v. Beaufort County Bd. of Educ., 200 N.C. App. 403 (2009). “When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), a trial court may consider and weigh matters outside the pleadings.” DOT v. Blue, 147 N.C. App. 596, 603 (2001), disc. review denied, 356 N.C. 434 (2002) (internal citations omitted). Under Rule 12(b)(2), a claim should be dismissed when the court lacks authority to exercise personal jurisdiction over the defendant. Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148 (1993). The Court of Appeals has specifically held that the doctrine of sovereign immunity presents a question of personal jurisdiction. See Green v. Kearney, 203 N.C. App. 260, 266 (2010). Moreover, the claimant is required to affirmatively plead a waiver of sovereign immunity. Id.

Rule 12(b)(6) tests the legal sufficiency of the complaint, where the well pleaded material allegations of the complaint are taken as admitted; but conclusions of law or deductions of fact are not admitted. Sutton v. Duke, 277 N.C. 94, 98 (1970). A legal insufficiency may be due to an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. State ex rel. Tenn. Dep’t of Health & Env’t v. Environmental Mgt. Comm’, 78 N.C. App. 763 (1986). An “esoteric analysis of the issue” in the absence of the specifically pleaded facts in the complaint does not survive a motion to dismiss under Rule 12(b)(6). Peele v. Provident Mut. Life Ins. Co., 90 N.C. App. 447,

449, disc. rev. denied, 323 N.C. 366 (1988). To prevent dismissal under Rule 12(b)(6), a party must (1) give sufficient notice of the events on which the claim is based to enable the adverse party to respond and prepare for trial, and (2) state sufficient facts to satisfy the substantive elements of a legally recognized claim. Hewes v. Johnston, 61 N.C. App. 603 (1983).

A. The Actions Of The General Assembly Are Presumed Constitutional And Plaintiff Must Demonstrate A Constitutional Defect Beyond a Reasonable Doubt.

Plaintiff "face[s] a heavy burden of persuasion" when attacking legislative acts of the General Assembly as unconstitutional. Ivarsson v. Office of Indigent Def. Servs., 156 N.C. App. 628, 631 (2003). "Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." Id. (quoting Baker v. Martin, 330 N.C. 331, 334 (1991)). Any doubt as to the legislature's power to act must be resolved in favor of the legislature. Baker, 330 N.C. at 338. Acts of the General Assembly are entitled to "great deference, and a statute will not be declared unconstitutional under [the] Constitution unless the Constitution clearly prohibits that statute." In re Spivey, 345 N.C. 404, 413 (1997). Thus, Plaintiff must show beyond a reasonable doubt that the policy choices enacted by the General Assembly, including the APA, violate Article IX, Section 5 of the Constitution.

II. THE DOCTRINE OF SOVEREIGN IMMUNITY BARS PLAINTIFF'S CLAIM.

This issue is presented pursuant to Rules 12(b)(1), (2) and (6). The doctrine of sovereign immunity is well settled in North Carolina. "It is an established principle of jurisprudence, resting on grounds of sound public policy that a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from

suit.” Welch Contracting, Inc. v. N.C. Dep’t of Transp., 175 N.C. App. 45, 51 (2005) (internal citations omitted). “By application of this principle, a subordinate division of the state or an agency exercising statutory governmental functions may be sued only when and as authorized by statute.” Id.

A. Sovereign Immunity - Pleading Requirements.

In order to sustain an action against the sovereign, a claimant must allege that the State has waived its immunity to be sued before the action may proceed, and absent those allegations, the claim must be dismissed for want of personal jurisdiction. Green v. Kearney, 203 N.C. App 260, 268 (2010). “This requirement does not, however, mandate that a complaint use any particular language. Instead, consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are sufficient to establish a waiver by the State of sovereign immunity.” Fabrikant v. Currituck Cty., 174 N.C. App. 30, 38 (2005). Here, a review of the Board’s Verified Complaint reveals absolutely no allegations, factual or otherwise, that Defendants have waived their sovereign immunity to this suit. According to the opinions of the Court of Appeals, the Board’s claim should be dismissed pursuant to Rule 12(b).

B. Sovereign Immunity - Constitutional Claims.

The two remaining Counts of Plaintiff’s Verified Complaint seek relief under the terms of the Declaratory Judgment Act. Even had Plaintiff made the necessary allegations of a waiver of sovereign immunity, jurisdiction under the Act is not automatically invoked. In fact, as it pertains to the State and its agencies, the Court of Appeals has explicitly held that sovereign immunity is not waived by the Act. Petroleum Traders Corp. v. State, 190 N.C. App. 542 (2008). Defendants have not expressly waived sovereign immunity, and in fact, no such waiver exists under the plain

terms of the Declaratory Judgment Act. As such, Plaintiff's only recourse is to cull a waiver of immunity from common law pursuant to Corum v. University of North Carolina, 330 N.C. 761 (1992). However, as was true in Petroleum Traders, Corum fails to provide Plaintiff any refuge.

In Corum, the Supreme Court held that "[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights [of our Constitution]." Id. at 785-86, 413. However, with Petroleum Traders, the Court of Appeals specifically noted that "[o]ur appellate courts have applied the holding of Corum to find a waiver of sovereign immunity **only in cases wherein the plaintiff alleged a violation of a right protected by the Declaration of Rights.**" Id. at 548 (emphasis added). With Petroleum Traders, the Court of Appeals went on to specifically note that "every other case waiving sovereign immunity based on Corum," alleged a violation of a right protected by the Declaration of Rights, Id. at 550, that "Corum contains no suggestion of an intention to eliminate sovereign immunity for any and all alleged violations of the N.C. Constitution," Id. at 551, and that "Corum is properly limited to claims asserting violation of the plaintiff's personal rights as set out in the N.C. Constitution Declaration of Rights." Id. at 551.

Moreover, Petroleum Traders specifically bars claims against the sovereign predicated upon constitutional clauses that articulate procedural rules, rather than those where personal rights have been abridged by the State. That is precisely the case here as Plaintiff's claim rests entirely upon the terms of Article IX, Section 5 of the State's Constitution which provides that:

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and

shall make all needed rules and regulations in relation thereto,
subject to laws enacted by the General Assembly.

This clause is entirely procedural in nature and function, and articulates no personal rights. Indeed, Plaintiff has made no allegations that any of its rights have been abridged by Defendants, or that it has ever been compelled by Defendants to submit rules for analysis under the Administrative Procedures Act. Absent that intrusion upon rights articulated under the Constitution, no waiver of sovereign immunity may be implied. Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334 (2009).

III. THIS COURT LACKS JURISDICTION TO ENTERTAIN PLAINTIFF'S CLAIMS UNDER THE DECLARATORY JUDGMENT ACT.

This issue is presented pursuant to Rules 12(b)(1) and (6). Under N.C.G.S. § 1-253, actions for declaratory judgment will lie for an adjudication of rights, status, or other legal relations only when there is an actual existing controversy between the parties. Wright v. McGee, 206 N.C. 52 (1934). Courts have jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance or franchise. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285 (1964).

It is Plaintiff who must show the existence of the conditions upon which the court's jurisdiction may be invoked. Elliott v. Ballentine, 7 N.C. App. 682 (1970). When the record shows that there is no basis for declaratory relief, the claim is subject to dismissal. Kirkman v. Kirkman, 42 N.C. App. 173, cert. denied, 298 N.C. 297 (1979). It is not necessary that one party

have an actual right of action against another, but there must be more than a mere disagreement. This means that it must be shown in the complaint that litigation appears unavoidable. North Carolina Farm Bureau Mut. Ins. Co. v. Warren, 89 N.C. App. 148, cert. denied, 322 N.C. 481 (1988). A mere difference of opinion between the parties does not constitute a controversy within the meaning of the Declaratory Judgment Act. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230 (1984). The sufficiency of the Complaint is judged not according to whether it shows that a claimant is entitled to the declaration in accordance with his theory, but whether he is entitled to a declaration of rights at all. Hubbard v. Josey, 267 N.C. 651 (1966).

A. Plaintiff's Verified Complaint is Facially Defective.

Plaintiff's Verified Complaint features absolutely no factual allegations from which it can be concluded that an actual controversy exists between the Board and Defendants. At most, Plaintiff concocts the idea of a controversy and uses suggestive language in its allegations, to wit:

- "Because the Board is not expressly named as an exempt entity under the law, **the RRC has taken the position** that the Board is subject to its authority." (Verified Complaint, ¶ 2)
- "... the RRC since its creation in 1986 has **purported to exercise authority** over the Board..." (Verified Complaint, ¶ 4)
- "...the RRC since 1986 has **purported to exercise control** over the Board, deeming the Board an "agency" within the meaning of N.C.G.S. § 150B-2(1a)." (Verified Complaint, ¶ 24)
- The Board recognizes that its decision [to no longer voluntarily submit its rules for RRC approval] is in **direct conflict with the RRC's interpretation and application** of both N.C.G.S. § 150B2-(1a) and the RRC's enabling legislation. (Verified Complaint, ¶ 29)

Even a cursory review of these paragraphs reveals no assertion of factual, or other allegations to establish the existence of an actual controversy between the parties. Instead, the allegations in these paragraphs simply offer speculation and deductions as to what the Board perceives the RRC's position to be. Yet, these are precisely the allegations Plaintiff wield in an attempt to conjure a non-existent controversy. At no point does Plaintiff plead any facts to allege that the RRC has actively demanded that the Board submit its Rules for evaluation; any facts that RRC has claimed that the Board lacks the authority to devise and promulgate rules; any facts that the RRC has unilaterally declared that an un-submitted rule lacks force and effect; or, any facts that any member of the RRC has publically declared that the Board is bound to submit its rules for review under the APA. Likewise, Plaintiff's Verified Complaint features no facts regarding any specific rule that may serve as a source of controversy.

Not only are there no predicate allegations of a controversy between the parties, the Board candidly admits that since 1986, it has voluntarily submitted "its rules for RRC approval." (Verified Complaint ¶¶ 24, 25, 28) That voluntary submission of rules is emblematic of the cooperative relationship that actually exists between the RRC and the Board. Indeed, pursuant to N.C.G.S. § 150B-21, the Board has continuously designated a member of its staff to serve as rule-making coordinator to work with the RRC to ensure that the Board's rules sufficiently comply with the terms of the APA. See Exhibit F. Likewise, a review of the Board's website reveals that it contemplates the APA as part of its own rulemaking authority by designating an entire section to "Rules (APA)."¹ These, and other admissions, manifestly establish a lack of any controversy

¹ <http://stateboard.ncpublicschools.gov/rules-apa>

between the parties, either now or ever.

Indeed, since May 2014, the Board has refused to submit rules to the RRC, and has during that time adopted these rules as binding “policies.” See Exhibit G. Yet despite this apparent exercise of the full extent of the Board’s “constitutional authority,” the RRC has remained silent and has taken no position on the Board’s unilateral actions. This silence is telling: the RRC has expressed absolutely no dominion over the Board’s adopted “policies,” and there exists no controversy between them. As a consequence, the Board’s Verified Complaint merely seeks this Court’s engagement into impermissible academic exercises. Competitor Liaison Bureau of Nascar, Inc. v. Blevins, 242 N.C. 282 (1955). Our State’s courts have construed the law in such a manner that the jurisdiction may be protected against such academic inquiry when the questions presented are altogether moot, arising out of no necessity for the protection of any rights or avoidance of any liability, and where the parties have only a hypothetical interest in the decision of the court. Hicks v. Hicks, 60 N.C. App. 517 (1983). That is precisely the case here.

IV. THE PRINCIPLES OF ESTOPPEL BAR PLAINTIFF’S CLAIM.

This issue is presented pursuant to Rules 12(b)(1) and (6). Since the inception of the RRC in 1986, the Board of Education has consistently sought the benefits derived from the analysis and counsel of the RRC through adherence to the APA process. Twenty-eight years later, the Board now seeks to ignore that process and proclaims itself a “Constitutional fixture” that is no longer subject to the provisions of the APA. Despite its assertion, under the doctrine of “quasi-estoppel,” the Board is prohibited from unilaterally exercising its so-called “full constitutional authority”:

The rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. The principle is an application of the broader doctrine of quasi-estoppel, which states that where one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it.

Shell Island Homeowners Ass'n v. Tomlinson, 134 N.C. App. 217, 226 (1999) (citations and quotations omitted). Admittedly, Plaintiff's Verified Complaint is crafted in such a way as to eliminate the "transactional" nature of an estoppel argument. However, quasi-estoppel is inherently flexible and cannot be reduced to any rigid formulation. See Taylor v. Taylor, 321 N.C. 244, 249 n.1 (1987). Instead of a particular transaction, this Court should recognize that the RRC functions on behalf of the general public, who have come to rely upon the procedural safeguards embedded in the APA. This need to serve and reinforce the public's expectations of uniform and properly promulgated rules that are subject to objective oversight is particularly vital in the forum of education, which is perhaps the most important of the core functions performed by the State. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1 The Board of Education should be estopped from denying the RRC the ability to perform the public purpose assigned to it by the General Assembly, and relied upon by the general public.

V. PLAINTIFF HAS OTHERWISE FAILED TO ALLEGE SUFFICIENT FACTS UPON WHICH RELIEF MAY BE GRANTED.

This issue is presented pursuant to Rule 12(b)(6). A fundamental premise of the APA is that State agencies should not promulgate regulations without first informing the public and providing the people with an opportunity to comment. See N.C.G.S. § 150B-21.2. To ensure

that the public is included in the rulemaking process, the APA requires agencies to publish their proposed rules in the North Carolina Register. Id. § 150B-21.2(a). State agencies are prohibited from adopting any rule that differs substantially from the text published in the Register. Id. § 150B-21.2(g). During its review of a permanent rule, the RRC must determine whether changes to the rule made by the submitting agency in response to an RRC objection are “substantial.” Id. § 150B-21.12(c). If they are, the revised rule must be published and reviewed in accordance with the expedited procedures normally used for temporary rules. Id. (referencing N.C.G.S. § 150B-21.1(a3) and (b)).

With its Verified Complaint, Plaintiff now seeks to thwart the important public purpose of the APA as effectuated by the RRC. Yet, other than historical anecdotes and legal conclusions, the Verified Complaint filed by Plaintiff is virtually devoid of any facts from which a claim can be stated under Rule 12(b)(6). Plaintiff’s complaint amounts to a subjective interpretation of the law, and a demand that this Court accept that interpretation. In doing so, Plaintiff’s assiduously attempt to avoid being labeled an “agency,” and thereby seemingly avoids being made subject to the APA. In that regard, it should be noted that the General Assembly itself has specifically defined the Board as an agency by making it the head of the DPL. N.C.G.S. § 143-44.1.

The Board nevertheless persists, insisting with its Verified Complaint that Article IX, Section 5 grants it the status of a unique governmental body endowed with unfettered constitutional authority to “make all needed rules and regulations” in relation to the supervision and administration of a free public school system. Indeed, Plaintiff presses further to contend that the Board’s power to promulgate rules is only limited by rule-specific legislation that is

consequently drafted by the General Assembly, and signed into law by the Governor. Despite the confidence expressed by the Board, Article IX, Section 5 features no such language:

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and **shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.**

(Emphasis added). The exact constitutional provision relied upon by Plaintiff to demand its authority, also serves to expressly limit that authority by subjecting the Board to the laws enacted by the State's legislature. While there is no question that the Board draws authority from the Constitution, it must be acknowledged that it is also subject to statutory provisions and scrutiny propounded by the General Assembly.

A. **Guthrie v. Taylor.**

To avoid that conclusion, and buttress its own contentions regarding its authority, Plaintiff expressly relies upon Guthrie v. Taylor, 279 N.C. 703 (1971) cert. denied 406 U.S. 920 (1972) for the proposition that because the Board's original authority was granted by the Constitution, it is a unique governmental body that may make any and all rules and regulations related to the supervision and administration of free public schools, without the safeguarding provisions of administrative oversight. According to Plaintiff, that case further serves to substantiate the claim that any rule unilaterally adopted by the Board may only be revised or repealed by specific legislation enacted by the General Assembly. Despite these assertions, Plaintiff misapprehends the holding in Guthrie, especially in light of doctrinal and statutory changes since 1971.

In Guthrie, a certified public school teacher sued on behalf of himself and all other

classroom teachers in the State for a judgment to declare the invalidity of certain rules and regulations of the Board pertaining to teacher certification. According to that Plaintiff, the certification requirements mandated by the Board went beyond the permissible scope of certification requirements found in N.C.G.S. § 115 (repealed 1981), and that as a result, the Board exceeded its authority under the statute. The Supreme Court noted that the Board derives power from the Constitution and the General Assembly. *Id.* at 713. The Court then held that Chapter 115 did not “specifically limit[] the authority of the State Board of Education to promulgate or administer rules and regulations” in relation to certification requirements, and in the “the silence of the General Assembly, the authority of the State Board to promulgate and administer regulations...was limited only by other provisions in the Constitution, itself.” *Id.* at 710.

From this language, Plaintiff presumes that the Court acknowledged the Board’s plenary authority to conduct rule-making, with the specific enactment of legislation serving as the sole limitation. Indeed, Plaintiff notes that “since the creation of the Board in 1868, no state constitutional amendment or decision of the Supreme Court of North Carolina has limited the Board’s broad powers and duties...” (Verified Complaint, ¶ 19). Yet Guthrie was concerned with the silence found in the now repealed N.C.G.S. § 115, *et seq.* Since that time of legislative silence, the General Assembly has since instructed the Board of certain limitations on its authority by virtue of the comprehensive, explicit, and binding nature of N.C.G.S. § 115C, *et seq.* Coupled with N.C.G.S. § 150B, (as described more fully immediately below), that statute eliminates doubt that the Board is subject to the rulemaking provisions of the APA.

B. The Administrative Procedure Act.

The allegations made by Plaintiff specifically avoid reference to any limitations imposed

by virtue of "the laws of the General Assembly." Specifically, the APA was enacted in 1975, roughly four years following the Supreme Court's opinion in Guthrie. With the Act, the General Assembly no longer remained "silent" regarding the manner and method the Board may promulgate its rules. Instead, the Act provides that the Board is subject its provisions. N.C.G.S. § 150B-18 specifically provides that the Act is applicable to an "agency's exercise of its authority to adopt rules." Chapter 115C, which has in part replaced the antiquated Chapter 115, and which describes the duties of the Board of Education, specifically notes that "[a]ll actions of agencies taken pursuant to this Chapter, as agency is defined in G.S. 150B-2, is subject to the requirements of the Administrative Procedure Act, Chapter 150B of the General Statutes." N.C.G.S. § 115C-2.

Other statutes within the chapter further demonstrate that the applicability of the APA to the Board. For instance, in crafting certain exceptions to the APA, the General Assembly enacted N.C.G.S. § 115C-17, which provides in pertinent part that:

(a) **G.S. 150B-21.2(a)(1) shall not apply to proposed rules adopted by the State Board of Education if the proposed rules are directly related to the implementation of this act [1995 (Reg. Sess., 1996), c. 716, s. 28].**

(b) **Notwithstanding G.S. 150B-21.3(b), a permanent rule that is adopted by the State Board of Education, is approved by the Rules Review Commission, and is directly related to the implementation of this act, shall become effective five business days after the Commission delivers the rule to the Codifier of Rules, unless the rule specifies a later effective date. If the State Board of Education specifies a later effective date, the rule becomes effective upon that date. A permanent rule that is adopted by the State Board of Education that is directly related to the implementation of this act, but is not approved by the Rules Review Commission, shall not become effective.**

(c) **G.S. 150B-21.4(b1) shall not apply to permanent rules the State Board of Education proposes to adopt if those rules are directly related to the implementation of this act** [1995 (Reg. Sess., 1996), c. 716, s. 28].

(Emphasis added). From this statute, no other logical conclusion can be drawn than the Board is subject to the APA when it creates its rules.

Perhaps as a nod to Guthrie, the General Assembly enacted N.C.G.S. § 115C-296 dealing with the Board's certification requirements for teachers, and noted in subsection (a1) that:

The State Board shall adopt policies that establish the minimum scores for any required standard examinations and other measures necessary to assess the qualifications of professional personnel as required under subsection (a) of this section. **For purposes of this subsection, the State Board shall not be subject to Article 2A of Chapter 150B of the General Statutes.**

(Emphasis added) "In determining the will or intent of the people as expressed in the Constitution, all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument." Coley, 360 N.C. at 498 (internal quotation marks omitted). "[A]s in interpreting a statute, if the meaning is clear from reading the words of the Constitution, [courts] should not search for a meaning elsewhere." Melott, 320 N.C. at 520 (citing Elliot v. Gardner, 203 N.C. 749 (1932)).

The meaning of the last portion of Article IX, Section 5 is unambiguous. Pursuant to that plain language, the General Assembly has demonstrated its will to subject the Board to the provisions of the APA by enacting appropriate legislation as prescribed by Article IX, Section 5 of the Constitution. In that regard, it should be further noted that:

[S]tatutory interpretation presents a question of law. The cardinal principle in the process is to ensure accomplishment of legislative intent. To achieve this end, the court should consider "the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." **In ascertaining the intent of the legislature, the presumption is that it acted with full knowledge of prior and existing laws.**

Williams v. Alexander County Bd. of Educ., 128 N.C. App. 599, 603 (1998) (internal citation omitted) (emphasis added). Pursuant to Article IX, Section 5, the Constitutional grant of powers to the Board may be limited and defined by "laws enacted by the General Assembly." Id. Setting aside constitutional legal theories that are cloaked as allegations, there is no doubt that the Verified Complaint is fatally defective. In addressing a similar claim regarding the Board's constitutional authority, the Court of Appeals noted that:

Finally, defendants claim "exclusive authority to regulate the professional qualifications of persons employed in North Carolina schools" as "the Constitution itself grants the State Board [this] plenary authority." This power is unfettered, the Board of Education asserts, as its "authority regarding certification of school professionals does not derive from the General Assembly at all." (Emphasis added.) Defendants have misapprehended their power under the N.C. Constitution and the Act. Certainly, they are subject to both. Article IX, § 5 of the North Carolina Constitution is unambiguous on this point, as it states: "The State Board of Education shall supervise and administer the free public school system . . . and shall make all needed rules and regulations in relation thereto, **subject to laws enacted by the General Assembly.**" (Emphasis added.) Moreover, this Constitutional provision was interpreted by our Supreme Court in Guthrie v. Taylor, 279 N.C. 703, 710, 185 S.E.2d 193, 198 (1971), cert. denied, 406 U.S. 920, 32 L. Ed. 2d 119, 92 S. Ct. 1774 (1972). There the Court held that Article IX, § 5 "was designed to make, and did make, the powers so conferred upon the State Board of Education

subject to limitation and revision by acts of the General Assembly.”

Id.

North Carolina Bd. of Examiners for Speech & Language Pathologists & Audiologists v. North Carolina State Bd. of Educ., 122 N.C. App. 15, 20 (1996) aff’d in part, disc. rev. improvidently all’d in part by 345 N.C. 493, 480 S.E.2d 50 (1997) (emphasis in the original). The instant case presents the same claims of Constitutional authority that was offered by the Board in that case. As was found there, the claims made by the Board here are without merit. Plaintiff’s Verified Complaint is factually deficient, legally flawed, and is worthy of dismissal.

RESPONSE TO PLAINTIFF’S MOTION FOR SUMMARY JUDGEMENT

With its Motion for Summary Judgment, the Board pursues a ruling that would entirely exempt the agency from the APA process. Specifically, the Board seeks a summary declaratory judgment on Counts 2 and 3 of its Verified Complaint, praying the Court to declare that “RRC’s exercise of authority over the Board violates Article IX, Section 5 of the North Carolina Constitution because it subverts the Board’s general supervisory and administrative rulemaking authority on matters concerning North Carolina’s free public schools;” and to further find that “the RRC’s exercise of authority over the Board violates the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution because it unconstitutionally delegates to the RRC the authority to review, revise, or repeal rules of the Board, which are acts that only the General Assembly is authorized to take[.]” (P Compl. P 14 (b)-(c)). Despite the allegations made by Plaintiff, there exist ample facts to suggest that not only should the Board’s Motion be denied, but that Summary Judgment should be granted to the non-movants.

I. STANDARD FOR MOTION FOR SUMMARY JUDGMENT

The propriety of a summary judgment in declaratory judgment actions is governed by the same rules applicable to other actions. North Carolina Life & Accident & Health Ins. Guar. Ass'n v. Underwriters Nat'l Assurance Co., 48 N.C. App. 508, cert. denied and appeal dismissed, 301 N.C. 527 (1980), rev'd on other grounds, 455 U.S. 691 (1982). Under the rule, a party is entitled to summary judgment if it can establish through the pleadings and affidavits, that there is no genuine issue as to any material fact, that only issues of law remain and that it is entitled to judgment as a matter of law. Whittington v. North Carolina Dep't of Human Resources, 100 N.C. App. 603, 605 (1990). Facts necessary to support summary judgment must be established by pleadings, depositions, answers to interrogatories, admissions or affidavits. Cieszko v. Clark, 92 N.C. App. 290. Where the pleadings and attendant supporting documents affirmatively disclose that the nature of the controversy presents a good faith and actual dispute on one or more material issues, summary judgment cannot be used. Page v. Sloan, 281 N.C. 697 (1972). "If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper." Insurance Agency v. Leasing Corp., 26 N.C. App. 138 (1975).

The movant's burden in a motion for a declaratory summary judgment regarding the constitutionality of our statutes is especially heavy, because "a statute enacted by the General Assembly is presumed to be constitutional." Farber v. N.C. Psychology Bd., 153 N.C. App. 1, 18 (2002) (citing Wayne County Citizens Assn. v. Wayne County Bd. of Comrs., 328 N.C. 24, 29 (1991).) "Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." Baker v. Martin, 330 N.C. 331, 334 (1991), quoting Gardner v. Reidsville, 269 N.C. 581, 595 (1967).

Summary judgment may also be appropriate against the moving party. If the non-movants clearly establish that there is no genuine issue as to the nonexistence of material facts which are necessary as an essential element of any cause of action against them, then they are entitled to summary judgment on that action. Clodfelter v. Bates, 44 N.C. App. 107 (1979), cert. denied, 299 N.C. 329 (1980). A defending party is entitled to summary judgment if the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. Little v. National Servs. Indus., Inc., 79 N.C. App. 688 (1986).

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS DEFECTIVE AND SHOULD BE DENIED IN EVERY RESPECT.

A. Plaintiff's Motion for Summary Judgement Is Premature As Defendants Have Not Yet Filed An Answer.

Entry of a declaratory judgment is improper until an answer to a complaint has been filed. "In the absence of a stipulation, a declaratory judgment may be entered **only after answer** and on such evidence as the parties may introduce upon the trial or hearing." Insurance Co. v. Roberts, 261 N.C. 285, 288, (1964) (internal citations omitted) (emphasis added). See also Hubbard, 267 N.C. 651 (1966). Defendants have made no factual stipulations concerning SBE's allegations, and have filed no answer to the Board's Verified Complaint. Therefore, especially in light of this "as applied" constitutional challenge, the Court should deny the Board's Motion for Summary Judgment.

B. The Verified Complaint Lacks Sufficient Facts To Establish That Defendants Have Impermissibly Encroached Upon The Board's Rulemaking Authority.

Requests for declaratory summary judgments in the context of "as applied" constitutional challenges of statutes are subject to a very careful and strict scrutiny by the court for factual

sufficiency. State ex rel. Edmisten v. Fayetteville Street Christian School, 299 N.C. 351, 358-360 (1980). The Board insists that RRC exceeds the bounds of certain constitutional limitations when it reviews the Rules submitted to it. Yet, factually the Board merely alleges that "[s]ince its inception in 1986, the RRC or its staff has objected to or modified every rule adopted by the Board and submitted to the RRC for approval. Moreover, the Board has declined to adopt a number of rules that it otherwise would have adopted but for the fact that the RRC would have objected to these rules or struck them down." (P Compl ¶ 25).

The Board does not allege that the RRC requires or even possesses the authority to require it to submit rules for review. Further, there is nothing in the record to guide the judicial inquiry into whether the RRC has ever rejected a Board's rule based on its finding that the Board exceeded the bounds of its Constitutional authority, whether RRC's amendments or revisions to the Board's rules submitted for its review were arbitrary or capricious, whether the length of the rules review process violated RRC's enabling statutes as applied to the Board, or any other specific allegation concerning any specific rule promulgated by the Board. Summary judgment regarding the constitutionality of a statute based on such a paucity of facts is improper:

In short, defendants' assertions in their affidavits have not been tested by cross examination; their allegations have not been buttressed by the introduction of evidence; and there has been no resolution of the factual issues upon which defendants' constitutional claims are grounded. Yet the validity of their constitutional argument can be measured on appeal only against a fully developed factual record which clearly delineates the nature and scope of the unconstitutional intrusion which defendants assert arises from the burden imposed by the Act. Such a record is essential to the proper determination of the constitutional infirmities, if any, of a statute's application to a particular situation.

State ex rel. Edmisten, at 358-360 (1980) (citations omitted).

Without any factual allegations regarding the RRC's supposed improper dominion over the Board's authority to develop rules, or regarding any controversy over any specific RRC decision, Plaintiff's Verified Complaint nevertheless seeks to topple the RRC's rule reviewing authority. Yet the Board's Motion for Summary Judgment simply amounts to an improper solicitation of an academic legal advice, which should be rejected by this Court.

D. The Board Is An "Agency" Subject To The APA.

Unless otherwise prescribed by the General Assembly, only nonexempt agencies are subject to the rule making requirements of APA. N.C.G.S. §§ 150B-1(c), 150B-291(a). The Board is not generally exempt from the rulemaking requirements of APA. N.C.G.S. § 150B-1. If the Court concludes that the Board is an agency, then the APA rulemaking provisions must apply.

An agency is defined by the APA as "an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency." N.C.G.S. § 150B-2(1a). Therefore, a determination of whether the Board is an executive agency is necessary prior to the Court's contemplation of Plaintiff's motion for summary judgment. Although the Board claims itself to be a "constitutional body," (P Compl ¶ 1, 3, 6, 13, 14, 33-36), the Supreme Court has held the contrary: "[t]he General Assembly created the State Board of Education and fixed its duties. It is an agency of the State with statewide application." Turner v. Gastonia City Bd. of Education, 250 N.C. 456, 462 (1959); Meyer v. Walls, 347 N.C. 97, 105 (1997) (citations omitted). The Verified

Complaint fails to recognize and adhere to these authorities, and fails to delineate how the Constitutional reference to the Board and its duties to “supervise and administer the free public school system and the educational funds provided for its support ... and ... make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly” severs it from the confines of the executive branch. Moreover, the General Assembly specifically created and placed the Board as the head of “DPI”, an umbrella executive department administering elementary and secondary education. See supra p 15. The Board fails to establish, as a matter of law, why as a “constitutional fixture” it is deemed divorced from the executive branch.

E. The Board Is Otherwise An Executive Agency Subject To The APA.

As an agency of state government, the nature and status of the Board is administrative or executive. Black’s Law Dictionary defines executive branch as “[t]he branch of government responsible for effecting and enforcing laws; the persons who constitute this branch. The executive branch is sometimes said to be the residue of all government after subtracting the judicial and legislative branches.” (7th ed., 1999).² By definition, the Board would fall somewhere within the continuum of executive branch of government.

Executive branch agencies possess the power to execute the State’s laws. State ex rel. Martin v. Melott, 320 N.C. 518, 523 (1987) (plurality opinion) (emphasis added). While the Board is not specifically referenced in Article III, its functions are nevertheless executive in their scope. The Board promulgates certain educational rules to be implemented by DPI. In that

² North Carolina courts have often looked to Black’s Law Dictionary for applicable definitions. See, e.g., Angel v. Ward, 43 N.C. App. 288, 293, 258 S.E.2d 788, 792 (1979), Goard v. Branscom, 15 N.C. App. 34, 39, 189 S.E.2d 667, 670 (1972).

sense, the Board is far from unique in its capacity to promulgate rules, since the adoption of rules and policies is a legitimate part of any agency's executive role. Through their rules, executive agencies prescribe the criteria and lay down the detail of how their respective areas of responsibility enacted by legislature or Constitution are to be enforced. See, Coastal Highway v. Coastal Turnpike Authority, 237 N.C. 52 (1953).

Addressing the question of whether an agency not founded under Article III is nevertheless an executive agency, with State ex rel. Wallace v. Bone, 304 N.C. 591, 607-608 (1982), the Supreme Court noted that the Environmental Management Commission possessed the power and duty to promulgate rules and regulations to protect, preserve, and enhance the water and air resources of the State, which were executive by nature: "[i]t is crystal clear to us that the duties of the EMC are administrative or executive in character." Here, the Board's duties and powers to promulgate and administer the rules affecting elementary and secondary education in North Carolina are likewise, in fact, executive. N.C. Const. Art. IX, Sect. 5; N.C.G.S. § 115C-12. Although Plaintiff's Verified Complaint relies exclusively upon Guthrie, that case also suggests that the Board is an executive agency by declaring that: "[w]here, as here, power to make rules and regulations has been delegated to an administrative board or agency by the Constitution... Guthrie at 712.); see also Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland County Bd. of Educ., ___ N.C. App. ___, 763 S.E.2d 288 (2014) (suggesting that unlike the Board, local boards of education are not executive agencies.)

Likewise, contrary to the Board's argument that it is not subject to APA, it nevertheless availed itself of and participated fully in other provisions of APA, including the provisions governing contested case hearings at the Office of Administrative Hearings. See, e.g., Rainey v.

N.C. Dep't of Pub. Instruction, 361 N.C. 679 (2007); North Carolina Chiropractic Ass'n v. North Carolina State Bd. of Educ., 122 N.C. App. 122 (1996). Outside the framework of this action, the Board has consistently held itself out as an executive branch agency:

- The Board has acknowledged in legislative hearing testimony to the General Assembly that it is, in fact, subject to rulemaking requirements of APA. (Exh A).
- The Board sought a regulatory reform seeking a full exemption from the APA's rulemaking regulations. (Exh B)
- The Board abides by N.C.G.S. § 138A-15(e) of the State Government Ethics Act by making appropriate proclamations at the beginning of the Board's meetings. (Exh C)
- The Board designated a rulemaking coordinator as required by APA rulemaking requirements. (Exh D)
- The Secretary of State formally lists the Board as a part of the Executive Branch. (Exh E).
- The Board lists itself as a division of the executive agency DPL. (Exh. F).
- The Board represents in its own website that it promulgates rules according the APA. (Exh G).

Contrary to its allegations, the Board is admittedly an executive agency subject that is subject to the terms of the APA, as executed by the RRC. Plaintiff's Motion for Summary Judgment should therefore be denied.

III. VERIFIED COMPLAINT - COUNT TWO: PLAINTIFF HAS FAILED TO ESTABLISH THAT APA-MANDATED REVIEW OF SBE'S RULES VIOLATES ART. IX, SECT. 5 OF N.C. CONSTITUTION.

Although the Verified Complaint implies that the RRC has exerted improper Constitutional control over the Board, (Verified Complaint ¶ 38, 41), those factual conclusions

were neither conceded by the RRC nor otherwise established by any record evidence. See supra p.

11. The non-existence of a genuine issue of material fact as to the scope of the RRC's exercise of authority over the Board renders the Plaintiff's motion for Summary Judgment improper.

More significantly, the Board misinterprets the Article IX, Section 5 of the N.C. Constitution. According to the Board, the Constitution grants the Board "general supervisory and administrative rulemaking authority with respect to public education **unless the General Assembly enacts specific legislation revising or repealing a particular rule adopted by the Board.**" (P Compl ¶ 37) In reality, the Constitution does not demand that the General Assembly implement **specific legislation** to address each rule adopted by the Board. Instead, the Constitution simply provides that the Board shall make all needed rules, **subject to laws enacted by the General Assembly.** See supra p 15. It is undisputed that the APA is a set of laws enacted by the General Assembly, and the Board does not challenge the facial constitutionality of those laws with its pending Motion for Summary Judgment. It is further undisputed that among other rule-making criteria, the APA requires State agencies, departments and boards to submit their temporary and permanent rules for RRC review. The "General Assembly intended only those agencies it expressly and unequivocally exempted from the provisions of the Administrative Procedure Act be excused in any way from the Act's requirements and, even in those instances, that the exemption apply only to the extent specified by the General Assembly." North Buncombe Ass'n of Concerned Citizens v. Rhodes, 100 N.C. App. 24, 28 (1990). Therefore, consistent with the express constitutional limitations, the Board's rulemaking powers are subject to the APA.

Indeed, the leading case relied upon by Plaintiff explicitly recognizes the General Assembly's power to limit the Board's constitutional powers: "the powers [Constitutionally]

conferred upon the State Board of Education [are] subject to limitation and revision by acts of the General Assembly,” Guthrie at 703, and in no way suggests that the General Assembly must specifically review, revise and/or repeal each particular rule adopted by the Board. In suggesting that “[a]ny attempt by the General Assembly to review, revise, or repeal [the Board’s] rules must be done “specifically[,]” (Verified Complaint ¶ 40), the Board presumably seizes on the Guthrie analysis to conclude that “[n]one of [repealed Chapter 115] provisions **specifically limits** the authority of the State Board of Education to promulgate or administer rules and regulations concerning the certification of teachers.” Id. at 710-11. Guthrie was decided prior to the enactment of APA, and therefore does not address or take into account the specific rule-making schemata established by the General Assembly, and its application to the Board. Because the APA **specifically** prescribes rulemaking criteria for all nonexempt agencies, the Board is properly subject to the rulemaking laws passed by the General Assembly, and must abide by legislatively-mandated RRC review requirements. It is additionally clear that the General Assembly intended for APA to apply to the rules promulgated by the Board in the same manner as they are applicable to all other state agencies. See supra pp 17-19. The existence of these specific exemptions from certain provisions of rulemaking underscores the clear legislative intent to make the remainder of the Board’s rulemaking process subject to RRC review.

North Carolina appellate courts have likewise recognized that the Board’s power over the administration of elementary and secondary education is not unfettered, and is limited by General Assembly’s enactments. For example, in State v. Whittle Communications, 328 N.C. 456 (1991), the Supreme Court held that local boards of education, rather than the State Board of Education, have complete and ultimate control over supplementary instructional materials in public schools,

pursuant to General Assembly's grant of such powers to the local boards. Similarly, citing its broad constitutional powers, the Board sought to regulate speech pathologists employed in public schools. North Carolina Bd. of Examiners for Speech & Language Pathologists, discussed supra. The appellate courts disagreed concluding that the Board's constitutional powers to administer public education are subject to other laws of the General Assembly, and are limited by enactment of the Licensure Act for Speech and Language Pathologists. Id. Likewise, the enactment of the APA reflects a divestment of "authority" from the Board to the RRC, in the context of procedural review of promulgated rules. See Whittington v. North Carolina Dep't of Human Resources, 100 N.C. App. 603, 612-13 (1990) (The APA is a specific set of statutes, which prescribes specific procedural limitations upon agencies' general rule-making authority.) As such, the Board's contention that APA violates Article IX of the N.C. Constitution by "subverting" the Board's constitutional powers, (P Compl p. 14, ¶ b), should be rejected.

IV. VERIFIED COMPLAINT - COUNT 3: THERE IS NO CONSTITUTIONAL VIOLATION WHEN THE RRC EXERCISES THE ADMINISTRATIVE REVIEW AUTHORITY DELEGATED TO IT BY THE GENERAL ASSEMBLY WHILE CONTEMPLATING THE BOARD'S PROPOSED RULES.

As with other counts of its Complaint, the Board fails to allege any specific facts that would allow the Court to conclude that the RRC unconstitutionally applied N.C.G.S. § 150B-2(1a), (P Compl p. 14, ¶ 44), and its motion for summary judgment should be denied for lack of the appropriate factual basis as outlined supra. Moreover, Plaintiff is mistaken in its assertion that the General Assembly is not allowed to delegate a power to review the Board's rules to the RRC, pursuant to the APA. The separation of powers doctrine does not require that the branches of government "must be kept wholly and entirely separate and distinct[.]" State v. Furrage, 250

N.C. 616, 626 (1959). The problems that the legislature must confront are of such complexity that strict adherence to the purist notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its legislative powers. See, e.g., Coastal Highway v. Turnpike Authority, 237 N.C. 52 (1953).

A modern legislature must be able to delegate -- in proper instances -- "a limited portion of its legislative powers" to administrative bodies which are equipped to adapt legislation "to complex conditions involving numerous details with which the Legislature cannot deal directly." Turnpike Authority v. Pine Island, 265 N.C. at 114. North Carolina courts have "repeatedly held that the constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies, provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers. See, e.g., Hospital v. Davis, 292 N.C. 147 (1977); Guthrie v. Taylor, 279 N.C. 703 (1971), cert. denied, 406 U.S. 920 (1972), and cases cited therein." Adams at 696-697. It should be noted that the Supreme Court specifically referenced Guthrie when it made these conclusions in Adams.

The appellate courts have further stated that the "guiding standards" provided by the legislature to the agency need be no more specific than the circumstances permit. "It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances." Id. at 698; see Broad and Gales, 300 N.C. at 273. The "General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation." Bring v. N.C. State Bar, 348 N.C. 655, 658 (1998).

The RRC's purpose is to help ensure that administrative rulemaking complies with the APA. See N.C.G.S. § 143B-30.2. Consequently, the RRC is expressly prohibited from considering "questions relating to the quality or efficacy of the rule." Id. § 150B-21.9(a). The RRC is limited to determining (1) whether promulgation of the rule in question is within the submitting agency's statutory authority, (2) whether the rule is clear and unambiguous, (3) whether the rule is reasonably necessary to implement or interpret State or federal law, (4) whether the agency submitting the rule conformed to the APA's procedural requirements for rulemaking, and (5) whether changes to the rule made by the agency during the review process are substantial enough to require an opportunity for further public comment. Id. §§ 150B-21.9(a), -21.12(c). Our appellate courts have upheld much less stringent guiding standards as being adequate to withstand a separation of powers challenges.

For instance, in Bring, the Supreme Court upheld the constitutionality of the provision in N.C.G.S. § 84-24 that provides that "the Board [of Law Examiners] shall make and amend the rules of the Board "as in their judgment shall promote the welfare of the State and the profession" as sufficient statutory guidance to prevent this delegation of authority from being declared unconstitutional." Bring at 655. Likewise, the Court of Appeals has noted that "the [law] examination shall be held in the manner and at the times as the Board of Law Examiners may determine," provided adequate guidance for the Board to prepare and administer the bar examination so that there was no unconstitutional delegation of legislative authority. Bowens v. Board of Law Examiners, 57 N.C. App. 78, 82 (1982). The Legislature's directions to the RRC summarized above are significantly more specific, provide appropriate guidance regarding its rule review authority, and are sufficient to withstand judicial scrutiny. Additionally, in the analysis

of whether the delegated guiding standards are adequate, the courts also consider whether the authority vested in the agency is subject to procedural safeguards. See, e.g., Adams, 295 N.C. at 698. “[T]he existence of adequate procedural safeguards supports the constitutionality of the delegated power and tends to ‘insure that the decision-making by the agency is not arbitrary and unreasoned.’” In re Declaratory Ruling, 134 N.C. App 22, 33 (1999) (quotations omitted).

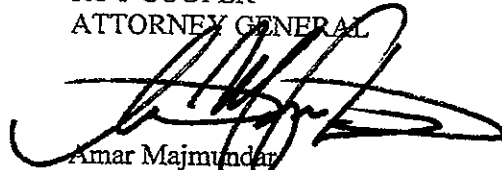
The APA itself prescribes a specific structured rule review process with statutorily imposed time requirements and a limited scope of review, which serves as a procedural safeguard in its own right. See N.C.G.S. 150B-21.1, -21.1A, 21.2. (See Exh H). Moreover, an agency’s ability to obtain judicial review of the RRC’s decisions is a significant procedural safeguard that the Board is free to utilize in case of an actual controversy. See Adams, 295 N.C. at 701-02. Under the APA, when the RRC returns a permanent rule to an agency, “the agency may file an action for declaratory judgment in Wake County Superior Court” to obtain review of the RRC’s decision. N.C.G.S. § 150B-21.8(d). If a court finds that the RRC’s objections to a rule were incorrect or otherwise improper – if, for example, the RRC determines that a particular rule is outside an agency’s statutory authority and the court disagrees – the court can so declare. Id. Additional safeguards are found in N.C.G.S. § 150B-21.3(b1), (b2), which provide that the RRC’s review of administrative rules is subject to a further legislative oversight

In summary, the RRC’s rule review authority is guided by adequate standards, and accompanied by significant procedural safeguards to ensure that RRC decisions are not arbitrary and unreasoned. The Legislature, therefore, appropriately delegated its power to review rules to RRC, since the delegation serves the expressed legislative policy objective that rule making procedures are not “performed by the same person in the administrative process”, N.C.G.S.

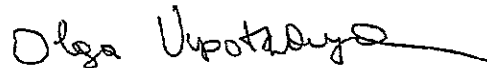
150B-1(a), and meaningfully constrains the RRC by placing various specific restrictions on RRC's powers to review agency rules. The Board's motion for declaratory summary judgment with regard to count three of its Complaint should be denied.

Respectfully submitted, this the 25th day of June, 2015.

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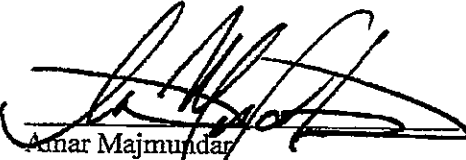
CERTIFICATE OF SERVICE

I, Amar Majmundar, attorney for Defendants, hereby certify that a copy of the foregoing Brief was duly served upon the attorneys for the Plaintiff by virtue of electronic mail, addressed as follows:

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This the 25th day of June, 2015.


Amar Majmundar
Special Deputy Attorney General



NORTH CAROLINA GENERAL ASSEMBLY

JOINT LEGISLATIVE
ADMINISTRATIVE PROCEDURE OVERSIGHT COMMITTEE

STATEMENT OF KATIE CORNETTO

COPY

TUESDAY, FEBRUARY 4, 2014

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P R O C E E D I N G S

Chairman Hartsell: Okay. Next we have the State Board of Education, Ms. Katie Cornetto, the board attorney. Welcome.

Ms. Cornetto: Good morning, members. My name is Katie Cornetto and I'm in-house counsel to the State Board of Education and I'm also the rule-making coordinator.

To distinguish the State Board of Education from the previous two presenters, the State Board of Education does not have a blanket exemption. They are here--we are here today to talk to you about a specific exemption with respect to licensing fees. And with respect to licensing fees, I'll be glad to entertain any questions that you have, but I'd also like to note that I've got the Director of Licensure, Susan Ruiz, here with me to respond to any technical issues you may have.

On behalf of Chairman Cobey and the State Board of Education members, we are here today to talk to you just briefly about that licensure exemption. Before I get started with that, though, I would like to say for the reasons set forth from the university system and the community colleges, we too, on an academic schedule dealing with a lot of changes in federal, state, local laws, policies, need to work quickly to respond to them so that our students have the best education and the best resources for their future.

1 Focusing on the licensure exemptions, I believe
2 you have a PowerPoint printed for you, and I'll just walk you
3 through briefly the slides. As you know, the General
4 Assembly this past session required the state board to
5 establish a schedule of fees for teacher licensure.

6 We have had a licensure fee since 1998 that has
7 not changed. So for 15 years we have--and on page 2 of the
8 presentation it will enumerate for you the respective costs
9 associated with becoming a licensed teacher in North
10 Carolina.

11 Notably, the State Board of Education does not
12 fall under occupational licensing boards under Article 3A of
13 Chapter 150B, but it does fall under Article 3. And we too
14 are subject to Article 4 and judicial review. That being
15 said, you can see that a new license for a teacher costs \$85.
16 The licensing cycle is every five years and a renewal would
17 be \$55. That's very different than other professions in this
18 state in terms of cost.

19 Okay. So this is the second slide. And you'll
20 note also that with these fees, educators actually apply
21 directly to the State Board of Education Division of
22 Licensure under the Department of Public Instruction.

23 Okay. So specifically for the 2013-14 fiscal year
24 only, the General Assembly granted a very limited exception
25 with respect to fees for teacher licensure, so we are

1 currently exempt in establishing fees. And the reason that
2 the General Assembly granted this exemption was specifically
3 because we have been doing paper applications since the
4 beginning of time for teacher licensure.

5 The agency has procured a technical--an automated
6 system that will be implemented within the next 60 days, and
7 that is going to change some of the fee structure that you
8 saw that had been in place for 15 years. And some of the
9 adjustments will be no cost, some of them may be higher cost,
10 depending on the details of the specific license request.

11 And just to keep you informed, the licensure
12 division is receipts based, and so it brings in about \$1.6
13 million annually. The cost of the system, the automated
14 system, to the state over three years is \$1.5 million.

15 And I bring that to your attention so that you
16 understand that during this transition time of implementing
17 this automated system, we will need to be able to adjust and
18 study what the actual costs are given the volume of
19 applicants. And keep in mind there are 100,000 licensed
20 teachers approximately in North Carolina, and at any one time
21 any of them may contact Licensure to change their license
22 status, apply for a license, or add an additional area.

23 With respect to the rule-making process and
24 licensure fees, the fiscal note that you've heard mentioned
25 several times today is something that is a very detailed

1 fiscal impact analysis, which as I'm sure you can imagine,
2 would require some study and some specific numbers about
3 costs. I would like to also let you know that your law
4 prevents us from going over or charging anything more than
5 actual costs, so that is a safeguard that's in place in the
6 law which would not require a rule.

7 What we don't want to have happen is adopting a
8 rule without very clear fiscal numbers and then have to redo
9 the rule-making process in the future. So for the next year,
10 our exemption gives us the opportunity to study the system,
11 integrate it, implement it, and figure out what cost
12 adjustments need to be made and present that to the State
13 Board of Education for their review and input from the
14 stakeholders impacted by this policy.

15 All right. And as you know, we're here today to
16 report to you we're always accountable to our General
17 Assembly. We are subject to the laws the General Assembly
18 enacts and we are always reporting to you about what things
19 cost, how we're implementing them. And we will continue to
20 do that obviously, and in the upcoming months will be
21 reporting on the success and the challenges of implementing
22 the new system. And that concludes my report.

23 Chairman Hartsell: Okay. Questions from the
24 committee? Representative Glazier.

25 Representative Glazier: Thank you very much, Ms.

1 Cornetto. I have a question more--not on the specific
2 exemption, but on the broader question that you raised and I
3 guess really two questions.

4 One, is the requirement that the state board
5 operates under to be effectively outside of (microphone
6 malfunction) we've talked about under the APA in any way
7 (microphone malfunction) in line with the *Guthrie* decision?
8 And secondly, the community colleges and the university have
9 made pretty significant arguments as to why they should
10 maintain their broad exemption.

11 And I wonder if you would compare and contrast as
12 best you can why the state board would fit in that same
13 category or perhaps with as unbiased way as you can why there
14 might be some differences?

15 Ms. Cornetto: I appreciate the question.
16 The *Guthrie v. Taylor* decision from the North Carolina
17 Supreme Court in 1971 states that absent legislation limiting
18 the authority of the State Board of Education, the state
19 board has plenary authority to adopt regulations, policies in
20 furtherance of its duty to supervise and administer the free
21 and public school system.

22 That being said, there is a tension with the State
23 Board of Education having been constitutionally created,
24 along with the fact that it is subject to the laws enacted by
25 the General Assembly, as to where we fit within the rule-

1 making process.

2 Over decades we have had an inconsistent
3 application with the rule-making process, and notably, we
4 have tried to increase our efforts to participate in the
5 rule-making process. It has become increasingly difficult to
6 juggle that alongside of the state board's already existing
7 policy formation process, which includes notice to the public
8 about any potential policy that the state board would have,
9 again communicating with listservs, again communicating with
10 stakeholders across the state.

11 Our staff is present in every region across the
12 state. Our state board is a membership derivative of the
13 educational regions of the state and also has ex officio
14 members of the treasurer and the lieutenant governor.

15 So the representation of the State Board of
16 Education as well as its policy-making process, which is
17 notice to the public about a potential policy, gathering
18 feedback from stakeholders and the public at large, and then
19 coming before the State Board of Education in a public forum
20 monthly to, for the first month of introduction, put the
21 policy on the table, and then 30 days later act on that
22 policy, the 30 day window gives the constituents and stake-
23 holders an additional opportunity to give feedback to the
24 State Board of Education.

25 It is very much akin on the academic calendar as

1 the community colleges has referenced to where we will have
2 policies that we will learn from one year's implementation
3 and not be able to have the rule in place by the next year in
4 order to adapt the process to best serve our students,
5 teachers, and school districts.

6 That being said, the rule-making process is very
7 valuable in terms of the transparency to the public and the
8 involvement of the public because, quite frankly, if we don't
9 have consensus from the people, it is very difficult to
10 implement any policy set forth by the State Board of
11 Education. It is very important to the State Board of
12 Education to hear from the K-12 community before deciding
13 anything.

14 And that said, all of our state board members have
15 e-mail addresses where they are frequently communicated with
16 24 hours a day, seven days a week. I know because I get to
17 see most of those communications. And it is very important
18 that the public weigh in, more than anything, before the
19 state board moves forward.

20 Chairman Hartsell: Representative Jordan.

21 Representative Jordan: Thank you very much for
22 your presentation. Let me follow up on a question I asked
23 previously. Do you have a--in your process, your current
24 internal process, do you have any sort of extra-agency review
25 of proposed rules?

1 Ms. Cornetto: So by extra-agency,
2 talking about like for example the Rules Review Commission?

3 Representative Jordan: Sure.

4 Ms. Cornetto: Our policies, when they
5 are sent out, are reviewed by the public, which include
6 representative agencies for, for example, the school
7 districts, the local education agencies, charter schools,
8 parents, and the community. That is really the external
9 agency review that we have. The public has to look at it and
10 see what it says and whether it agrees or disagrees with it.

11 That being said, the statutory authority provided
12 to us through the courts in *Guthrie v. Taylor* is at conflict
13 with for example when the General Assembly hasn't passed a
14 law about a specific area and the desire of the state board
15 to actually pass a policy in that area. So there's a
16 conflict there, and we haven't done a very good job of
17 resolving it, frankly.

18 Chairman Hartsell: Follow-up?

19 Representative Jordan: I'm confused. You said
20 the statutory authority granted by the court?

21 Ms. Cornetto: I'm sorry. The reference
22 to the *Guthrie v. Taylor* decision talks about the statutory
23 authority of the state board and absent any statute, the
24 State Board of Education's ability to establish a policy.

25 Chairman Hartsell: Follow-up?

1 Representative Jordan: Following up on my
2 discussion with the university general counsel, with the
3 Board of Governors being appointed by the legislature and so
4 forth, the State Board of Education has two ex officio
5 constitutional officers who are under the executive branch
6 and 11 members appointed by the governor.

7 Would you agree that the State Board of Education
8 more closely aligns with the executive branch than the
9 university system, for example?

10 Ms. Cornetto: It's a very good question,
11 and I would say that the State Board of Education is truly a
12 hybrid between the executive agency and the legislative
13 branch--an executive agency and a legislative branch of
14 government in that it's asked to bring together all sorts of
15 community representatives to formulate policy and not to have
16 a specific agency other than the state board put forth the
17 policies that are good for K-12 education.

18 Chairman Hartsell: Follow-up?

19 Representative Jordan: Then connect that for me
20 with the fact that the state superintendent of public
21 instruction is a constitutional officer. What's the
22 connection there?

23 Ms. Cornetto: The state superintendent
24 of public instruction is a constitutional officer. She's the
25 chief administrative officer of the State Board of Education

1 and she is a nonvoting member of the State Board of
2 Education, but she serves as the secretary to the state
3 board. And in her official capacity, as outlined in 115C-19
4 and 21, there are very specific statutory responsibilities
5 that she has under the State Board of Education. It's quite
6 confusing.

7 Chairman Hartsell: Mr. Hudson?

8 Mr. Hudson: Thank you, Mr. Chairman.

9 This is the same question as for the previous speakers.
10 Specifically what aspects of the Administrative Procedure Act
11 would be problematic for you with your exemptions from it?

12 Ms. Cornetto: The concern with the rule-
13 making process, as we've recently learned, is that there is
14 an inordinate amount of rule making that needs to happen in a
15 very short amount of time with very limited staffing
16 resources. But the statute, as it's outlined for rule making
17 in the APA, is something that we as the State Board of
18 Education have adopted and internalized as a process not
19 unlike the community colleges.

20 I think the most difficult part of the APA process
21 for rule making is truly getting the fiscal notes in enough
22 time to be able to get the policies to align with what the
23 fiscal notes and fiscal impacts say. It's a juggling act and
24 it involves a lot of back and forth.

25 Chairman Hartsell: Representative Glazier.

1 Representative Glazier: Just a follow up to that,
2 Mr. Chairman. Thank you.

3 I'm seizing on the comment that you just made and
4 I wonder if you could highlight. So you operate within an
5 effectively 180 day time frame on everything with the
6 exception of understanding year-round concerns.

7 With the testing requirements and the issue that's
8 arisen over board policy on how to handle both alternate
9 assessment issues and how to handle as it relates to third
10 grade reading assessments, I wonder if you could talk about
11 the need to be acting quickly in response to stakeholder and
12 public and for that matter legislative comment and the
13 restrictions that the process might put on that capacity.

14 Ms. Cornetto: So may I answer? Okay.
15 The reference to the Read to Achieve law that was passed in
16 2012 by the General Assembly required the state board to have
17 a rule-making responsibility. In that responsibility we have
18 had implementation for the '13-'14 school year. Right now,
19 we are realizing and hearing from the local superintendents
20 that the implementation needs to be adjusted to provide a
21 reasonable amount of practicality to the implementation of
22 the General Assembly's law.

23 The rule, ironically, is set to be potentially
24 before the Rules Review Commission either February or March,
25 depending on when we can get approval for the final touches

1 on the rule. And that's an entire year and two months after
2 we began the rule-making process. And we sit here today in
3 February where the state board tomorrow will be hearing from
4 and learning about how to change, possibly, the alternate
5 assessment approval process and adoption. So it's a dance
6 that is incredibly confusing to the community and the
7 constituents that we serve.

8 Mr. Hudson: Follow-up, Mr. Chairman?

9 Chairman Hartsell: Yes.

10 Mr. Hudson: Thank you; one last
11 follow-up. And I think it would be most helpful for me, and
12 if the chair is willing, if the department has a moment to
13 outline that particular issue and a time frame diagram to
14 show the difficulty in responding--first, in creating the
15 rules for implementing the statute and then in responding to
16 what seems to a lot of us legitimate concerns and how your
17 not having the exemption has caused increasing difficulty for
18 all the stakeholders in the process.

19 Ms. Cornetto: I'll be glad to provide
20 that to the committee.

21 Chairman Hartsell: Thank you. Other
22 questions from the committee? Representative Jordan.

23 Representative Jordan: Thank you, Mr. Chairman.
24 Just to be clear, we're talking today about the exemption on
25 the licensing?

1 Ms. Cornetto: That's correct.

2 Representative Jordan: Are there other exemp-
3 tions for the State Board of Education or DPI?

4 Ms. Cornetto: I am not aware of any
5 specific exemptions. Right now there is a staff member who
6 is presenting a floor above us about the residential school
7 rules that are proposed. So that's happening right now,
8 which is why I'm here and he's there. But to my knowledge
9 there are no other exemptions. This was the first of its
10 kind.

11 Chairman Hartsell: Follow-up?

12 Representative Jordan: All right. So for the
13 non-lawyers and those not familiar with the *Guthrie* decision,
14 is there an exemption--a general exemption for DPI, or if
15 not, what has been DPI and State Board of Education's
16 experience dealing with the rule-making process since the APA
17 was established?

18 Ms. Cornetto: So there are legal
19 arguments to say that the State Board of Education is not
20 subject to the rule-making provisions. But I can't reconcile
21 that in my licensed attorney capacity when we are subject to
22 the laws enacted by the General Assembly.

23 That being said, the experience with the Rules
24 Review Commission process is that the state board goes
25 through its labor intensive policy review/stakeholder input

1 process, albeit not accountable to an outside agency, but to
2 the public at large.

3 And then it comes to the rule-making process of
4 beginning the--once the state board has adopted its policy in
5 its form, submitting it to the Rules Review Commission and
6 the attorneys to review what the language of the policy says
7 and how it conforms with the rule-making requirements.

8 What we have tried to do is dovetail the State
9 Board of Education's process of policy promulgation alongside
10 with this pre-review by the Rules Review Commission
11 attorneys. They provide detailed feedback, which we would
12 like the state board to essentially adopt in rule-making
13 form.

14 The time that it takes to go back and forth
15 between staffs has been really cumbersome, and it's not any
16 one person's fault. It's to the greater process and getting
17 the Rules Review Commission monthly meetings aligned with the
18 State Board of Education monthly meetings and the dance in
19 between with the feedback.

20 I don't know if that answers your question, but I
21 think when I provide additional information about a specific
22 case in point, you may be able to see it better.

23 Chairman Hartsell: Other questions?
24 Representative Murray.

25 Representative Murray: In the state board process

1 is there--can you describe to us the fiscal dimension on how
2 you guys analyze the fiscal impact on the policies or rules
3 that you guys implement?

4 Ms. Cornetto: That is a wonderful
5 question, and the response to that is our CFO and his staff
6 is present at all of our State Board of Education meetings
7 and is present in the agenda adopting process. So he is
8 aware of the policies as the state board is considering them
9 and weighs in regularly at the State Board of Education
10 meetings.

11 There are two questions the State Board of
12 Education asks every time at the State Board of Education
13 meeting for every policy: is it legal, can we pay for it.
14 And those are things that we do just as a matter of business.

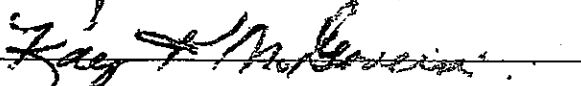
15 Chairman Hartsell: Seeing no further
16 questions, thank you, Ms. Cornetto. We appreciate it.

C E R T I F I C A T E

I, Kay K. McGovern, do hereby certify that the foregoing pages 2 through 16 represent a true and accurate transcript of a digital recording of the proceedings held in Raleigh, North Carolina on Tuesday, February 4, 2014.

This, the 22nd day of April, 2015.

ORIGINAL SIGNED BY

A handwritten signature in cursive script, appearing to read "Kay K. McGovern", is written over a horizontal line.

Kay K. McGovern, CVR-CM
Transcriptionist



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SBE Offices:
Mortez Hill
Executive Director

December 12, 2013

The Honorable Senator Fletcher Hartsell
NC Senate
300 N. Salisbury Street, Room 300-C
Raleigh, NC 27603-5925

The Honorable Representative Tim Moffitt
NC House of Representatives
16 W. Jones Street, Room 2119
Raleigh, NC 27601-1096

Re: Study of Statutory Exemptions from Rulemaking, State Board of Education

Dear Senator Hartsell and Representative Moffitt:

I write in response to your letter dated November 15, 2013, in which you request a justification for a continued exemption from rulemaking with respect to certain teacher licensure fees. In addition, you request potential consequences to the repeal of such exemption.

Specifically, Session Law 2013-360, Section 9.3 amended "G.S. 115C-296. Board sets licensure requirements; reports; lateral entry and mentor programs" to exempt the State Board of Education from promulgating rules regarding required teacher license processing fees.

The NCDPI Licensure Division is "receipts-based" and therefore recommends fees based on the actual cost of processing each applicant's request(s). In the upcoming year, the Division will be phasing out some of its manual processing and transition to more functions that can be accomplished by the applicant at no cost to the Division. As a result, the future costs associated with various processing requests may actually be reduced or eliminated for the applicant. This transition will require the State Board of Education, with input from the public and stakeholders, to analyze and adjust the fees, aligning the fees to their actual costs. The rulemaking process would be extremely difficult to accomplish during this time. The fiscal impact analysis required would not be accurate until the system is fully operational. Without the proper fiscal analysis, rulemaking would be stalled and result in an unreasonable delay for any cost-savings to be realized by the applicants.

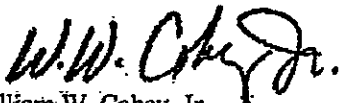
NORTH CAROLINA STATE BOARD OF EDUCATION

William W. Cobey, Jr., Chairman | william.cobey@dpi.nc.gov
6302 Mail Service Center, Raleigh, North Carolina 27699-6302 | (919) 807-3430 | Fax (919) 807-3445
AN EQUAL OPPORTUNITY/AFFIRMATIVE ACTION EMPLOYER

Page 2 of 2
December 12, 2013

In addition to providing justification for this particular licensure application fee exemption, I note that the State Board of Education has labored through the rulemaking process with minimal success. My experience as a public servant leaves me wondering why the State Board of Education cannot be exempt from the rulemaking process like every other educational entity in this state and one that operates in an open and transparent fashion with monthly public meetings. Therefore, I have enclosed the 2012 State Board of Education Report to the Administrative Procedures Act Oversight Committee requesting an exemption from rulemaking for your review and reconsideration. I look forward to working toward regulatory reform for all citizens impacted by public education in North Carolina.

Sincerely,



William W. Cobey, Jr.
Chairman of NC State Board of Education

WWC/KGC/jpc

Enclosure

c: Karen Cochrane-Brown, Committee Counsel
Jeff Hudson, Committee Counsel
Chris Saunders, Committee Counsel
Jennifer Hillman, Committee Counsel
Mark Bondo, Fiscal Analyst
Lisa Kennedy, Committee Clerk
June Atkinson, Superintendent of Public Instruction
Rebecca Garland, Chief Academic Officer
Philip Price, Chief Financial Officer
Martez Hill, Executive Director
Zane Stilwell, Legislative Liaison
Rachel Beaulieu, Legislative Liaison
Katie Cornetto, Rulemaking Coordinator
Susan Ruiz, Director of Licensure



Public Schools of North Carolina
State Board of Education
Department of Public Instruction

Report to the Administrative Procedure Act Committee of the North Carolina General Assembly

NC State Board of Education and
Department of Public Instruction:
Report on Rulemaking

N.C.G.S. §150B

Date Due: January 31, 2013

Report Requested by the APA Committee January 2013

STATE BOARD OF EDUCATION

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June St. Clair Atkinson, Ed.D., State Superintendent
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INTRODUCTION

The State Board of Education (SBE) and the Department of Public Instruction (DPI) submit this report at the request of the Administrative Procedure Act Committee of the General Assembly. This report is in response to the Committee's inquiry regarding SBE/DPI rulemaking. The APA Committee has requested an "explanation of the State Board of Education's interpretation and approach to rulemaking, including reasons for not adopting rules, the legal basis for not adopting rules, and current efforts to adopt rules." See *Appendix 1, Request for Report*.

EXECUTIVE SUMMARY

The State Board of Education (SBE), unlike any other state agency, has constitutional powers to supervise and administer a uniform and general public school system. The North Carolina Supreme Court has held that absent legislation limiting the authority of the SBE, it has plenary authority to adopt regulations, policies in furtherance of its duty to "supervise and administer the free and public school system." See *Guthrie v. Taylor*, 185 S.E.2d 193 (1971); See *Appendix 2*. Notwithstanding the authority under the Constitution and specific mandates from Congress and the General Assembly, the APA imposes upon the SBE rulemaking obligations that, in many instances, obstruct the orderly and timely implementation of education policy, often as specifically dictated by Congress or the General Assembly. Absent a statutory exemption from rulemaking and in an effort to adhere to G.S. 150B, the SBE and DPI have developed new procedures intended to bolster the policy-making process and

streamline the SBE rule-making process. This report outlines the past and current SBE rulemaking efforts.

THE STATE BOARD OF EDUCATION AND LAW

Pursuant to G.S. 150B, all covered state agencies are required to adhere to its provisions regarding rulemaking. The SBE is unique as a policy-making board. It is the agency constitutionally charged with the supervision and administration of the public education system. It is the only board created by the N.C. Constitution and is endowed with powers separate and apart from legislation. Notably, the SBE is the only board of education in the state that is subject to the APA rulemaking provisions. Both the Board of Governors of the UNC System and the Board of Community Colleges are specifically exempt from the rulemaking process. Local boards of education are also not subject to rulemaking.

DIVERSE STATEWIDE REPRESENTATION AND COLLABORATION

The N.C. Constitution requires that the SBE be comprised of statewide board members who are appointed by the Governor and confirmed by a Joint Session of the General Assembly. The powers vested in the SBE are exercised by a membership of diverse individuals who are representative of a cross-section of regional and professional viewpoints. As prescribed by state law, the SBE members convene in a public, open forum at least monthly. The agenda is designed to allow for full discussion and deliberation on various prospective SBE

policies. These policies are critical to the timely and equitable implementation of the state's uniform, public system of elementary and secondary education.

UNLIMITED PUBLIC ACCESS TO THE SBE

When a quorum of the SBE convenes together, whether to receive information, to receive training or to deliberate action, the meetings are noticed publicly and the public has the option to attend the meetings in person or listen to the meetings streamed across the Internet. Furthermore, unlike an agency that is led exclusively by a single executive decision-maker, the SBE must publicly and openly weigh expert agency recommendations put forth by the Department of Public Instruction and that of stakeholders statewide. That public deliberative process is further accessible through digital technology and has led the SBE to be instantly reachable by the general public, parents, students, teachers and stakeholder organizations. In fact, on a regular basis, the agency communicates through listservs and website announcements the various policies being considered by the SBE for development, modification or repeal. Further, agency staff meet internally on a daily basis to inform the policy-development process.

The SBE procedures for adoption of any policies require that the policies be read and discussed one month and acted on no earlier than the subsequent month. This is a minimum requirement and ensures that the public SBE policy adoption process allows proposed policies to have at least 30 days of public and stakeholder comment prior to taking action. Members of the SBE are accessible via email, mail and phone at every point in the decision-making process in

passing policies. This is not unlike the public comment period required by the APA rulemaking process. It is redundant and inefficient to repeat such a time-consuming and public process. Finally, because the SBE policy adoption process is so visible, when the SBE adopts a policy, the public and Local Education Agencies become confused when the SBE policy adoption date is at least six months to a year prior to the effective date of the rule.

This is an ongoing, public process that drives SBE policy adoption in a swift, efficient, effective and equitable manner. This process strikes the appropriate balance of receiving input before enacting education policy statewide, subject to the laws enacted by the General Assembly. The SBE relies on this process and as a result, significant education reform has not been delayed for over a million public school students every year across the state with a broad base of feedback. This process is effective and without unnecessary regulation on local boards of education, charter schools, students, parents, teachers or administrators who, together with the SBE, operate the general and uniform state system of public education.

LEGAL SUPPORT FOR POLICY ADOPTION, NOT RULEMAKING

There are a number of instances where the SBE adopts policies that do not warrant rulemaking. For example, Federal programs like No Child Left Behind, Race to the Top, and Individuals with Disabilities Education Act are all federal mandates that prescribe state and local conduct conditioned upon the receipt of funds. Therefore, imposing the same regulations through state

rulemaking is redundant and unnecessary. However, there are a number of categories of SBE policies that, by law, should not go through the rulemaking process. Those policies fall into at least one of the following categories:☐

(a) No specific legislation, authorization or directive exists for the SBE to adopt a rule (e.g., the charter school law does not authorize the SBE to adopt rules);
☐

(b) The policy merely repeats provisions already in state or federal law (e.g., exceptional children regulations);☐

(c) The policy involves detailed subject matter specifications that cannot be articulated in a rule (e.g., curriculum and lesson plans);☐

(d) The policy is guidance or best practices as opposed to mandates or directives (e.g., Positive Behavioral Intervention and Support);☐

(e) The policy involves complex financial calculations (e.g., funding formulas);☐

(f) The policy involves standards or criteria that change too often to be timely incorporated into a rule (e.g., to achieve gains in student performance and graduation rates); and☐

(g) The relationship between the state and local boards of education, in some instances, is such that the SBE and LEAs are groups of agencies jointly required to deliver public education and subject to the same statutory and constitutional mandates governing public education. Accordingly, that unique relationship is analogous to G.S.150B (8a)(a). (e.g., *Hoke County et al v. State of North Carolina and NC State Board of Education*¹; *Leandro I*² and *II*³).

See G.S. 150B-2(8a)(a-d)(g) and (l); See also G.S. 150B-19.

☐

RULEMAKING REQUIREMENT

For the SBE policies that are required to go through the rulemaking process, staff has engaged in a concerted effort to prepare rules for review by

¹ *Hoke County et al. v. State of NC; State Bd. of Education*, 95 CVS 1158; 122 N.C. App. 1, 468 S.E. 2d 543 (1996)

² *Leandro v. State*, 346 N.C. 336; 488 S.E.2d 249; 1997 N.C. LEXIS 486 (1997)

³ *Hoke County Board of Education v. State of NC*, 358 N.C. 605; 599 S.E.2d 365; 2004 N.C. LEXIS 886

the Rules Review Commission staff and the Office of State Budget and Management. Much work remains to be done. As an agency, we are working to revamp our policy-making in order to more fully comply with APA rulemaking. An Internal Policy Council has been appointed in furtherance of this goal. The Council, which includes staff from all sections of DPI, meets regularly and reviews all policies and rules, past, present and proposed, to determine the applicability of the APA as well as to recommend detailed revisions and repeals of policies and rules.

CONCLUSION

Further inquiry may be directed to Dr. William C. Harrison, Chairman of the State Board of Education and Dr. June St. Clair Atkinson, Secretary to the State Board of Education and State Superintendent of Public Instruction.

APPENDICES TO FOLLOW

- APPENDIX 1:** **NCGA email**
- APPENDIX 2:** ***Guthrie v. Taylor***



**Minutes of the
North Carolina State Board of Education
Education Building
301 N. Wilmington Street
Raleigh, NC 27601-2825
February 4, 2015**

The North Carolina State Board of Education met and the following members were present:

William Cobey, Chairman	Wayne McDevitt
A.L. "Buddy" Collins, Vice Chairman	Olivia Oxendine
Dan Forest, Lt. Governor	John Tate
Gregory Alcorn	Rebecca Taylor
Eric C. Davis	Patricia Willoughby
Kevin Howell	

Also present were:

June St. Clair Atkinson, State Superintendent	Karyn Dickerson, Teacher of the Year Advisor
Evelyn Bulluck, Local Board Member Advisor	James E. Ford, Teacher of the Year Advisor
Carrie Tulbert, Principal of the Year Advisor	Shykeim Williams, Senior Student Advisor

CALL TO ORDER AND INTRODUCTION

State Board of Education Chairman William Cobey called the Wednesday session of the February 2015 State Board of Education meeting to order and declared the Board in official session. After explaining that today's meeting was being audio-streamed and that the agenda and all materials are posted online, accessible through the State Board's website, he welcomed visitors, online listeners, and Twitter followers. The Chairman reported that two of the Board's committees met through conference call on January 23 and on January 26. Both meetings were public, were given public notice, and were audio streamed for availability to the public. In addition, many Board members attended the meeting of the UNC System Education Summit last week in Cary where the focus was on improving teacher leadership and effectiveness.

In compliance with the requirements of Chapter 138A-15(e) of the State Government Ethics Act, Chairman Cobey reminded Board members of their duty to avoid conflicts of interest and appearances of conflicts of interest under Chapter 138A. He asked if members of the Board knew of any conflict of interest or any appearance of conflict with respect to any matters coming before them during this meeting. There were no conflicts of interest communicated at this time. The Chairman then requested

Education Building, Raleigh	Wednesday, February 4, 2015	Board Room, 2:15 PM
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that if, during the course of the meeting, members became aware of an actual or apparent conflict of interest that they bring the matter to the attention of the Chairman. It would then be their duty to abstain from participating in discussion and from voting on the matter.

APPROVAL OF AGENDA

As the first order of business, Chairman Cobey drew attention to the full meeting agenda, which is available on eBoard. The Chairman asked if there were any changes to the agenda that Board members wished to request. Hearing none, Chairman Cobey asked for a motion to approve the State Board of Education meeting agenda for February 4-5, 2015, as presented.

Discussion/Comments:

- There was no further discussion.

Upon motion made by Mr. Wayne McDevitt, and seconded by Ms. Patricia Willoughby, the Board voted unanimously to approve the State Board of Education meeting agenda for February 4-5, 2015, as presented.

SBE ISSUES SESSION

Chairman Cobey explained that Issues Sessions provide the Board with in-depth information on relevant education topics. These sessions are, in fact, a part of the Board's required Board member development. He called on Dr. Atkinson to introduce this Issues Session.

- **NC Department of Public Instruction Division Profiles**
 - ❖ **Division of Career and Technical Education – Ms. Jo Anne Honeycutt (Director)**

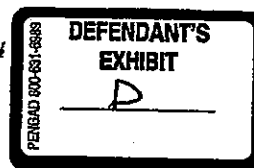
Dr. Atkinson recognized Ms. Jo Anne Honeycutt to provide an overview of the work of the Division of Career and Technical Education in this second in a series of division presentations.

Using a PowerPoint presentation, Ms. Honeycutt prefaced this presentation by explaining that Career and Technical Education (CTE) supports three types of readiness: college, career and community. As it relates to college and career, the State Board's Goal 1.3 is to graduate students pursuing a CTE concentration prepared for careers. Ms. Honeycutt reported that in 2013-14, the data show 94.1 percent of CTE concentrators graduated in four years, which reflects a real benefit to student graduation rates when students have a focused area of study.

Providing examples of partnerships and resources developed by the division and professional development where applicable, Ms. Honeycutt elaborated on the bulleted list below. The Career and Technical Education Division

- Leads the development of content standards and curriculum resources for Career and Technical Education program areas.
- Supports the development of rigorous programs of study and career pathways for over 526,000 students each year.

5/14



RULES REVIEW COMMISSION

G.S. 150B-19.1 CERTIFICATION

Instructions for completing and submitting the application for Rules Review Commission certification of compliance with the provisions of G.S. 150B-19.1 prior to publishing a notice of text:

- Complete and print out the certification form
- Sign (or have appropriate person sign) the form
- Scan the form, a dated copy of the proposed rule, and copies of any necessary attachments
- Email the scanned document(s) as an attachment to the email to: oah.rules@oah.nc.gov
- An automatically generated email will be sent indicating receipt of the email

Rule-making Agency: State Board of Education	
Rule Citation(s): 16 NCAC 6D.0508	
(1a) What is the authority for this rule? (attach a copy of any federal authority or state authority that is not in the current edition of the NCGS) G. S. 115C-83.1, 83.3, 83.7 & 83.8	
(1b) Why is this rule necessary to serve the public interest? To implement North Carolina General Assembly's Read to Achieve program, G. S. 115C-83.1, 83.3, 83.7 & 83.8	
(2) How did the agency seek to reduce the burden upon those persons or entities who must comply with this rule? Agency staff charged with program implementation met with legislative staff in person and communicated with them electronically to understand legislative intent and to ensure that no portion of the implementation plan or program procedure imposes an unintended burden upon the school systems required to comply with the rule. Communication included providing flowcharts and other documents to legislative staff for review.	
(3) Why is the rule reasonably necessary to implement or interpret federal or state law? The rule is necessary because the End of Grade reading tests for students must be aligned with the newly adopted English Language Arts (ELA) Common Core. Absent a rule, it is unclear how the State can require a uniform Reading test on which student promotion decisions are based.	
(4a) Are there existing rules adopted by the agency related to this specific purpose? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If "yes," provide citation:	
(4b) If "yes," did the agency consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which this rule is proposed? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(5) If appropriate, is this rule based on sound, reasonably available scientific, technical, economic, and other relevant information? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Not Applicable If "yes," include a reference to the information to be included in the Notice of Text: The Read to Achieve program is based upon academic-quality, peer-reviewed scientific research. Please see the attached North Carolina Read to Achieve Manual, which has seven components: Comprehensive Reading Plan, Developmental Screening and Kindergarten Early Assessments (KEA), Facilitating Early Grade Reading Proficiency, Elimination of Social Promotion, Successful Reading Development for Retained Students, Parent/Guardian Notification, and Accountability Measures.	
(6) How is the rule designed to achieve the regulatory objective in a cost-effective and timely manner? The rule and aforementioned program manual provide the necessary level of detail to permit implementation of this program in a timely and efficient manner by users familiar with school operations (principals and teachers). State funding for the Read to Achieve program has been approved by the NC General Assembly and is included in the NC Department of Public Instruction budget. The NCDPI pays for the administration of this program for all LEAs and charter schools, in accordance with the Read to Achieve legislation.	
AGENCY CERTIFICATION	RRC CERTIFICATION
The agency adhered to the principles in G.S. 150B-19.1 in developing and drafting the rule.	The Rules Review Commission certifies that the agency adhered to the principles in G.S. 150B-19.1.
Signature: _____	By: <u><i>Joseph J. De Luca</i></u>
Typed Name: Katie Cornetto	Date: <u>5/14/13</u>
Title: Rulemaking Coordinator, SBE	

5/14/2013

RULES REVIEW COMMISSION

G.S. 150B-19.1 CERTIFICATION

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(4a) Are there existing rules adopted by the agency related to this specific purpose? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If "yes," provide citation:	
(4b) If "yes," did the agency consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which this rule is proposed? <input type="checkbox"/> Yes <input type="checkbox"/> No	
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AGENCY CERTIFICATION	RRC CERTIFICATION
The agency adhered to the principles in G.S. 150B-19.1 in developing and drafting the rule.	The Rules Review Commission certifies that the agency adhered to the principles in G.S. 150B-19.1.
Signature: _____	By: <u><i>Joseph J. De Luca</i></u>
Typed Name: Katie Cometto	Date: <u>5/16/13</u>
Title: Rulemaking Coordinator, SBE	



TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

ORIGINAL

OAH USE ONLY

VOLUME:

ISSUE:

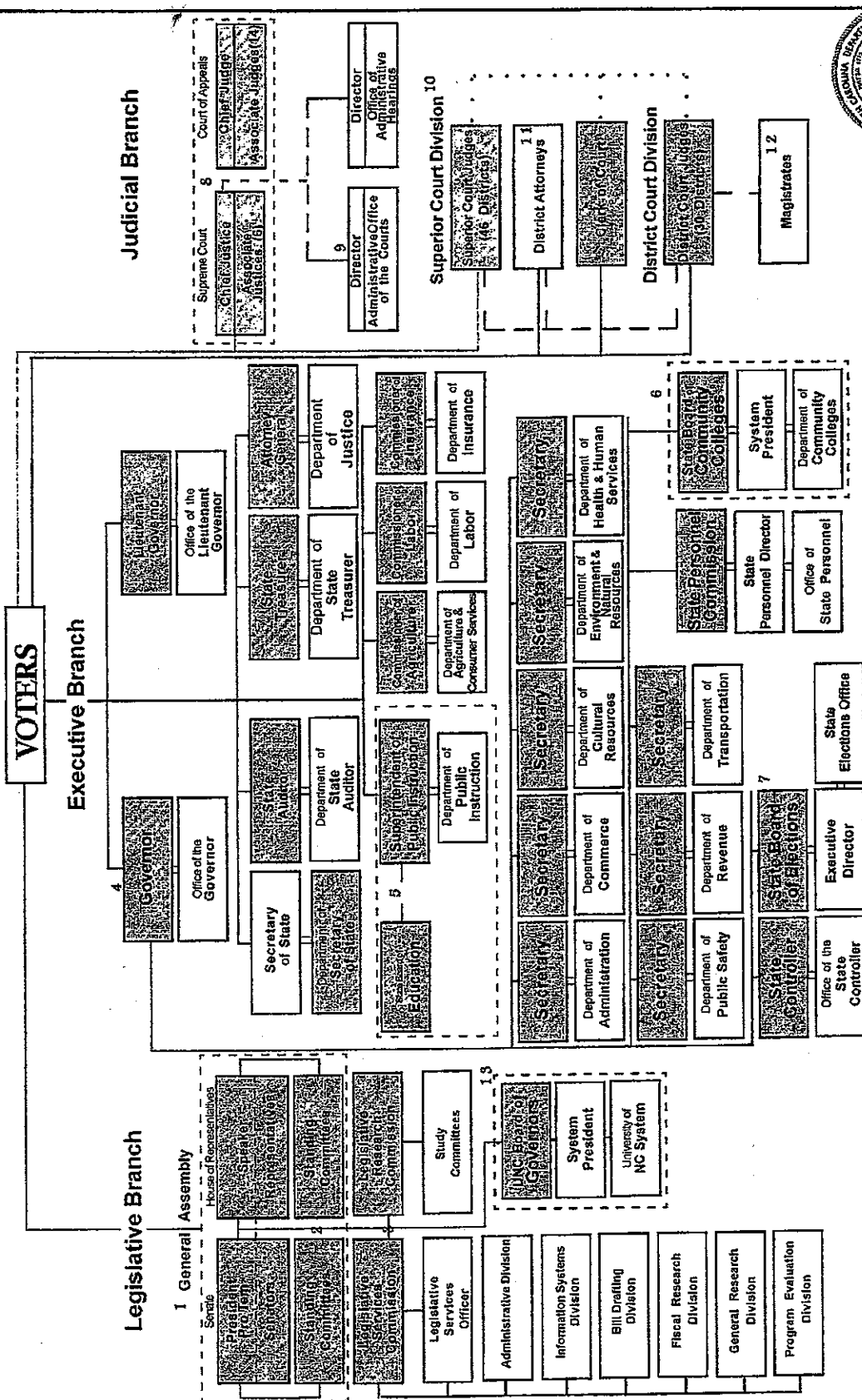
1. Rule-Making Agency: North Carolina State Board of Education	
2. Rule citation & name: 16 NCAC 06C .0701 Model Teacher Contract	
3. Action: <input checked="" type="checkbox"/> Adoption <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal	
4. Was this an Emergency Rule: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Effective date:	
5. Provide dates for the following actions as applicable: a. Proposed Temporary Rule submitted to OAH: 12/12/2013 b. Proposed Temporary Rule published on the OAH website: 12/17/2013 c. Public Hearing date: 1/15/2014 d. Comment Period: 12/19/2013 – 1/15/2014 e. Notice pursuant to G.S. 150B-21.1(a3)(2): 12/17/2013 f. Adoption by agency on: <u>2/6/2014</u> g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B-21.1(b) and G.S. 150B-21.3]: February 1, 2014 h. Rule approved by RRC as a permanent rule: N/A	
6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review. <input type="checkbox"/> A serious and unforeseen threat to the public health, safety or welfare. <input checked="" type="checkbox"/> The effective date of a recent act of the General Assembly or of the U.S. Congress. Cite: S.L. 2013-360, Section 9.6(e) Effective date: 7/1/2013 <input type="checkbox"/> A recent change in federal or state budgetary policy. Effective date of change: <input type="checkbox"/> A recent federal regulation. Cite: Effective date: <input type="checkbox"/> A recent court order. Cite order: <input type="checkbox"/> State Medical Facilities Plan. <input type="checkbox"/> Other: Explain: The State Board of Education was mandated by Session Law 2013-360, Section 9.6(e) to develop, by rule, a model teacher contract for use by local boards of education in awarding teacher contracts. Pursuant to S.L. 2013-360, Section 9.6(e), the State Board may adopt a temporary rule for a model contract and provide it to local boards no later than January 1, 2014, but shall replace the temporary rule with a permanent rule as soon as practicable. This law went into effect on July 1, 2013. The State Board has begun the permanent rule-making process.	

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ADMIN HEARING

2013

**DEFENDANT'S
EXHIBIT**

Organizational Chart of North Carolina State Government



Issued by: **Elaine F. Marshall, NC Secretary of State**

Legend

██████████ elected to 2 year term

[REDACTED] elected to 4 year term

elected to 8 year term
auxiliary lines of authority

Authority
lines of appointment
to new jobs

over branch unit
or department

Notes of Explanation

Organizational Chart of the North Carolina State Government

- 1 The North Carolina General Assembly is divided into two chambers - the Senate with 50 members and the House of Representatives with 120. The Lieutenant Governor is presiding officer of the Senate.
- 2 Legislators are appointed to one or more committees within their respective chambers by the presiding officers of their chambers.
- 3 The President Pro Tempore of the Senate and the Speaker of the House serve on the Legislative Services and Legislative Research Commission. They also appoint 5 members each from their respective chambers to serve on the Legislative Research Commission and 4 each to serve on the Legislative Services Commission and also can appoint designees to serve in their own places. The Legislative Services Officer is appointed by the Legislative Services Commission and provides administrative support to the legislators.
- 4 The Governor and the other 8 elected officials of the Executive Branch form the Council of State. The heads of other executive departments, "secretaries," are appointed by the Governor and serve at his pleasure.
- 5 The State Board of Education serves as "head" of the Department of Public Instruction. Eleven of its 14 members are appointed by the Governor, subject to confirmation by the General Assembly in joint session. The Lieutenant Governor, State Treasurer and Superintendent of Public Instruction, who is secretary to the board, are *ex officio* members. The Superintendent of Public Instruction is the administrative head of the Department of Public Instruction and is elected by the citizens of North Carolina.
- 6 The State Board of Community Colleges is the "head" of the Department of Community Colleges. Ten of its members are appointed by the Governor, as well as 4 each by the NC House and Senate. The Lieutenant Governor and State Treasurer are *ex officio*
- members. The State President of the Community College System is elected by the State Board and serves as the administrative head of the department.
- 7 The State Board of Elections is an autonomous agency whose members are appointed by the Governor. The Executive Director-Secretary is appointed by the board and with a supporting staff provides administrative services to the board and to the local boards of elections in the counties.
- 8 The Chief Justice of the Supreme Court designates one of the Judges of the Court of Appeals as Chief Judge. The Chief Justice also designates one of the District Court Judges in each district as Chief District Court Judge.
- 9 The Administrative Office of the Courts provides administrative and research assistance to all levels of the Judicial System. The Director of the Administrative Office of the Courts is appointed by the Chief Justice of the Supreme Court.
- 10 North Carolina is divided into 30 Judicial Districts. Several of the districts are further divided into "A" and "B" districts for administrative purposes.
- 11 District Attorneys serve as prosecuting officers at both the Superior and District Court levels. The Clerks of Court in each county also serve both courts.
- 12 Magistrates, 1 or more in each county, are appointed for two-year terms by the Senior Resident Superior Court Judge in each district and serve under the Supervision of the Chief District Court Judge in their respective districts.
- 13 The UNC System Board of Governors consists of 32 members elected by the General Assembly. The board also includes special members, including the president of the UNC Association of Student Governments, former board chairs and former state governors.



Need Information Regarding NCSBE Policies -- Who to Call

The following is a listing of the Areas and Divisions that make up the Department of Public Instruction, the leader of those areas and divisions along with an appropriate telephone number for obtaining information. Written correspondence should be mailed to the appropriate area or division at the NC Department of Public Instruction (click [here](#) to find appropriate DPI address).

AREA	DIVISION	CONTACT PERSON	PHONE # (919)
Office of the State Superintendent	Administrative Office	June Atkinson	807-3430
	Legislative Liaison	Rachel Beaulieu	807-4035
Office of the State Board Chairman	Administrative Office	William Cobey	807-3401
	Communications and Information	Vanessa Jeter	807-3450
	Personnel Relations	Lou Ann Phillips	807-3385
Office of the State Board of Education	Administrative Office	Martez Hill	807-3405
	SBE Staff Attorney/Legal Advisor	Katie Cornetto	807-3406
Office of Financial and Business Services	Administrative Office	Philip Price	807-3600
	Financial Services	Sarah Harris	807-3741
	Office of Charter Schools	Joel Medley	807-3491
	School Business Services	Alexis Schauss	807-3700
	School Support Services	Ben Matthews	807-3500
Office of Academic Services and Instructional Support	Administrative Office	Rebecca Garland	807-3759
	Deputy Chief Academic Officer	Angela Quick	807-3769
	Accountability Services	Tammy Howard	807-3769
	Career and Technical Information	Jo Anne Honeycutt	807-3879
	District and School Transformation	Pat Ashley	807-4006
	Educator Effectiveness	Lynne Johnson	807-3355
	Exceptional Children		807-3969
	K-12 Curriculum, Instruction and Technology	Maria Pitre-Martin	807-3817
Office of Technology Services	Program Monitoring and Support	Donna Brown	807-3957
	Administrative Office	Philip Price	807-3600
	IT Operations	Rodney McLaurin	807-3394

	NCWISE Business Services	Rosalyn Galloway	807-3261
	IT Business Support	Donna Roch	807-3253



Administrative Procedures Act (APA) Policies

Click on the Policy ID # you would like to view; Deleted Policies can not be viewed.

Policy ID Number	Policy Title	Current Date	Status	Deleted Date
GCS-A-002	16 NCAC 6D.0303 Policy governing the role of the testing coordinator	05/06/1999	A	
GCS-B-001	16 NCAC 6G.0201 Policy establishing the purpose of accreditation	06/06/1990	A	
GCS-C-006	16 NCAC 6G.0306 Policy governing the identification of low performing schools under the ABCs Model		D	10/18/2012
GCS-C-007	16 NCAC 6G.0307 Policy governing the assistance teams under the ABCs Model	06/05/2014	A	
GCS-C-008	16 NCAC 6G.0308 Policy outlining due process protections under the ABCs Model	06/05/2014	A	
GCS-C-009	16 NCAC 6G.0309 Policy governing the suspension of duties of local schools boards under the ABCS Model	05/06/1999	A	
GCS-C-011	16 NCAC 6G.0310 Policy establishing the formula for the annual performance students for high schools		D	10/05/2000
GCS-C-017	16 NCAC 6G.0303 Policy governing flexible funding	06/05/2014	A	
GCS-C-026	Achievement Level Ranges for the NCEXTEND2 EOG Reading and Mathematics Grades 3-8 and Science Grades 5 & 8		D	11/01/2012
GCS-D-001	16 NCAC 6H.0101 Policy defining special education terms	06/05/2014	A	
GCS-D-002	16 NCAC 6H.0103 Policies outlining complaint procedures for federal programs (Policy MOVED to EEO-E-001)		D	04/07/2004
GCS-D-003	16 NCAC 6H.0105 Policy guiding the administration of special education programs	06/05/2014	A	
GCS-D-004	16 NCAC 6H.0106 Policy guiding the administration of non-instructional special education services	06/05/2014	A	

<u>GCS-D-005</u>	16 NCAC 6H.0007 Policies governing special education assessment and placement procedures	08/01/2000	A	
<u>GCS-D-006</u>	16 NCAC 6H.0008 Policy for the selection and responsibilities of surrogate parents	06/05/2014	A	
<u>GCS-D-007</u>	16 NCAC 6H.0009 Policies governing confidentiality and access to records	06/05/2014	A	
<u>GCS-D-008</u>	16 NCAC 6H.0010 Policies governing special education due process procedures	12/01/1999	A	
<u>GCS-G-002</u>	16 NCAC 6D.0101 Policy defining key terms used in the Basic Education Plan	02/07/2002	A	
<u>GCS-G-003</u>	16 NCAC 6D.0102 Policy delineating the curricular components of the Basic Education Plan.	06/05/2014	A	
<u>GCS-G-005</u>	16 NCAC 6D.0401 Policy outlining required BEP support programs	04/06/1994	A	
<u>GCS-G-006</u>	16 NCAC 6D.0402 Policy designating special health care services to be provided under BEP support services	04/06/1995	A	
<u>GCS-H-001</u>	Textbook Evaluation Criteria and Invitation to Submit	01/08/2015	A	
<u>GCS-H-002</u>	Textbook Evaluation Advisors	01/08/2015	A	
<u>GCS-H-003</u>	Textbook Commission	01/08/2015	A	
<u>GCS-H-004</u>	Textbook Contracts	01/08/2015	A	
<u>GCS-H-005</u>	Disposition of Old Textbooks	01/08/2015	A	
<u>GCS-H-006</u>	Publishers	01/08/2015	A	
<u>GCS-J-001</u>	16 NCAC 6E.0105 Policy delineating the standards for early admission to kindergarten	07/09/1998	A	
<u>GCS-K-000</u>	Policy establishing guidelines for Limited English Proficient Programs	06/01/1996	A	
<u>GCS-L-002</u>	16 NCAC 6D.0103 Policy delineating graduation requirements (earth science delay)		D	12/01/1999
<u>GCS-N-001</u>	16 NCAC 6D .0304 Policy outlining grade-level expectations for public school students		D	12/01/1999
<u>GCS-N-002</u>	16 NCAC 6D .0501 Definitions related to		D	10/07/2010

	Student Accountability Standards			
GCS-N-003	16 NCAC 6D .0502 Student Accountability Standards		D	10/07/2010
GCS-N-005	16 NCAC 6D .0504 Review procedures for promotion requests		D	10/01/2009
GCS-N-006	16 NCAC 6D .0505 Local Accountability Procedures		D	10/07/2010
GCS-N-007	16 NCAC 6D .0506 Accountability Standards for Students with Disabilities		D	10/07/2010
GCS-N-008	16 NCAC 6D .0507 Accountability Standards for Students With Limited English Proficiency		D	10/07/2010
GCS-R-001	Driver education contracts	01/08/2015	A	
GCS-R-003	Non-certified driver training instructor	01/08/2015	A	
GCS-R-004	Driver training requirements	01/08/2015	A	
TCP-A-000	16 NCAC 6C.0102 Policy regarding nature of licensure	08/01/2000	A	
TCP-A-007	Policy on Licensure Suspension and Revocation	10/07/2004	A	
TCP-A-010	16 NCAC 6C.0301 Policy governing general information on licensure	08/01/2000	A	
TCP-A-011	16 NCAC 6C.0302 Policy regarding the computation of credit for licensure	08/01/2000	A	
TCP-A-012	16 NCAC 6C.0303 Policy delineating the program requirements for licensure	08/01/2000	A	
TCP-A-013	16 NCAC 6C.0304 Policy delineating types of licenses	10/06/2005	A	
TCP-A-014	16 NCAC 6C.0305 Policies on licenses for non-teacher education graduates	11/03/2005	A	
TCP-A-015	16 NCAC 6C.0306 Policy governing license endorsement	08/01/2000	A	
TCP-A-016	16 NCAC 6C.0307 Policies governing the requirements for license renewal	10/06/2005	A	
TCP-A-017	16 NCAC 6C.0308 Policy regarding expired licenses	08/01/2000	A	

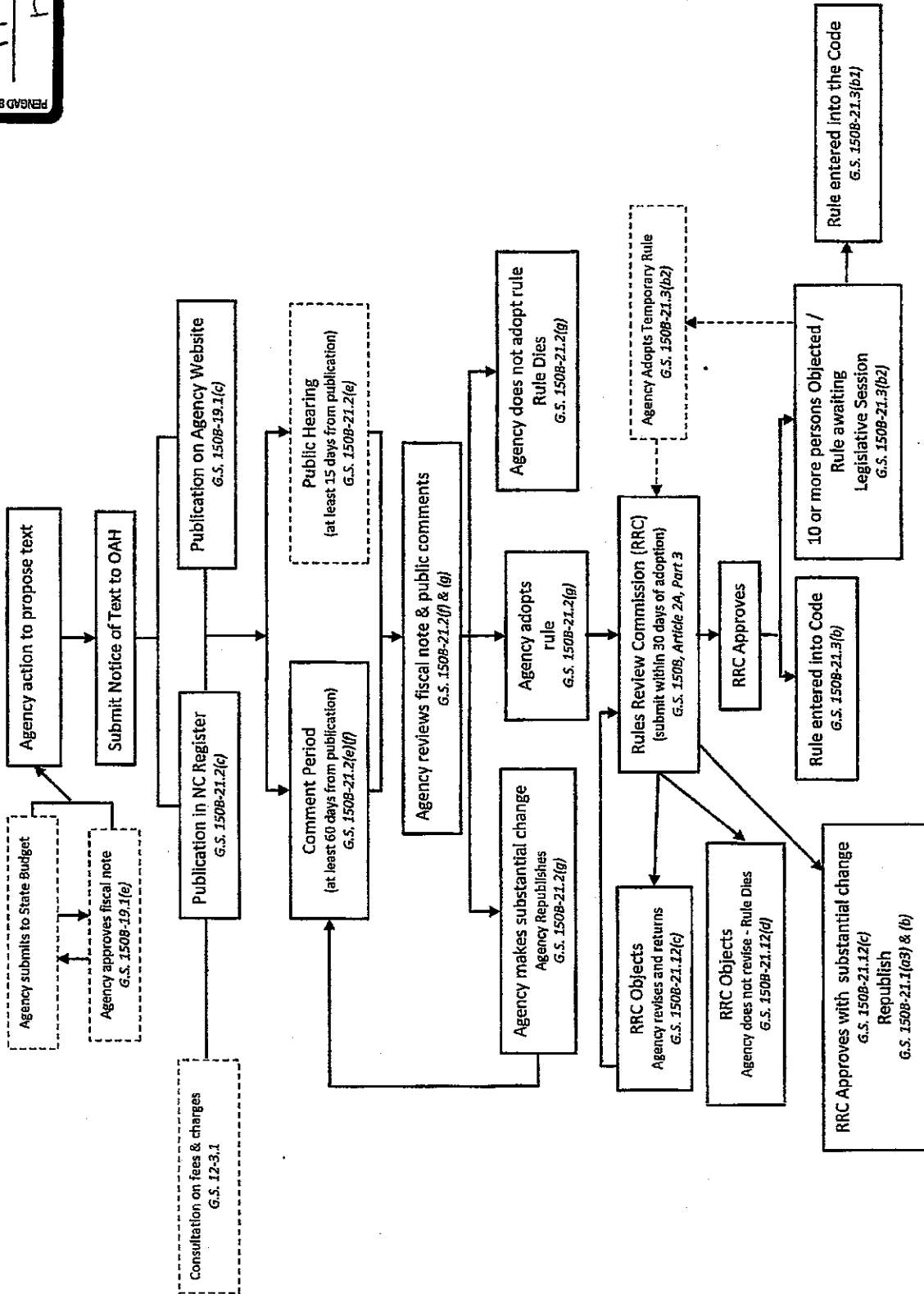
<u>TCP-A-018</u>	16 NCAC 6C.0309 Policy governing reciprocity in licensure	08/01/2000	A	
<u>TCP-A-019</u>	16 NCAC 6C.0311 Policy governing temporary licensure permit	08/01/2000	A	
<u>TCP-A-020</u>	16 NCAC 6C.0312 Policy relative to licensure, suspension, and revocation	10/07/2004	A	
<u>TCP-B-000</u>	16NCAC 6C.0310 Policy Governing Standard Examinations	03/05/1998	A	
<u>TCP-B-003</u>	16 NCAC 6C.0103 Policy giving the SBE authority to approve Teacher Education Programs	05/07/1986	A	
<u>TCP-B-007</u>	16 NCAC 6C.0207 Policy on prospective teacher scholarship loans		D	01/01/2006
<u>TCP-C-002</u>	16 NCAC 6C.0502 Policy regarding hearings under GS 115C-325(j) and (j3)	07/09/1998	A	
<u>TCP-C-003</u>	16 NCAC 6C.0501 Policies and Provisions Governing Professional Employee Evaluation		D	03/07/2013
<u>TCP-C-007</u>	Policy delineating the job description and performance appraisal for assistant superintendents/associate superintendents		D	07/01/1999
<u>TCP-C-008</u>	Policy delineating the job descriptions and performance standards for the Director of Instruction position		D	07/01/1999
<u>TCP-C-010</u>	Policy delineating the job description and performance criteria for student services personnel		D	07/01/1999
<u>TCP-C-011</u>	Policy delineating the job description and performance criteria for School Media Coordinators		D	07/01/1999
<u>TCP-C-012</u>	Policy delineating the job description and performance criteria for School Counselors		D	07/01/1999
<u>TCP-C-013</u>	Policy delineating the job description and performance criteria for the School Social Worker		D	07/01/1999
<u>TCP-C-014</u>	16 NCAC 6C.0601 Policy regarding the Code of Ethics for North Carolina Educators	02/05/1998	A	
	16 NCAC 6C.0311 Policy adopting the Florida College Level Academic Skills Test			

TCP-C-015	and other requirements related to this test for certified personnel in low-performing schools		D	06/05/2014
<u>TCP-C-017</u>	16 NCAC 6C.0313 Policy authorizing LEAs to require criminal history checks of applicants	08/01/2000	A	
TCP-D-002	Policy allowing LEAs to hire retired teacher to teach in areas where there are teacher shortages without affecting the retiree's retirement compensation		D	06/30/2003
<u>TCP-D-003</u>	16 NCAC 6C.0401 Policy on vacation leave for public school employees	06/05/2014	A	
<u>TCP-D-004</u>	16 NCAC 6C.0402 Policy on sick leave for public school employees	10/02/2003	A	
<u>TCP-D-005</u>	16 NCAC 6C.0403 Policy on substitutes for instructional personnel	08/04/1993	A	
<u>TCP-D-006</u>	16 NCAC 6C.0404 Policy on leave with pay for public school personnel	10/04/1989	A	
<u>TCP-D-007</u>	16 NCAC 6C.0405 Policy on leave without pay for public school personnel	10/04/1989	A	
<u>TCP-G-000</u>	16 NCAC 6C.0101 Policy defining the general provisions of the APA Personnel Rules	03/14/1996	A	
HRS-B-000	16 NCAC 6E.0201 Policy defining paramedical emergency life saving services and sports medicine services		D	07/25/2012
TCS-B-004	16 NCAC 6C.0201 Policy establishing the State Evaluation Committee on Teacher Education		D	06/05/2014
<u>TCS-C-002</u>	16 NCAC 1A.0006 Policy on State Board of Education Policy-Making Process	11/06/2014	A	
<u>TCS-C-014</u>	16 NCAC 1A.0001 Policy defines key terms	11/05/1992	A	
TCS-C-015	16 NCAC 1A.0003 Policy concerning departmental organization		D	06/05/2014
<u>TCS-C-020</u>	Policy on Dispute Resolution Process for Homeless Students	06/01/2006	A	
<u>TCS-E-000</u>	16 NCAC 6H.0002 Policies governing the operations of federal programs	05/07/1986	A	

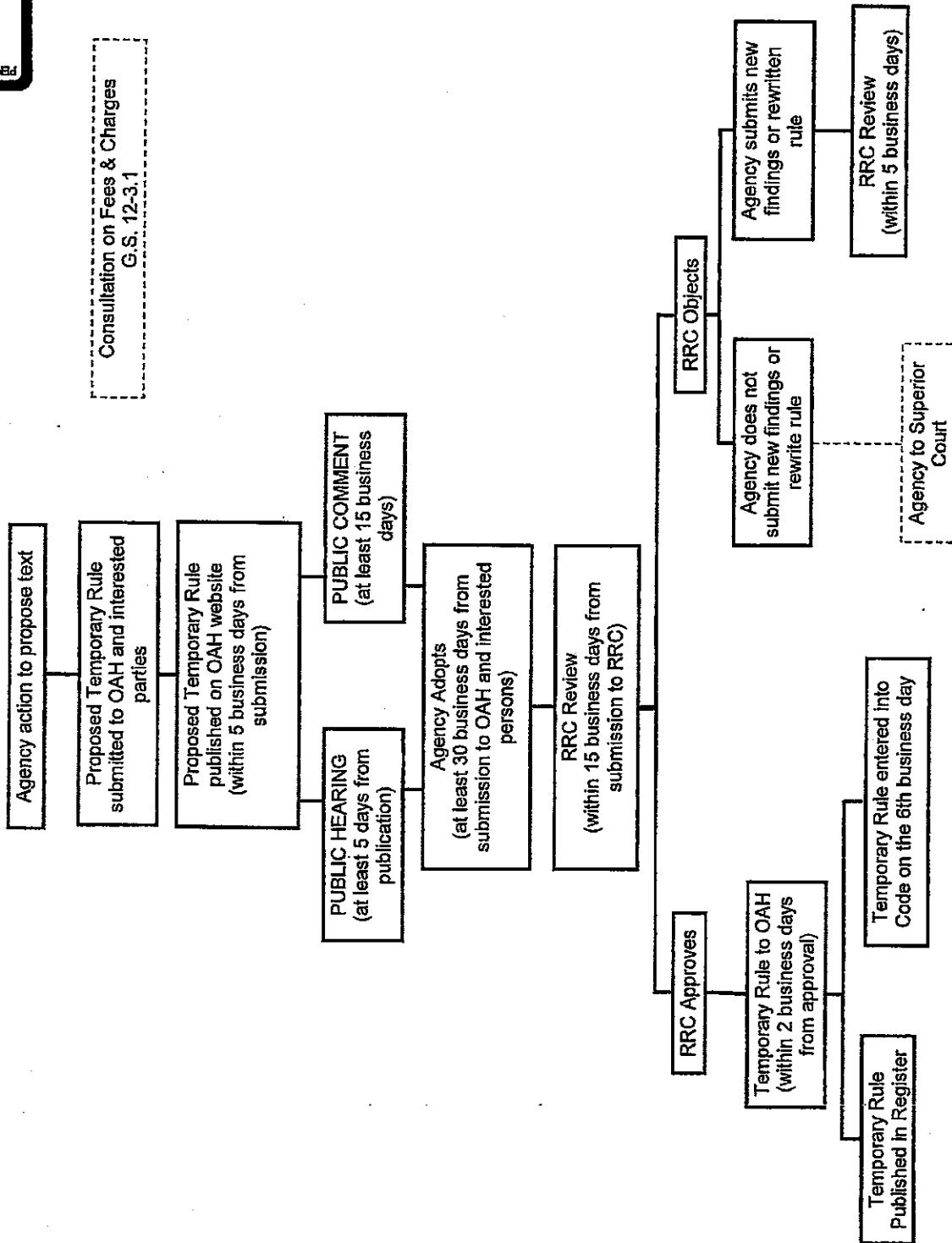
<u>TCS-E-001</u>	16 NCAC 6H .0103 Policy outlining the complaint procedures for federal programs	08/01/2000	A	
TCS-H-003	16 NCAC 6B.0007 Policy outlining supervisory and safety practices		D	09/16/2011
TCS-K-001	16 NCAC 6F.0001 Policy regarding definitions relative to the Community Schools Program		D	06/05/2014
TCS-K-002	16 NCAC 6F.0002 Policy defining local requirements for units applying for state community schools funds		D	06/05/2014
TCS-K-003	16 NCAC 6F.0003 Policy defining application process for units applying for state community schools funds		D	06/05/2014
TCS-K-004	16 NCAC 6F.0004 Policy outlining the review criteria for community schools projects		D	06/05/2014
TCS-L-001	16 NCAC 6E.0101 Policy defining attendance		D	06/05/2014
<u>TCS-L-002</u>	16 NCAC 6E.0102 Policy defining excused absences	03/14/1996	A	
<u>TCS-L-004</u>	16 NCAC 6E.0104 Policy covering involuntary suspensions	03/14/1996	A	
<u>TCS-M-000</u>	16 NCAC 1A.0004 Policy delineating the process of personnel allotments to LEAs	05/07/1986	A	
TCS-M-004	16 NCAC 1A.0004 Policy concerning personnel allotments		D	05/18/1999
<u>TCS-P-004</u>	16 NCAC 6H .0111 Policy regarding rule for the administration of the Qualified Zone Academy Bonds (QZAB) Program	06/07/2001	A	
<u>TCS-S-000</u>	16 NCAC 6H.0004 Policy and standards for the National School Lunch Program	08/04/1993	A	
TCS-S-001	16 NCAC 6H.0002 Policy governing federal programs		D	05/18/1999
<u>TCS-U-004</u>	16 NCAC 6G.0501 Policy regarding liability insurance for charter schools	01/07/2005	A	
TCS-U-005	16 NCAC 6G.0502 Policy regarding the Charter Schools Advisory Committee		D	04/05/2007
	16 NCAC 6D.0301 Policy governing testing			

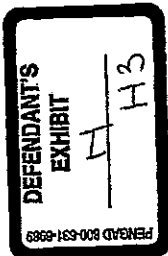
<u>OLD-A-000</u>	requirements and opportunities	01/02/2006	A	
<u>OLD-A-001</u>	16 NCAC 6D.0302 Policy governing test administration in the public schools	03/01/2001	A	
<u>OLD-A-002</u>	16 NCAC 6D.0303 Policy governing the role of the testing coordinator	05/06/1999	A	
<u>OLD-A-010</u>	16 NCAC 6D.0306 Policy adopting a testing code of ethics	08/01/2000	A	

PERMANENT RULEMAKING PROCESS

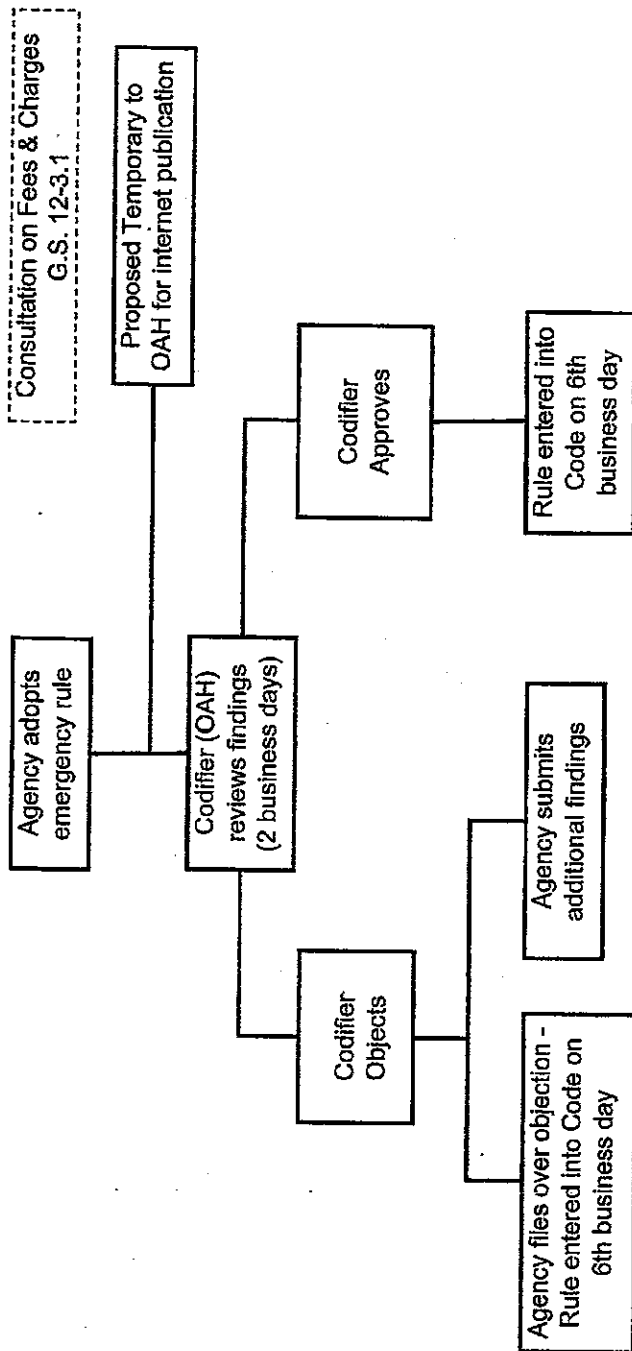


TEMPORARY RULEMAKING PROCESS
(G.S. 150B-21.1)





EMERGENCY RULEMAKING (G.S. 150B-21.14)



Emergency Rule expires on the earliest of the following dates:

- (1) The date specified in the rule.
- (2) The effective date of the temporary rule adopted to replace the emergency rule, if the Commission approves the temporary rule.
- (3) The date the Commission returns to an agency a temporary rule the agency adopted to replace the emergency rule.
- (4) Sixty days from the date the emergency rule was published in the North Carolina Register, unless the temporary rule adopted to replace the emergency rule has been submitted to the Commission.

NORTH CAROLINA
WAKE COUNTY

NORTH CAROLINA STATE
BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA and
THE NORTH CAROLINA RULES
REVIEW COMMISSION,

Defendants.

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14-CVS-14791

**PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT AND
IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

INTRODUCTION

This action is a state constitutional challenge to the North Carolina Rules Review Commission's ("RRC's") exercise of authority over the North Carolina State Board of Education ("the Board"). It presents a matter of first-impression in North Carolina, yet it requires no more than a review of the plain language of the North Carolina Constitution and the expressly-stated intent of the framers to resolve the issues.

For nearly 150 years, the people of North Carolina in their Constitution have conferred broad, sweeping, "legislative" rulemaking power on the Board to manage North Carolina's free public schools. Article IX, Section 5 of the North Carolina Constitution provides:

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

N.C. Const. art. IX, § 5.

As discussed more fully below, this provision only allows two instances in which the Board's rules can be nullified. First, if the Board enacts a rule, the General Assembly may veto that rule by revising or repealing it. Second, if the General Assembly preemptively enacts

specific legislation on a particular substantive topic, the Board is precluded from enacting a rule to the contrary. Outside of these two instances, the Board has plenary rulemaking authority on matters concerning North Carolina's free public schools.

Neither of these two instances are present here. This action concerns the authority of the RRC, a statutorily-created administrative agency mentioned nowhere in the North Carolina Constitution. For reasons it has never articulated, the RRC believes it has the constitutional authority to strike down the Board's rules. The RRC's exercise of veto authority fits nowhere within the two carefully circumscribed instances in which the General Assembly can veto the Board's rules under Article IX, Section 5 of the North Carolina Constitution. Instead, the RRC's position is contrary to the plain language of Article IX, Section 5 and the intent of the framers. Furthermore, when the RRC strikes down the Board's rules, its exercise of unchecked authority violates the North Carolina Constitution's non-delegation doctrine.

Accordingly, the Board is duty-bound under the North Carolina Constitution to exercise the full extent of the powers delegated to it by the people of North Carolina without unconstitutional interference by the RRC. For the reasons that follow, the Board is entitled to summary judgment on its Article IX, Section 5 claim (Count 2) and, should the Court reach it, the Board's non-delegation doctrine claim (Count 3).

STATEMENT OF FACTS

Overview of the Board's Constitutional Powers and Duties

Article I, Section 15 of the North Carolina Constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. To ensure that the State fulfills its duty of "guarding and maintaining" this right, the people of North Carolina in their 1868 Constitution created the Board to manage the day-to-day issues facing North Carolina's free public schools. *See infra* at 10-11.

Commensurate with this great responsibility, the 1868 Constitution conferred broad, sweeping, "legislative" rulemaking power on the Board. *See* 1868 N.C. Const. art. IX, § 9. Specifically, the 1868 Constitution provided that "[t]he Board of Education shall . . . have full power to legislate and make all needful rules and regulations in relation to Free Public Schools." *Id.* Under the 1868 Constitution, this plenary power could only be limited by an act of the General Assembly "altering, amending, or repealing" a particular rule adopted by the Board. *See id.* ("[A]ll acts, rules and regulations of said Board may be altered, amended or repealed by the General Assembly, and when so altered, amended or repealed, they shall not be re-enacted by the Board.").

As discussed more fully below, that same power exists today. Since the creation of the Board in 1868, no state constitutional amendment or judicial decision has reduced the broad, sweeping, "legislative" rulemaking power conferred upon the Board by the 1868 Constitution.

In its current form, Article IX, Section 5 of the North Carolina Constitution provides:

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

N.C. Const. art. IX, § 5.

History and Overview of the RRC Rules Review Process

In the late 1970s, the General Assembly considered the establishment of an advisory committee to review rules adopted by executive branch agencies. Charlotte A. Mitchell, *The North Carolina Rules Review Commission: A Constitutional Quandary*, 2 N.C.L. Rev. 2092, 2099 (2004) (citing M. Jackson Nichols, *Rules Review in North Carolina: History and Constitutional Issues*, Admin. Law (N.C. Bar Ass'n Nov. 1997)). To perform this advisory function, the General Assembly in 1977 created the Administrative Rules Review Committee

("the Committee"). The Committee was comprised of nine legislators. *Id.* The Committee functioned in an oversight capacity, identifying potential problems with agency regulations and recommending to the General Assembly as a whole that it take corrective legislation in order to address those problems. *Id.* The Committee was purely advisory, however, and lacked any authority to veto administrative rules. *Id.*

In 1983, the General Assembly replaced the Committee with the Administrative Rules Review Commission, the predecessor to the current RRC. *Id.* This new agency had the authority to "object on the record" to administrative rules. *Id.* However, it lacked the authority to veto administrative rules. *Id.*

In 1985, the General Assembly established the current RRC. *Id.* However, the General Assembly made the creation of the RRC contingent upon an advisory opinion from the Supreme Court of North Carolina. *Id.* When the Court ultimately did not issue any such opinion, the General Assembly the following year removed the contingency provision and established the current RRC. *Id.*

The typical executive branch agency subject to the RRC is created by statute. Because these agencies are statutorily created, they can be reorganized, limited, or even abolished by the General Assembly as it sees fit. By contrast, the Board was created by the North Carolina Constitution as a constitutional body in its own right. Nevertheless, because the Board was not expressly named as an exempt entity under the RRC's enabling statute, the RRC takes the position that the Board is subject to its authority. (Verified Complaint at ¶ 24).

The RRC's Encroachment on the Board's Constitutional Authority

Under the RRC's enabling statutes, an agency that adopts a rule must file that rule with the RRC within 30 days. N.C. Gen. Stat. § 150B-21.2(g) (2013). The RRC in its sole discretion then decides whether the rule is enacted. N.C. Gen. Stat. § 150B-21.10 (2013). Unless and until

the RRC approves the rule, the agency's adopted rule is of no force and effect – it is void *ab initio*. N.C. Gen. Stat. § 150B-21.3(b)(2) (2013). If the RRC objects to the agency's adopted rule, then the rule cannot be implemented unless and until the agency revises the rule to address the RRC's objections. N.C. Gen. Stat. § 150B-21.19(4) (2013).

Since the RRC's inception, the RRC or its staff has objected to or modified every rule adopted by the Board. (Verified Complaint at ¶ 25). Most recently, the RRC in February 2014 struck down the Board's Model Teacher Contract Rule, which would have established uniform requirements for contracts between teachers and local boards of education. Exhibit A, RRC Objection Letter for Model Teacher Contract Rule (stating that "the Commission disapproved the [Model Teacher Contract] rule"), and March 17, 2014 Response Letter from the Board ("The [Board] has received the [RRC's] objection of the . . . rule. We disagree with the objection and are considering our next course of action.").¹ In addition, the Board has declined to adopt a number of rules that it otherwise would have adopted but for the fact that the RRC would have objected to these rules or struck them down. (Verified Complaint at ¶ 25).

The RRC review process typically takes a minimum of six months and often longer. *Id.* at ¶ 26. Thus, because the Board's rules are void *ab initio* unless the RRC approves them, in the intervening months or years, statewide education policy is effectively enjoined. *Id.* As a result, the RRC's exercise of authority over the Board's rulemaking impedes the Board's ability to timely address critical issues facing our State in the area of education. *Id.*

The Board's Decision to Exercise the Full Extent of its Constitutional Authority

Although historically the Board has stopped short of bringing a legal challenge, the Board has repeatedly questioned the constitutionality of the RRC's purported exercise of authority. *Id.*

¹ The Court may take judicial notice of these public records. See, e.g., *West v. Slick*, 313 N.C. 33, 45, 326 S.E.2d 601, 608-09 (1985); *State ex rel. Utilities Com. v. Southern Bell Tel. & Tel. Co.*, 289 N.C. 286, 288, 221 S.E.2d 322, 323 (1976).

at ¶ 24. As currently constituted, the Board has now made the decision to exercise the full extent of its powers and duties under the North Carolina Constitution without unconstitutional interference by the RRC. *Id.* at ¶ 27.

The Board has resolved that it will no longer voluntarily submit its rules for RRC approval. *Id.* at ¶ 28. The Board will nevertheless deem its rules to have the immediate full force and effect of law. *Id.* The Board recognizes that this decision is in direct conflict with the RRC's views about whether it can exercise authority over the Board. *Id.* at ¶ 29. It is for that reason that the Board filed this declaratory judgment action seeking a determination of the proper interpretation and application of the North Carolina Constitution. *Id.*

The Complaint does not seek damages, nor does it seek retroactive relief to address past violations of the North Carolina Constitution. *Id.* at ¶¶ 14-15. Rather, the Complaint merely seeks prospective declaratory and injunctive relief to prevent the RRC from continuing to exercise authority over the Board in violation of the North Carolina Constitution. *Id.*

The only two claims currently before the Court are the Board's Article IX, Section 5 claim (Count 2) and the Board's non-delegation doctrine claim (Count 3). The remainder of the Board's claims are not before the Court on any pending motion.² Counts 2 and 3 challenge the RRC's exercise of authority over the Board alone, such that entry of summary judgment in the Board's favor would only affect the RRC's exercise of authority over the Board. Entry of summary judgment in the Board's favor on these claims would not affect the RRC's exercise of authority over any other state government entity.

² The Board voluntarily dismissed its facial challenges on separation of powers grounds (Counts 4-7) without prejudice as part of an unsuccessful effort to resolve this dispute. The Board also voluntarily dismissed its statutory construction claim (Count 1) without prejudice in light of legislation introduced in the 2015 Legislative Session that, if enacted, could ultimately moot that claim. The Board intends to pursue those claims should the Court not resolve this action on the basis of Count 2 or 3.

Counts 2 and 3 are now ripe for decision on the Board's motion for summary judgment.

STANDARD OF REVIEW

Counts 2 and 3 of the Complaint involve pure issues of law. "In cases 'where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment.'" *Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 488, 616 S.E.2d 602, 604 (2005) (quoting *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971)). "The purpose of a summary judgment motion is to eliminate a trial when, based on the pleadings and supporting materials, the trial court determines that only questions of law, not fact, are at issue." *Loy v. Lorm Corp.*, 52 N.C. App. 428, 437, 278 S.E.2d 897, 903 (1981); *Kessing*, 278 N.C. at 534, 180 S.E.2d at 830.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY JUDGMENT ON COUNT 2 OF THE COMPLAINT BECAUSE THE RRC'S EXERCISE OF AUTHORITY OVER THE BOARD VIOLATES ARTICLE IX, SECTION 5 OF THE NORTH CAROLINA CONSTITUTION.

A. The RRC's decisions to strike down the Board's rules violate the plain language of Article IX, Section 5.

The first and most basic rule for construing the North Carolina Constitution is that the Court must apply the plain language as it appears in the text. *Coley v. State*, 360 N.C. 493, 498, 631 S.E.2d 121, 125 (2006). If the plain language is clear, that is where the analysis begins and ends. *See id.* ("If the meaning of the language of [a state constitutional provision] is plain, we must follow it."); *Martin v. North Carolina*, 330 N.C. 412, 416, 410 S.E.2d 474, 476 (1991) (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989)) ("In interpreting our Constitution – as in interpreting a statute – where the meaning is clear from the words used we will not search for a meaning elsewhere."); *see also, e.g., In re Appeal of University of North Carolina*, 300 N.C. 563, 573, 268 S.E.2d 472, 478 (1980) (holding

legislation unconstitutional because it was in direct conflict with the plain language of the Constitution).

The plain language of Article IX, Section 5 of the North Carolina Constitution provides:

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

N.C. Const. art. IX, § 5. As the Supreme Court of North Carolina explained in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), this plain language “conferred upon the State Board of Education the powers so enumerated, including the powers to . . . make needful rules and regulations in relation to . . . the administration of the public school system.” *Id.* at 710, 185 S.E.2d at 198-99. These powers are only “subject to limitation and revision by acts of the General Assembly.” *Id.*

Accordingly, the plain language of Article IX, Section 5 means what it says: only “laws enacted by the General Assembly” can nullify the Board’s rules governing public education. N.C. Const. art. IX, § 5; *Guthrie* at 710, 185 S.E.2d at 199. Here, the RRC’s exercise of authority over the Board violates this plain language because the RRC’s decisions to strike down the Board’s rules are not “laws enacted by the General Assembly” within the meaning of Article IX, Section 5.

First, the RRC’s decisions to strike down the Board’s rules are not “laws enacted.” Under the North Carolina Constitution, any “laws enacted” in North Carolina require bicameral passage and presentment of a bill. N.C. Const. art. II, § 22. The RRC’s decisions to strike down the Board’s rules are not passed by the North Carolina House and Senate or presented to the Governor. They are mere administrative decisions by an administrative agency. For this reason alone, the RRC’s decisions to strike down the Board’s rules violate Article IX, Section 5.

Second, the RRC is not “the General Assembly.” The RRC is not a subdivision of the General Assembly. *See* N.C. Const. art. II, § 1 (providing that “the General Assembly . . . shall consist of a Senate and a House of Representatives”). The RRC is a separate administrative agency that is neither representative of the people of North Carolina nor accountable to them. It is comprised entirely of unelected, appointed individuals who are not members of the General Assembly. *See* N.C. Gen. Stat. § 143B-30.1(a) (2013) (“The Commission shall consist of 10 members to be appointed by the General Assembly, five upon the recommendation of the President Pro Tempore of the Senate, and five upon the recommendation of the Speaker of the House of Representatives.”). These unelected individuals act on their own accord when the RRC strikes down the Board’s rules. They formulate their own reasons for striking down the Board’s rules. Thus, the RRC’s decisions to strike down the Board’s rules are the actions of the RRC, not the actions of “the General Assembly.”

For these reasons, the RRC’s exercise of authority over the Board violates the plain language of Article IX, Section 5. The Board’s rules are not “subject to decisions of the Rules Review Commission.” Rather, the Board’s rules are only “subject to laws enacted by the General Assembly.” N.C. Const. art. IX, § 5. The plain language of Article IX, Section 5 is clear, and the Court must apply it.

On these grounds alone, the Board is entitled to summary judgment on Count 2 of the Verified Complaint. The Court need not go any further in resolving this dispute.

B. The RRC’s exercise of authority over the Board is directly contrary to the framers’ expressly-stated intent.

“In interpreting our Constitution, [courts] are bound to ‘give effect to the intent of the framers of the organic law and of the people adopting it.’” *Beaufort County Bd. of Educ. v. Beaufort County Bd. of Comm’rs*, 363 N.C. 500, 505, 681 S.E.2d 278, 282 (2009) (quoting *Perry*

v. Stancil, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953)). “Therefore, courts should keep in mind the object sought to be accomplished by its adoption” *N.C. State Bar v. DuMont*, 304 N.C. 627, 633-34, 286 S.E.2d 89, 93 (1982).

Article I, Section 15 of the North Carolina Constitution establishes the great principle that “[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.” N.C. Const. art. I, § 15. These strong words were first included in the 1868 Constitution and have remained part of the Constitution since then without change. They are unique to the North Carolina Constitution. No other state constitution includes these words. No other state constitution includes any right to education in its bill of citizens’ rights.

The people of North Carolina in their 1868 Constitution created the Board as a means of ensuring that the State lived up to its promise to “guard and maintain” the right to public education. See *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 614-15, 621-22 n.8, 599 S.E.2d 365, 376, 381 n.8 (2004) (“In *Leandro*, this Court, in sum, decreed that the State and State Board of Education had constitutional obligations to provide the state’s school children with an opportunity for a sound basic education”). As the Supreme Court of North Carolina succinctly explained shortly after the 1868 Constitution was approved by the voters, the 1868 Constitution “establishes the public school system[,] the General Assembly provides for it, and the State Board of Education . . . manage[s] it.” *Lane v. Stanly*, 65 N.C. 153, 157 (1871).

When they created the Board, the people of North Carolina made an important decision. Rather than simply stating in the Constitution that the legislature would prescribe what the Board’s powers and duties would be, the people of North Carolina conferred specific powers on the Board directly in the Constitution itself. *Id.* Specifically, Article IX, Section 9 of the 1868

Constitution conferred on the Board the "full power to *legislate* and make all needful rules and regulations in relation to Free Public Schools." 1868 N.C. Const. art. IX, § 9 (emphasis added).

By setting forth this broad, sweeping power in the Constitution itself, the people elevated the Board to a unique status. The Board and the Office of Governor are the only two entities in North Carolina whose powers and duties are set forth in the North Carolina Constitution itself. N.C. Const. art. IX, § 5; N.C. Const. art. III, § 5. Although the North Carolina Constitution establishes other constitutional entities and offices, the Constitution merely provides that their powers and duties will be prescribed by the legislature. *See, e.g.*, N.C. Const. art. III, § 7 (establishing the office of the Secretary of State and Attorney General, among others, but stating that "their respective duties shall be prescribed by law"). Thus, like the Office of Governor, the constitutional status of the Board is unique.

Since the creation of the Board in 1868, no state constitutional amendment or judicial decision has reduced the Board's broad constitutional powers and duties. In fact, the Board's powers were further increased when the people ratified an amendment in 1942 to strengthen the Board's powers by further centralizing public education governance with the Board.

In the 75 years that had passed since the Board's creation in the 1868 Constitution, various administrative agencies had begun to insert themselves into matters that had traditionally been within the broad authority of the Board. *Report and Recommendations of the Governor's Commission on Education*, at 30 (1938) ("There seems to be much duplication and some dual control in the workings of these various boards and unnecessary duplication in the work of school administrators. It is the opinion of the Commission that all these boards should be consolidated under one State Board of Education in Raleigh and that the direction of all activities of the teaching profession should come from this central board."). In an effort to return authority

in these areas to the Board and further centralize power in the Board, the people in 1942 amended the North Carolina Constitution to list additional areas in which the Board – as opposed to other various, “scattered” administrative agencies – would have exclusive authority. *Id.* at 31 (explaining that further centralizing power in the Board would be in the “best interest of the public school system to have immediate relief from scattered administration”); 1942 N.C. Const. art. IX, § 8. These areas of authority included the “power to divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the text books to be used in the public schools; [and] to apportion and equalize the public school funds over the State.” 1942 N.C. Const. art. IX, § 8.

Thus, as amended in 1942, Article IX, Section 8 of the North Carolina Constitution provided:

The State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted. The State Board of Education shall have power to divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the text books to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly.

Id. By expressly stating that the Board “shall succeed to all the powers . . . of the State Board of Education as heretofore constituted,” the people further clarified that the Board retained all the powers it held under the 1868 Constitution, including the broad power to “legislate” on matters regarding North Carolina’s free public schools. *Id.*

Notably, in 1959, the North Carolina Constitutional Commission recommended that “the provisions giving broad, general administrative powers to the State Board of Education” in Article IX, Section 5 should be deleted and “replaced by a provision to the effect that that powers

of the Board, other than as specifically enumerated by the Constitution, shall be as prescribed by the General Assembly.” *Report of the North Carolina Constitutional Commission* (1959). This recommendation was never adopted by the General Assembly or presented to the voters for their approval.

Instead, the broad powers of the Board continue to remain as extensive as they had been since the 1868 Constitution. When the North Carolina Constitution was editorially revised in 1971, only non-substantive revisions were made to Article IX, Section 5. *DuMont*, 304 N.C. at 640, 286 S.E.2d at 97 (explaining that the 1971 Constitution “was meant to be an editorial revision of the 1868 Constitution and that fundamental changes in the constitution were made only by separate amendment”). In fact, as the people expressly stated in the 1942 amendment regarding the Board, the framers of the 1971 North Carolina Constitution likewise clarified their intent that the “legislative” rulemaking powers of the Board would remain as extensive as they had been since the 1868 Constitution. See *Report of the State Constitutional Study Commission* (1968) (“[Article IX, Section 5] restates in much abbreviated form the duties of the State Board of Education, but *without any intention that its authority be reduced.*”) (emphasis added). Accordingly, the Board’s broad, sweeping, “legislative” power to make whatever rules it deems necessary for North Carolina’s public schools was carried forward to North Carolina’s current Constitution in 1971.

That same year, the Supreme Court of North Carolina issued its seminal decision in *Guthrie*. The Court in *Guthrie* applied the plain language of Article IX, Section 5 to hold that the Board had “legislative power” under the North Carolina Constitution, and that the Board’s rules were “subject to limitation and revision” only “by acts of the General Assembly.” 279 N.C. at 710, 185 S.E.2d at 198. Thus, “[i]n the silence of the General Assembly, the authority of

the State Board . . . [is] limited only by other provisions in the Constitution itself.” *Id.* at 710, 185 S.E.2d at 198-99.

The Court in *Guthrie* recognized that both the plain language and intent of Article IX, Section 5 establish a constitutional framework under which there are only two instances in which the Board’s rules can be nullified. First, if the Board enacts a rule, the General Assembly may veto that rule by revising or repealing it. *Guthrie* at 710, 185 S.E.2d at 199 (recognizing that the Board’s rules are “subject to limitation and revision by acts of the General Assembly”). Second, if the General Assembly preemptively enacts specific legislation on a particular substantive topic, the Board is precluded from enacting a rule to the contrary. *See id.* at 711, 185 S.E.2d at 199 (implying that if the General Assembly had “specifically” enacted legislation, the Board would have been preempted from enacting a rule to the contrary). Absent either of those two instances, the Board has broad, sweeping, “legislative” power to make whatever rules it deems necessary for North Carolina’s public schools. *See, e.g., id.* at 710, 185 S.E.2d at 198-99 (holding that because the General Assembly had not enacted specific legislation to the contrary, “the authority of the State Board to promulgate and administer regulations concerning the certification of teachers in the public schools was limited only by other provisions in the Constitution, itself”).

Here, the RRC’s rules review process denies the Board its constitutional powers by turning this constitutional framework on its head. Instead of the Board or the General Assembly, the RRC has final veto authority over whether rules concerning North Carolina’s free public schools are ultimately made. The framers did not envision – and even sought to eliminate in 1942 – the potential for such an administrative agency to interfere with the Board’s broad, sweeping powers to govern North Carolina’s free public schools. *See supra* at 12-13; *see also*

1995 Op. N.C. Att’y Gen. 32 at 5 (May 1, 1995) (“By giving the State Board the power to ‘supervise and administer the free public school system . . . subject to laws enacted by the General Assembly we think the people intended that the policies and standards for the public school system would be set by the State Board in conjunction with the General Assembly *and not by the General Assembly in conjunction with some other body.*”) (emphasis added).

In addition, the RRC is composed entirely of non-experts. Its members are not required to have any background or experience in public education. This only worsens the constitutional problem because the framers intended that the Board – a constitutional body with experience in matters of public education – “legislate” on matters of education policy. *See Guthrie* at 709-10, 185 S.E.2d at 198 (quoting 1868 N.C. Const. art. IX, § 9); *see also, e.g., West Virginia Bd. of Educ. v. Hechler*, 376 S.E.2d 839, 842-43 (W. Va. 1988) (“‘General supervision’ is not an axiomatic blend of words designed to fill the pages of our State *Constitution*, but it is a meaningful concept to the governance of schools and education in this state. Decisions that pertain to education must be faced by those who possess expertise in the educational area. These issues are critical to the progress of schools in this state, and, ultimately, the welfare of its citizens.”).

Finally, the RRC’s rules review process frustrates the framers’ intent by impeding the Board of Education’s ability to “manage” the day-to-day issues facing public education and react quickly to the challenges facing North Carolina’s free public schools. *Lane*, 65 N.C. at 157; *Guthrie* at 710, 185 S.E.2d at 199 (observing that the Board’s “rules and regulations” are “needed for the effective supervision and administration of the public school system”); *see also, e.g., Hechler*, 376 S.E.2d at 842 (“Rules proposed by the Board, like the rule in this case, are integral to the day-to-day operation of schools.”). The magnitude of this problem is significant.

Since the RRC's inception in 1986, the RRC or its staff has objected to or modified *every* rule adopted by the Board and submitted to the RRC for approval. (Verified Complaint at ¶ 25). These include rules addressing a wide variety of important issues facing public education. Most recently, for example, the RRC in February 2014 struck down the Board's Model Teacher Contract Rule, which would have established uniform requirements for contracts between teachers and local boards of education. *See* Exhibit A. In addition to the countless rules struck down by the RRC, the Board has declined to adopt a number of rules that it otherwise would have adopted but for the fact that the RRC would have objected to these rules. (Verified Complaint at ¶ 25).

Worse, under the RRC's rules review process, the "default" is that the Board's rules are dead on arrival. *See* N.C. Gen. Stat. § 150B-21.3(b)(1) (2013) (providing that a "rule that is not approved by the Commission . . . does not become effective"). Thus, unless and until the RRC gives its approval, the Board's rules are void *ab initio*. N.C. Gen. Stat. § 150B-21.3(b)(1) (2013). However, this process of seeking RRC approval typically takes a minimum of six months and often longer. (Verified Complaint at ¶ 26). As a result, North Carolina's constitutional process for making statewide education policy is effectively enjoined for months or years at a time. *Id.* Not only is this not good constitutional law, it is not good government. It is precisely the opposite of what the framers and the people of North Carolina intended.

For these reasons, the RRC's exercise of authority over the Board is both contrary to the plain language of Article IX, Section 5 and contrary to the expressly-stated intent of the framers.

C. The RRC's rules review process in its entirety violates Article IX, Section 5 because it takes away the Board's constitutional rulemaking power and gives it to a separate entity.

The RRC may attempt an end-run around the plain language and intent of Article IX, Section 5 by arguing that all the various laws that make up the RRC rules review process as a

whole could somehow be deemed "laws enacted by the General Assembly" under Article IX, Section 5. That argument only creates more constitutional problems for the RRC.

In contrast to statutorily-created state boards of education, constitutionally-created state boards of education constitute "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature." *State v. State Bd. of Educ.*, 196 P. 201, 204-05 (Idaho 1921) (holding further that the Idaho State Board of Education "is a constitutional corporation with granted powers, and while functioning within the scope of its authority, is not subject to the control or supervision of any other branch, board or department of the state government, but is a separate entity, and may sue and be sued, with power to contract and discharge indebtedness, with the right to exercise its discretion within the powers granted"); *Hechler*, 376 S.E.2d at 843 ("Unlike most other administrative agencies which are constituents of the executive branch, the Board [of Education] enjoys a special standing because such a constitutional provision exists."); *Mont. Bd. of Public Ed. v. Mont. Adm. Code Comm.*, 1992 Mont. Dist. LEXIS 204, at *10 (Mont. Dist. Ct. 1992) ("The [Montana Board of Education] is a constitutionally recognized and created agency" and "[a]s such, it is not subject to the usual administrative and legislative constraints to which the State refers").

Article IX, Section 5 of the North Carolina Constitution provides that "the State Board of Education shall supervise and administer the free public school system . . . and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly." N.C. Const. art. IX, § 5. In *Guthrie*, the Court explained that the first part of this constitutional provision is a "direct delegation by the people" of North Carolina, who gave the Board the "power to make rules and regulations" concerning the "free public school system."

279 N.C. at 710, 712, 185 S.E.2d at 198-99. The second part of Article IX, Section 5 "was designed to make, and did make, the powers so conferred upon the State Board of Education subject to *limitation and revision* by acts of the General Assembly." *Id.* (emphasis added).

The Opinions of the North Carolina Attorney General and the decisions of other states uniformly recognize that when the legislature or an administrative agency interferes with a constitutionally-created state board of education's rulemaking function, this goes well beyond a "limitation" and amounts to an unconstitutional denial of the board's authority. 1994 Op. N.C. Att'y Gen. 41 (June 23, 1994) and 1995 Op. N.C. Att'y Gen. 32 (May 1, 1995), discussed *infra* at 20-22; *see, e.g., Hechler*, 376 S.E.2d at 840-41 (construing virtually identical state constitutional provision providing that the State Board of Education would "perform such duties as may be prescribed by law" and concluding it was unconstitutional for the legislature to require the Board to "submit its . . . rules to an oversight commission for review" because this interfered with the Board's constitutional rulemaking authority); *Mont. Bd. of Public Ed.*, 1992 Mont. Dist. LEXIS 204, at *8 ("As in *Hechler*, we here have a situation where the Montana legislature is interfering with the rule-making authority of a constitutionally created Board of Education. This being the case, that statutory interference is unconstitutional."); *see also State Bd. of Educ.*, 196 P. at 204 (construing virtually identical state constitutional provision making the State Board of Education's constitutional rulemaking powers subject to "such regulations as may be prescribed by law" and holding that such regulations "must not be of character to interfere essentially with the constitutional discretion of the board"). Just as the General Assembly cannot enact legislation providing that the Board "shall not make all needed rules and regulations," the General Assembly cannot accomplish the same objective by taking away the Board's rulemaking authority and giving it to another entity.

This axiomatic principle applies with even more force in North Carolina because the Board's constitutional status is unique. As described above, the Board and the Office of Governor are the only two entities in North Carolina whose powers and duties are set forth in the North Carolina Constitution itself. N.C. Const. art. IX, § 5; N.C. Const. art. III, § 5. This has great legal significance. As the North Carolina's Attorney General has explained, it is a "basic principl[e] of constitutional construction" that "[i]f powers are specifically conferred by the constitution upon the governor, or upon any other specified officer [or authority], the legislature cannot require or authorize [those powers] to be performed by any other officer or authority." 1995 Op. N.C. Att'y Gen. 32 at 5 (quoting *Cooley's Constitutional Limitations*, vol. 1, at 215) (1927)); see also *Cooley* at 225 ("Those matters which the constitution specifically confides to [a specified body or agency] the legislature cannot directly or indirectly take from [its] control.").

Yet the RRC's rules review process does just that by taking away the Board's rulemaking power and giving the RRC veto authority over the Board. When the RRC disagrees with the Board about whether a rule should be enacted, it stops the Board's rulemaking process dead in its tracks. This is because if the Commission does not approve the Board's rule, the Board is prohibited from exercising its constitutional rulemaking function. Consequently, under the RRC's rules review process, the RRC – not the Board – gets to decide whether a particular rule governing North Carolina's free public schools is enacted. In addition, because the "default" under the RRC's rules review process is that the Board's rules are dead on arrival, see N.C. Gen. Stat. § 150B-21.3(b)(1) (2013), the Board's rules adopted pursuant to its constitutional authority are void *ab initio* and have no force or effect on their own. This operates as an outright denial of the Board's constitutional power and duty to "make all needed rules and regulations" for North Carolina's free public schools.

Indeed, the North Carolina Attorney General recognized not long ago in two separate Opinions that giving an administrative agency the authority to veto the Board's rules would violate Article IX, Section 5. The first of these Attorney General Opinions addressed the constitutionality of a bill to create a Professional Teaching Standards Board, which was charged with setting standards for licensing teachers and issuing, renewing, and revoking licenses "independently of the State Board of Education." 1994 Op. N.C. Att'y Gen. 41. The Attorney General stated that this legislation was "likely" unconstitutional, because, even though the General Assembly had the power to specifically "limit" or "revise" the Board's decisions, the General Assembly could not transfer the Board's final rulemaking authority to a separate entity:

We think that a legislative act transferring the State Board's constitutional power regarding teacher licensing to another agency to be exercised by that agency independently of the State Board would amount to more than a limitation or revision of the constitutional powers of the State Board. It would amount to the denial to the State Board of a power conferred on the State Board by the people. While the General Assembly has the power to limit and revise the manner in which the State Board exercises its constitutional powers, the General Assembly in our opinion likely does not have the power to take away completely a constitutionally specified power of the State Board and give it to another agency.

Id. at 3-4.

The Opinion went on to explain that the key to whether the legislation was constitutional is whether "some form of final approval" or final "authority remains with the State Board." *Id.* at 4-5. In sum, the Attorney General recognized that Article IX, Section 5 prohibited the General Assembly from giving an administrative agency veto authority over the Board's rules.

A second Attorney General's Opinion addressed this issue again a year later, this time in response to an inquiry from the Board regarding "the power of the General Assembly to assign [the] State Board of Education's constitutional powers to an independent body." 1995 Op. N.C. Att'y Gen. 32. The General Assembly had created the Professional Teaching Standards Commission, which was charged with the duty to "prepare a plan for how it [the Commission]

could establish high standards for teachers and the teaching profession.” *Id.* at 1. The Attorney General explained that Article IX, Section 5 prohibited the General Assembly from taking away the Board’s authority to make the final decision about whether a rule is enacted and giving this authority to the Commission. *Id.* at 4.

In his Opinion, the Attorney General correctly contrasted the difference between a law requiring the Board to consider non-binding recommendations of an independent body versus a law giving an independent body the final decision of whether to adopt a rule. *See id.* (contrasting a constitutional law “requiring [the Board] to consider recommendations of study commissions” with an unconstitutional law that gave the power of determining whether to ultimately “adopt policies . . . to an independent body other than the State Board of Education”). The latter, it explained, would be unconstitutional under the plain language of Article IX, Section 5:

[T]he legislation proposed by the Commission, if enacted, likely would be in excess of the powers of the General Assembly, and therefore could be held by the courts to be unconstitutional. By giving the State Board the power to ‘supervise and administer the free public school system . . . subject to laws enacted by the General Assembly’ we think the people intended that the policies and standards for the public school system would be set by the State Board in conjunction with the General Assembly *and not by the General Assembly in conjunction with some other body.*

Id. at 5 (emphasis added).

The Attorney General further noted that its “reading of the Constitution is consistent with basic principles of constitutional construction,” including the principle that “[i]f powers are ‘specifically conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize [those powers] to be performed by any other officer or authority.’” 1995 Op. N.C. Att’y Gen. 32 at 5 (quoting *Cooley* at 215). The Attorney General further explained that his decision was “also consistent with the decisions of the courts of other

states.” *Id.* Notably, the Opinion cited the West Virginia Supreme Court’s decision in *Hechler*, 376 S.E.2d 839, discussed above. 1995 Op. N.C. Att’y Gen. 32 at 5.

In sum, as North Carolina’s Attorney General has twice recognized, the General Assembly cannot give an administrative agency veto authority over the Board’s rules because it would deny the Board its constitutional rulemaking power. For this reason, even if the RRC’s rules review process as a whole could constitute “laws enacted by the General Assembly,” the RRC’s exercise of authority over the Board violates Article IX, Section 5.

II. THE BOARD IS ENTITLED TO SUMMARY JUDGMENT ON COUNT 3 OF THE COMPLAINT BECAUSE THE RRC’S EXERCISE OF AUTHORITY OVER THE BOARD CONSTITUTES AN EXERCISE OF UNLAWFULLY DELEGATED AUTHORITY.

As described above, Article IX, Section 5 is crystal clear about which entity has the power to nullify the Board’s rules: the General Assembly. Here, however, it is not the General Assembly that is striking down the Board’s rules. It is the RRC.

Under the separation of powers set forth in Article I, Section 6 and Article II, Section 1 of the North Carolina Constitution, the legislature can delegate only a “limited portion of its legislative powers,” and it can do so only if the delegation is “accompanied by adequate guiding standards.” *Adams v. N.C. Dep’t of Natural & Econ. Res.*, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978) (quoting *N.C. Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965)); see also *Conner v. N.C. Council of State*, 365 N.C. 242, 251, 716 S.E.2d 836, 842 (2011). The Supreme Court of North Carolina has articulated several tests to determine whether this standard has been met. The RRC’s exercise of authority over the Board fails each one.

First, the General Assembly may only delegate its power to agencies that are “equipped to adapt legislation ‘to complex conditions involving numerous details with which the Legislature cannot deal directly.’” *Adams* at 697, 249 S.E.2d at 410 (quoting *Turnpike*

Authority, 265 N.C. at 114, 143 S.E.2d at 323). Surely the RRC would not contend that the General Assembly “cannot deal directly” with matters concerning North Carolina’s free public schools. It can and it must. *See generally Hoke*, 358 N.C. at 609, 599 S.E.2d at 373 (“[T]he North Carolina Constitution . . . recognize[s] that the legislative and executive branches have the *duty* to provide all the children of North Carolina the opportunity for a sound basic education.”) (emphasis added). In addition, any constitutionally-imposed burden on the General Assembly is ameliorated by the fact that under Article IX, Section 5, the General Assembly relies on the Board for the day-to-day “management” of North Carolina’s free public schools. *Lane*, 65 N.C. at 155-56.

Furthermore, the RRC is by no means well-equipped to “adapt [the Board’s rules] to complex conditions” in the field of public education. The members of the RRC are not required to have any particular expertise, knowledge, or background in public education. Other than being endorsed by the Speaker of the House or the President of the Senate, they are not required to have any particular qualifications at all. N.C. Gen. Stat. § 143B-30.1(a) (2013). As a result, the RRC’s rules review process takes away final decision-making authority from the Board and gives it to non-experts. This is especially dangerous given the importance of the duty to “supervise and administer the free public school system” under Article IX, Section 5. *See Hechler* at 842 (“‘General supervision’ is not an axiomatic blend of words designed to fill the pages of our State Constitution, but it is a meaningful concept to the governance of schools and education in this state. Decisions that pertain to education must be faced by those who possess expertise in the educational area. These issues are critical to the progress of schools in this state, and, ultimately, the welfare of its citizens.”).

Thus, in the context of its exercise of authority over the Board, the RRC cannot demonstrate that it is an agency “equipped to adapt legislation ‘to complex conditions involving numerous details with which the Legislature cannot deal directly.’” On these grounds alone, the RRC’s exercise of authority over the Board violates the non-delegation doctrine.

Second, the General Assembly has not provided the RRC with appropriate or sufficient standards to apply when deciding whether to strike down the Board’s rules. The only guidance the General Assembly has provided the RRC is that it must determine whether a rule is: (1) “within the authority delegated to the agency by the General Assembly”; (2) “clear and unambiguous”; (3) “reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency”; and (4) “adopted in accordance with [the APA].” N.C. Gen. Stat. § 150B-21.9(a) (2013). Other than assisting the Board with the scrivener’s task of drafting “clear and unambiguous” rules – a task that the Board is capable of accomplishing without the RRC’s assistance – this “guidance” is useless when applied to the Board.

This is because the Board’s rulemaking authority is not delegated to it by the General Assembly like a typical administrative agency. Rather, as discussed above, the Board’s plenary rulemaking authority derives from Article IX, Section 5 of the North Carolina Constitution. For that reason, determining whether the Board’s rules are within the authority delegated to it by the General Assembly, adopted in accordance with the APA, or necessary to implement legislation is nonsensical when applied to the Board. When the Board makes rules, it does not need to search for a source of its rulemaking power, nor does it need the RRC’s assistance to locate the source of that power. The source is the North Carolina Constitution itself. Accordingly, the General Assembly has failed to provide the RRC with appropriate standards here.

Furthermore, as the Court explained in *Adams*, the General Assembly's attempt to delegate power "should be closely monitored to ensure that . . . the agency is not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature." *Id.*, 295 N.C. at 697, 249 S.E.2d at 411. Here, the General Assembly gives the RRC no meaningful guidance on how to evaluate the Board's rules on a substantive level. As a result, the RRC's rules review process often devolves into a "forum to re-argue policy issues with which agencies have already wrestled." John Wagner, *Ten Citizens With Clout Irk Rule Makers*, News & Observer (Raleigh, N.C.), Feb. 20, 2000, at A1. History shows that this results in the RRC nullifying rules "based on ideology and political pressure." Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 Admin. L. Rev. 551, 563 (2001) (suggesting that the RRC has used its authority to veto several controversial rules in response to political pressure). Thus, when applied to the Board's constitutionally-enacted rules, not only is the General Assembly's "guidance" to the RRC inapplicable, it is also devoid of any substance.

Finally, there are no "adequate procedural safeguards in the [RRC] statute[s] to assure adherence to the legislative standards." *Bring v. N.C. State Bar*, 348 N.C. 655, 659, 501 S.E.2d 907, 910 (1998); *Adams*, 295 N.C. at 701, 249 S.E.2d at 412-13. When the RRC strikes down the Board's rules, the only available "procedural safeguard" is to file a lawsuit. Aside from the fact that years of protracted litigation is hardly an "adequate safeguard," this option is never "adequate" for the Board. As described more fully above, the "default" provisions of the RRC rules review process render the Board's rules void *ab initio* for at least six months or more every time the Board attempts to enact a rule. (Verified Complaint at ¶ 26). In the interim, the Board is unable to fulfill its constitutional rulemaking duties. This results in *per se* irreparable harm.

See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that constitutional violations “for even minimal periods of time, unquestionably constitutes irreparable injury”); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002) (same). Thus, when applied to the Board, the procedural safeguard of a lawsuit is meaningless.

For all these reasons, the legislature’s open-ended delegation to the RRC to strike down the Board’s rules violates the non-delegation doctrine. N.C. Const. art. I, § 6; *id.* at art. II, §1; *id.* at art. IX, § 5. Accordingly, should the Court reach this issue, the Board is entitled to summary judgment on Count 3 of the Complaint.

III. DEFENDANTS’ MOTION TO DISMISS THE COMPLAINT IS MERITLESS AND SHOULD BE SUMMARILY DENIED.

In deciding a Rule 12(b)(6) motion, the Court treats the well-pled allegations of the complaint as true and admitted. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). The facts and permissible inferences set forth in the complaint are to be treated in a light most favorable to the nonmoving party. *Ford v. Peaches Entm’t Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986). The “essential question” raised by a Rule 12(b)(6) motion is “whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory.” *Barnaby v. Boardman*, 70 N.C. App. 299, 302, 318 S.E.2d 907, 909 (1984).

A motion to dismiss should be granted only if “it appears certain that [the plaintiff] can prove no set of facts which would entitle [it] to relief under some legal theory.” *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010). Therefore, “Rule 12(b)(6) ‘generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.’” *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (quoting *Sutton*, 277 N.C. at 102, 176 S.E.2d at 166).

The RRC and the State contend that the Board's Complaint should be dismissed for "failure to abide by the applicable statute of limitations, failure to present a justiciable claim or controversy under the Declaratory Judgment Act, and failure to abide by the principles of estoppel." (Def. Mot. at 2). For the reasons that follow, each of these defenses is meritless.

A. Defendants' statute of limitations defense is both legally and factually without merit.

A cause of action based on the North Carolina Constitution accrues when the right to institute and maintain a suit arises. N.C. Gen. Stat. § 1-15(a) (2013). However, the North Carolina Supreme Court has "recognized the 'continuing wrong' or 'continuing violation' doctrine." *Williams v. Blue Cross Blue Shield*, 357 N.C. 170, 178-79, 581 S.E.2d 415, 423 (2003) (quoting *Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.*, 345 N.C. 683, 694-95, 483 S.E.2d 422, 429-30 (1997)). The doctrine is simple: "continual unlawful acts . . . restart the running of the statute of limitations." *Id.* Thus, "if the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation." *Id.* at 179-80, 581 S.E.2d at 423 (explaining that "a statute of limitations does not begin to run until the violative act ceases").

Our appellate courts have repeatedly applied the continuing violation doctrine to reject statute of limitations defenses to constitutional challenges. *See, e.g., id.; see also Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 56-57, 698 S.E.2d 404, 418 (2010) (holding that the statute of limitations did not bar the plaintiffs' constitutional challenge to an unconstitutional building permit requirement because under the continuing violation doctrine, the statute of limitations restarted "[e]ach time a builder-plaintiff applied for a permit and paid the fee to the Town"); *Faulkenbury*, 345 N.C. at 695, 483 S.E.2d at 429-30 (applying continuing violation

doctrine because “reductions in [plaintiffs’ retirement] payments under the [violative law] were deficiencies which have continued to the present time”).

This case presents a textbook example of the continuing wrong doctrine. The Verified Complaint states that “[n]otwithstanding the Board’s constitutional authority, the RRC since its creation in 1986 has purported to exercise authority over the Board” up to the present day. (Verified Complaint at ¶ 4). The Verified Complaint alleges that “[s]ince [the RRC’s] inception in 1986,” the RRC “has objected to or modified every rule adopted by the Board and submitted to the RRC for approval.” (*Id.* at ¶ 25). On the face of the Verified Complaint, Defendants’ statute of limitations defense fails, because the dispute continues right up to the present day.

Furthermore, even if the Court found it necessary to go beyond the Complaint, which by itself would be grounds for denying Defendants’ Rule 12(b)(6) motion, public records confirm that the RRC struck down one of the Board’s rules as recently as February 21, 2014. *See supra* at 5. In light of these publicly-available facts of which the RRC is well-aware, it is puzzling why Defendants would make a statute of limitations argument.

For these reasons, Defendants do not have a valid defense based on the statute of limitations.

B. Unless the RRC agrees with the Board’s decision to no longer voluntarily submit its rules for RRC approval, Defendants’ justiciability defense is without merit.

It is well-settled that state government entities may bring declaratory judgment actions to challenge the exercise of authority of other state government entities. *See, e.g., N.C. Dep’t of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 99, 675 S.E.2d 641, 648 (2009) (holding that a declaratory judgment was proper when the actions of the Department of Corrections and the North Carolina Medical Board, “both seeking to fulfill their statutory duties, are in irreconcilable conflict”); *Martin v. Thornburg*, 320 N.C. 533, 535, 359 S.E.2d 472, 473 (1987) (determining “the rights

and duties of the Governor and Council of State with respect to the entry of leases on behalf of the State"). In addition, North Carolina allows a plaintiff to bring claims directly under the North Carolina Constitution. *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992).

Like any other plaintiff in a declaratory judgment action, a state government entity need only demonstrate that its "rights, status or other legal relations are affected." N.C. Gen. Stat. § 1-254 (2013). The plaintiff is then entitled to "obtain a declaration of rights, status, or other legal relations." *Id.* The Declaratory Judgment Act is "remedial" and must be "liberally construed and administered." N.C. Gen. Stat. § 1-264 (2013).

Unlike the federal courts, North Carolina's state courts are not constrained by the strict "case or controversy" requirements of Article III of the United States Constitution. See *Time Warner Entm't Advance/Newhouse P'ship v. Town of Landis*, 747 S.E.2d 610, 614 (N.C. Ct. App. 2013) (reversing trial court's dismissal of declaratory judgment action for lack of case or controversy). Instead, all that is required is "an actual controversy between parties having adverse interests in the matter in dispute." *Id.* (quoting *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984)).

Here, the allegations of the Verified Complaint easily satisfy this low threshold. The Verified Complaint alleges that "[t]he Board as currently constituted has made the decision to exercise the full extent of its powers and duties under the North Carolina Constitution without unconstitutional interference by the RRC" and has "resolved that it will no longer voluntarily submit its rules for RRC approval." (Verified Complaint at ¶¶ 27-28). The Verified Complaint further states that "[t]he Board recognizes that its decision is in direct conflict with the RRC's

interpretation and application of both N.C. Gen. Stat. § 150B-2(1a) and the RRC's enabling legislation," and that "[a]ccordingly, a declaratory judgment is necessary to determine the proper interpretation and application of the statutory and state constitutional provisions discussed herein." (*Id.* at ¶ 29).

These facts alone more than adequately establish a justiciable case or controversy. The only way that a justiciable case or controversy would not exist is if the RRC agrees with the Board's reading of the plain language and expressly-stated intent of Article IX, Section 5. If so, then the RRC need only submit to a Consent Order resolving this action without further Court involvement. Otherwise, this action presents a case or controversy for the Court to resolve by declaratory judgment.

For these reasons, Defendants do not have a valid justiciability defense.

C. Defendants' estoppel defense is without merit because the doctrine does not apply to state entities exercising governmental powers.

Despite the Verified Complaint's sworn statement that "the Board has repeatedly questioned the constitutionality of [the] purported exercise of authority by the RRC over the Board" (*Id.* at ¶ 24), Defendants contend that the action should be dismissed for "failure to abide by principles of estoppel." This argument fails. To the best of the undersigned's knowledge, no North Carolina court has ever applied estoppel to a government entity exercising its governmental powers.

In Chief Justice Ruffin's opinion in *Candler v. Lunsford*, 20 N.C. 542 (1839), the North Carolina Supreme Court first adopted the English common law rule that "the sovereign cannot be estopped." *Id.* at 408 (explaining it is "a rule of justice and policy, equally applicable to our institutions as to those of the mother country"). In the more than 175 years since this decision, the Supreme Court of North Carolina has repeatedly held that estoppel does not apply to state

government entities exercising their "governmental" powers. See, e.g., *Plant Food Co. v. Charlotte*, 214 N.C. 518, 519-20, 199 S.E. 712, 713 (1938) (holding that the doctrine only applies in limited circumstances in which the government entity is exercising a "proprietary," as opposed to a "governmental," function); *Henderson v. Gill*, 229 N.C. 313, 316, 49 S.E.2d 754, 756 (1948) (holding that "facts, however potent in creating an estoppel in ordinary transactions between individuals, do not estop the State in the exercise of a governmental or sovereign right"); *Blackwelder v. Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 435-36 (1992) (quoting *Sykes v. Belk*, 278 N.C. 106, 120, 179 S.E.2d 439, 448 (1971)) ("It is generally recognized in North Carolina that the doctrine of estoppel will not be applied against [the government] in its governmental, public, or sovereign capacity."). The rationale for this rule is that if the government were "subject to estoppel to the same extent as an individual or a private corporation . . . it might be rendered helpless to assert its powers in government" – an untenable result. *Washington v. McLawhorn*, 237 N.C. 449, 454, 75 S.E.2d 402, 405-06 (1953).

Thus, the doctrine can only be applied to a government entity if it is certain that the application of "estoppel will not impair the exercise of the governmental powers of the entity." *Fike v. Board of Trustees*, 53 N.C. App. 78, 82, 279 S.E.2d 910, 913 (1981) (quoting *Washington*, 237 N.C. at 454); *McCaskill v. Dep't of State Treasurer, Ret. Sys. Div.*, 204 N.C. App. 373, 397, 695 S.E.2d 108, 126 (2010) (same). However, this threshold showing is extraordinarily high. The doctrine cannot be applied when there is only the mere "possibility that [the government's] exercise of governmental powers *might* be impeded by an estoppel claim." *Kings Mt. Bd. of Educ. v. N.C. State Bd. of Educ.*, 159 N.C. App. 568, 577, 583 S.E.2d 629, 636 (2003) (emphasis added).

Here, Defendants cannot seriously argue that the application of estoppel would not impair the exercise of the Board's governmental powers. The governmental powers at issue here are the Board's constitutional powers to "supervise and administer the free public school system" and "make all needed rules and regulations in relation thereto." N.C. Const. art. IX, § 5. As a matter of law, this is a "governmental" – as opposed to "proprietary" – power. *See Bynum v. Wilson County*, 367 N.C. 355, 359, 758 S.E.2d 643, 646 (2014) (quoting *Estate of Williams v. Pasquotank County Parks & Rec. Dep't*, 366 N.C. 195, 202, 732 S.E.2d 137, 142 (2012)) (holding that "activity is necessarily governmental [as opposed to proprietary] in nature when it can only be provided by a governmental agency or instrumentality").

Likewise, there is more than the mere "*possibility*" that the Board's exercise of governmental powers "*might* be impeded by an estoppel claim." This entire case concerns the Board's core governmental function: the exercise of its constitutional rulemaking authority. Thus, there is an absolute *certainty* that the "exercise of [the Board's] governmental powers" would be "impeded" if the doctrine of estoppel were applied. *Kings Mountain*, 159 N.C. App. at 577, 583 S.E.2d at 636.

Kings Mountain illustrates this point. There, the petitioners argued that the Board had previously recognized the existence of a school district in the past and therefore was estopped from approving a plan of merger inconsistent with that recognition. *Id.* at 576, 583 S.E.2d at 635. The petitioners further argued that the Board had annually certified the number of students within that district, which determines funding allocation among the school districts; having relied on these certifications, they contended, the Board was "estopped to deny what it ha[d] implicitly recognized over the years." *Id.* at 577, 583 S.E.2d at 636. The Court of Appeals rejected those arguments. As the Court explained, "application of the estoppel doctrine would impede the State

Board from exercising its legislative power to approve or deny school mergers under N.C. Gen. Stat. § 115C-68.1(a),” regardless of what the Board may have decided in the past. *Kings Mountain*, 159 N.C. App. at 577, 583 S.E.2d at 636. To be sure, if the Board’s statutory power to approve school mergers in *Kings Mountain* constituted a “governmental power” that could not be “impeded” by estoppel, then the Board’s constitutional rulemaking power is surely a governmental power that cannot be impeded by estoppel.

For these reasons, Defendants’ estoppel defense is without merit. Defendants’ motion to dismiss should be summarily denied.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter summary judgment in its favor and deny Defendants’ Motion to Dismiss.

Respectfully submitted the 25th day of June, 2015.

CAMPBELL SHATLEY, PLLC

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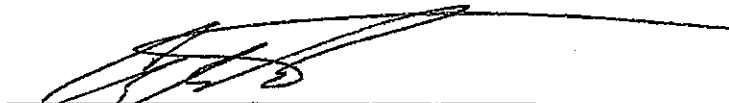
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CERTIFICATE OF SERVICE

I hereby certify that I have this day e-mailed a copy of the foregoing, by agreement of the parties, to the following persons at the following address which is the last address known to me:

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This the 25th day of June, 2015.



Andrew H. Erteschik

EXHIBIT A

Model Teacher Contract Rule

All contracts between a local board of education, as defined in G.S. 115C-5(5), and a teacher, as defined in G.S. 115C-325, shall contain the following:

- (a) A statement that the contract is effective only if approved by a majority of the local board at an officially called meeting of the local board.
- (b) The term of the contract. Such term may be for any length permitted by law. At the conclusion of the contract term, the local board may, but is not required to, re-employ the teacher by offering the teacher a subsequent contract as provided by law.
- (c) An indication of the compensation that the teacher shall receive for professional services performed pursuant to the contract. Such compensation shall be at a rate consistent with the North Carolina General Statutes, the salary schedule for teachers established by the State of North Carolina, and any local supplement that may apply. If the teacher is to be paid from local funds, the compensation will be consistent with the local salary schedule adopted pursuant to G.S. 115C-302.1(h).
- (d) With respect to qualifications:
 - (1) The teacher's obligation to maintain a North Carolina teaching license valid for the teacher's area of assignment.
 - (2) The teacher's obligation to inform the local board's Human Resources Office in the event that the teacher's license is revoked, suspended, expired, or not renewed for any reason.
 - (3) A statement that the teacher is solely responsible for obtaining and maintaining the required licensure.
- (e) With respect to duties:
 - (1) A requirement that the teacher shall perform all duties assigned by the superintendent and required by the laws of the State of North Carolina.
 - (2) A statement that the contract does not give the teacher a right to any particular assignment or school site.
 - (3) A requirement that the teacher agrees to become familiar with and abide by the policies and practices of the local board and the North Carolina State Board of Education, and to abide by the laws of the State of North Carolina and the United States.
- (f) With respect to special duties:
 - (1) A statement that, if there are special duties or assignments for which the local board has agreed to compensate the teacher, those will be described in a separate agreement and the additional compensation will not be considered salary for the purpose of computing the teacher's salary under the provisions of G.S. 115C-325.
 - (2) A statement that any return to regular duties is not a demotion as defined by law.
- (g) A provision that explains the teacher's entitlement to health care benefits, earned leave and such other benefits as are available pursuant to the laws of the State of North Carolina and the policies and practices of the local board.
- (h) Any requirements for termination of the contract initiated by the teacher pursuant to the provisions and procedures provided in G.S. 115C-325.1 *et seq.*
- (i) Any requirements for alteration or termination of the contract by the local board pursuant to the provisions and procedures provided in G.S. 115C-325.1 *et seq.*
- (j) With respect to modification, a statement that the contract is subject to modification as a result of subsequent legislative enactments.
- (k) With respect to severability, a statement that if any provision of the contract is held to be invalid or unenforceable, such provision shall be severed and shall be inoperative, and the remainder of the contract shall remain in full force and effect.
- (l) A statement indicating that the contract shall be governed by the laws of the State of North Carolina.
- (m) Any other provisions deemed necessary or as required by law.



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February 21, 2014

Via Email Only: william.cobey@dpi.nc.gov

William W. Cobey, Jr., Chairman
N.C. State Board of Education
6302 Mail Service Center
Raleigh, North Carolina 27699-6302

Re: 16 NCAC 06C .0701

Dear Chairman Cobey:

At the February 20, 2014 meeting of the Rules Review Commission, the Commission reviewed the one temporary rule filed by the N.C. State Board of Education on February 19, 2014. The Findings of Need form filed indicates that 16 NCAC 06C .0701, Model Teacher Contract, was adopted by the Board on February 6, 2014. The Commission declined to approve the above-captioned temporary rule based on the failure to comply with the Administrative Procedure Act (APA) in accordance with G.S. 150B-21.1(a) and 150B-21.9.

The findings of need for the rule states that the temporary rule was required by the Session Law 2013-360, Section 9.6(e) that states the following:

SECTION 9.6.(e) The State Board of Education shall develop by rule as provided in Article 2A of Chapter 150B of the General Statutes a model contract for use by local boards of education in awarding teacher contracts. The State Board may adopt a temporary rule for a model contract as provided in G.S. 150B-21.1 to provide a contract to local boards of education no later than January 1, 2014, but shall replace the temporary rule with a permanent rule as soon as practicable.

The Commission disapproved the above-captioned rule because the adoption date was after January 1, 2014 and therefore, the N.C. State Board of Education lacked the statutory authority for temporary rule making. Furthermore, the Commission expressed concerns that

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the temporary rule did not contain a model contract for use by local boards of education.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.1(b1) or (b2). If you have any questions regarding the Commission's action, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Abigail M. Hammond".

Abigail M. Hammond
Commission Counsel

Enclosure: Filing for 16 NCAC 06C .0701

cc: Katie Cornetto, Rule-making Coordinator – katie.cornetto@dpi.nc.gov



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Marcelle Savage
At-Large Member

SBE Office:
Mertez Hill
Executive Director

March 17, 2014

Ms. Abigail M. Hammond
Counsel to the Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, North Carolina 27609-6285

Dear Ms. Hammond:

The State Board of Education has received the RRC's objection of the Model Teacher Contract Temporary Rule. We disagree with the objection and are considering our next course of action.

Sincerely,

A handwritten signature in dark ink, appearing to read "W.W. Cobey Jr.", is written over a light blue horizontal line.

William W. Cobey Jr.

WWC/ilm

NORTH CAROLINA STATE BOARD OF EDUCATION

William W. Cobey Jr., Chairman | william.cobey@dpi.nc.gov
6302 Mail Service Center, Raleigh, North Carolina 27699-6302 | (919) 807-3401 | Fax (919) 807-3198
AN EQUAL OPPORTUNITY/AFFIRMATIVE ACTION EMPLOYER

STATE OF NORTH CAROLINA **FILED** IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE 2015 JUL -2 P 2:17 SUPERIOR COURT DIVISION
14 CVS 14791

NORTH CAROLINA STATE COUNTY, C.S.C.
BOARD OF EDUCATION,

BY _____)
Plaintiff,)

ORDER

V.)
THE STATE OF NORTH CAROLINA and)
THE NORTH CAROLINA RULES)
REVIEW COMMISSION)
Defendant.)

THIS MATTER came before the undersigned Resident Superior Court Judge on June 29, 2015 upon Defendants' Motion to Dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure, and Plaintiff's Motion for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Robert F. Orr and Andrew H. Erteschik appeared on behalf of the Plaintiff. Special Deputy Attorneys General Olga E. Vysotskaya de Brito and Amar Majmundar appeared on behalf of Defendants.

After careful consideration of the motions, the parties' briefs in support and opposition, and the arguments made by counsel, this Court finds and concludes as a matter of law the following;

1. The complaint, when liberally construed and treated in a light most favorable to the Plaintiff, states a claim upon which relief can be granted on, and
2. Upon consideration of the plain language of the North Carolina Constitution, and the verified complaint, there is no genuine issue of material fact and Plaintiff is entitled to judgment as a matter of law pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

THEREFORE, Defendants' Motion to Dismiss is denied and Plaintiff's Motion for Summary Judgment is allowed.

State Board of Education v. NC Rules Review Commission

2

SO ORDERED, this the 1st day of July, 2015.

A handwritten signature in black ink, appearing to read "Gessner", is written over a horizontal line.

Paul G. Gessner
Resident Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Order, which was sent to the undersigned by U.S. mail and received by the undersigned on July 14, 2015, to the following persons at the following addresses:

Amar Majmundar
amajmundar@ncdoj.gov
Charles G. Whitehead
cwhitehead@ncdoj.gov
Olga Vysotskaya
ovysotskaya@ncdoj.gov
NC Department of Justice
P.O. Box 629
Raleigh, NC 27602
Counsel for Defendants

This the 14th day of July, 2015.



Andrew H. Erteschik

2015 JUL 27 PM 2:15
STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY C.S.C. SUPERIOR COURT DIVISION
14-CVS-14791

BY
NORTH CAROLINA STATE BOARD
OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA
and THE NORTH CAROLINA RULES
REVIEW COMMISSION,

Defendants.

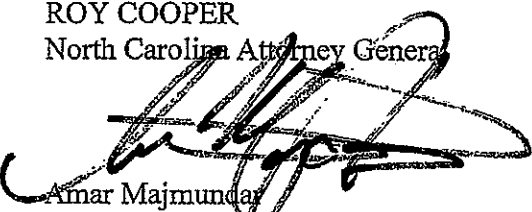
NOTICE OF APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA

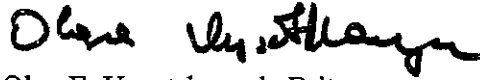
Defendants, pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure and N.C. Gen. Stat. §§ 1-277 and 7A-27, hereby give notice of appeal to the Court of Appeals of North Carolina from the Order entered in this action on 2 July 2015 in the General Court of Justice, Superior Court Division of Wake County, and served upon the Defendants on 14 July 2015.

Respectfully submitted this 27th day of July 2015.

ROY COOPER
North Carolina Attorney General


Amar Majmundar
Special Deputy Attorney General
North Carolina State Bar No. 24668
N.C. Department of Justice

Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-6821
Facsimile: (919) 716-6759
Email: amajmundar@ncdoj.gov



Olga E. Vysotskaya de Brito
Special Deputy Attorney General
North Carolina State Bar No. 31846
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-0185
Facsimile: (919) 716-6759
Email: ovysotskaya@ncdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE


I do hereby certify that I have served a copy of the foregoing Notice of Appeal by placing said document in the United States mail, first-class postage prepaid addressed as follows:

Robert F. Orr
Campbell Shatley, PLLC.
674 Merrimon Ave., Ste. 210
Asheville NC 28804

Andrew H. Erteschik
Poyner Spruill LLP
P.O. Box 1801
Raleigh NC 27602-1801

Attorneys for Plaintiff

This the 27th day of July 2015.


Olga E. Vysotskaya de Brito
Special Deputy Attorney General

STATEMENT OF TRANSCRIPT OPTION

Per North Carolina Rules of Appellate Procedure 7(b) and 9(c), the transcript of the hearing on the motions to dismiss and for summary judgment that took place on 29 June 2015, transcribed by Meredith Schramek, Court Reporter, consisting of 102 pages, bound in one volume, will be electronically filed by Meredith Schramek once a docket number is assigned to this appeal.

FILED

STATE OF NORTH CAROLINA
WAKE COUNTY
NORTH CAROLINA STATE
BOARD OF EDUCATION

2015 AUG -6 P 2:11
WAKE COUNTY, C.S.C.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14-CVS-14791

Plaintiff,

v.

THE STATE OF NORTH CAROLINA
and
THE NORTH CAROLINA RULES
REVIEW COMMISSION,

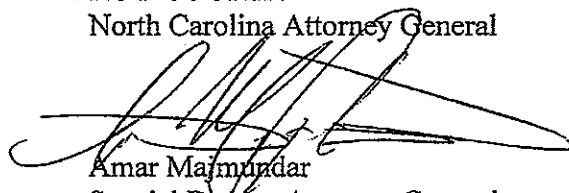
Defendants.

TRANSCRIPT
DOCUMENTATION

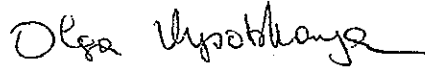
Defendants, pursuant to Rule 7 of the North Carolina Rules of Appellate Procedure, hereby file a copy of their agreement with Meredith Schramek, c/o Huseby Inc., 1230 West Morehead Street, Suite 408, Charlotte, NC 28208 to contract for the transcription of the hearing on the motions to dismiss and for summary judgment that took place on 29 June 2015 in this action. (See "Exhibit A.")

Respectfully submitted this 6th day of August 2015.

ROY COOPER
North Carolina Attorney General


Amar Majumdar
Special Deputy Attorney General
North Carolina State Bar No. 24668
N.C. Department of Justice
Post Office Box 629

Raleigh, NC 27602
Telephone: (919) 716-6821
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Facsimile: (919) 716-6759
Email: ovysotskaya@ncdoj.gov

COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing Transcript Documentation by placing said document in the United States mail, first-class postage prepaid addressed as follows:

Meredith Schramek
c/o Tiffany Lionetti
Huseby, Inc.
1230 West Morehead Street, Suite 408
Charlotte, NC 28208

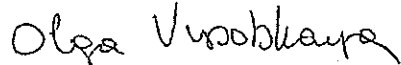
Transcriptionist

Robert F. Orr
Campbell Shatley, PLLC.
674 Merrimon Ave., Ste. 210
Asheville NC 28804

Andrew H. Erteschik
Poyner Spruill LLP
P.O. Box 1801
Raleigh NC 27602-1801

Attorneys for Plaintiff

This the 6th day of August 2015.


Olga E. Vysotskaya de Brito
Special Deputy Attorney General



State of North Carolina

Department of Justice
PO Box 629
Raleigh, North Carolina
27602
August 6, 2015

ROY COOPER
ATTORNEY GENERAL



Reply to:
Olga E. Vysotskaya de Brito
Composite Litigation Group
voice (919) 716-0185
email: ovysotskaya@ncdoj.gov

Meredith Schramek
c/o Tiffany Lionetti
Huseby, Inc.
1230 West Morehead Street, Suite 408
Charlotte, NC 28208

RE: North Carolina State Board of Education v. The State of North Carolina and The North
Carolina Rules Review Commission
14 CVS 14791

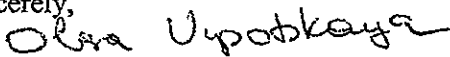
Dear Meredith:

As we discussed this week, this letter confirms our contract with Huseby for your transcription services for the appeal in the above-referenced case. We have agreed that you will prepare a complete transcript of the hearing on motions to dismiss and for summary judgment that took place in this case on June 29, 2015. We have agreed that we will pay your usual fees for this transcription per Huseby contract.

Rule 7(b) of the North Carolina Rules of Appellate Procedure makes the transcript due in electronic "PDF" format sixty (60) days after service of this contract. We would appreciate receiving the transcript as soon as possible. Please, deliver the completed transcript electronically to the parties. You will also need to certify to the clerk of the Wake County Superior Court (with a copy to the North Carolina Court of Appeals) that the transcript has been delivered, and file the transcript electronically with the Court of Appeals once a docket number is assigned, pursuant to Rule 7(b)(2) of the North Carolina Rules of Appellate Procedure

If I can answer any questions, please feel free to call me at (919) 716-0185. Thank you for your help with this appeal.

Sincerely,


Olga E. Vysotskaya de Brito
Special Deputy Attorney General

Enc.: transcript order; notice of appeal

cmh

TRANSCRIPTION REQUEST

Date: 08/03/2015
Name: Olga Vysotskaya
Firm (if applicable): NCDOJ
Address: 114 W Edenton St, Raleigh NC
Phone #: 919. 716. 0185
Email: ovysotskaya@ncdoj.gov

Type of Recording: _____
Audio file type: _____
Length: _____
Date needed if under 10 business days: _____
Do you need a hard copy? yes

Case Style: N.C. State Board of Education v.
The State of N.C. & the N.C.
Rules Review Commission

Is this for an appeal? Yes If yes, please attach documentation.

Attorneys/Speakers present: J. Majumdar ; Olga
Vysotskaya de Brito ; Drew
Ernst & Bob Orr.

Date(s) of Recording: June 29, 2015
Judge Name (if applicable): Gessner

Additional Info: _____



Huseby.com

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-168-

August 31, 2015

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

WAKE COUNTY

CIVIL ACTION NO. 14-CVS-14791

-----X
NORTH CAROLINA STATE BOARD OF

EDUCATION,

Plaintiffs.

v.

THE STATE OF NORTH CAROLINA AND

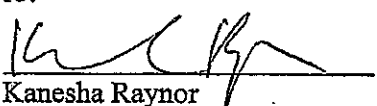
THE NORTH CAROLINA RULES REVIEW

COMMISSION,

Defendants.
-----X

Pursuant to rule 7B of the North Carolina Rules of Appellate Procedure, this is to certify that the transcript in the above-entitled case, which was heard on 06/29/2015, was requested by Olga E. Vysotskaya, Esq. and electronically delivered to the parties of record, as indicated below, on August 31, 2015.

Olga E. Vysotskaya
North Carolina Department of Justice
114 West Edenton Street
Raleigh, North Carolina 27602


Kanesha Raynor
Huseby, Inc.
1230 West Morehead St., Ste. 408
Charlotte, NC 28208

Robert F. Orr, Esq.
Campbell Shatley, PLLC
674 Merrimon Avenue, Suite 210
Asheville, North Carolina 28804

Andrew H. Erteschik, Esq.
Poyner Spruill LLP
301 Fayetteville Street, Suite 1900
Raleigh, North Carolina 27601

Cc: North Carolina Court of Appeals

Corporate Headquarters
1230 West Morehead Street
Suite 408
Charlotte, NC 28208
t 704.333.9889 • f 704.372.4593

STIPULATION SETTLING RECORD ON APPEAL

Counsel for the Appellants and Appellee stipulate as follows:

1. The transcript of the hearing before the Superior Court on the defendant's motion to dismiss and the plaintiff's motion for summary judgment was delivered to the parties on 31 August 2015.

2. The proposed record on appeal was timely served on 29 September 2015. The certificate of service of the proposed record may be omitted from the settled record.

3. Plaintiff-Appellee's notice of approval was served on 2 November 2015. Thus, the record on appeal was deemed settled on 2 November 2015.

4. Each document or pleading in this matter that was required to be filed or served was properly and timely filed or served. The certificates of service and any extensions of time may, but need not be, included in the record on appeal.

5. All captions, signatures, headings of papers, certificates of service and documents filed with the trial court that are not necessary for an understanding of the appeal may be omitted from the record, except as required by Rule 9 of the Rules of Appellate Procedure.

6. The parties have undergone a reasonable search of duplicative or substantially similar documents in the record.

For Defendant-Appellant North Carolina Rules Review Commission:

Date: 11/2/15

By: Christopher G. Browning, Jr.
Christopher G. Browning, Jr.
N.C. Bar No. 13436
(919) 835-4100
chris.browning@troutmansanders.com

C. Elizabeth Hall
N.C. Bar No. 42873
(919) 835-4100
elizabeth.hall@troutmansanders.com

Troutman Sanders, LLP
434 Fayetteville Street, Suite 1900
Raleigh, NC 27601

For Defendant-Appellant State of North Carolina:

Date: 11.3.15

By: Amar Majmundar
Amar Majmundar
N.C. Bar No. 24668
(919) 716-6821
amajmundar@ncdoj.gov

Olga E. Vysotskaya de Brito
N.C. Bar No. 31846
(919) 716-0185
ovysotskaya@ncdoj.gov

N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602

For Plaintiff-Appellee North Carolina State Board of Education:

Date: 11/2/15

By: Robert Orr
signed with approval
Robert F. Orr *by Chris Browning*
N.C. Bar No. 6798
(919) 608-5335

Campbell Statley, PLLC
674 Merrimon Avenue, Suite 210
Asheville, NC 28804

Date: 11/2/15

By: Andrew Erteschik
signed with approval
Andrew H. Erteschik *by Chris Browning*
N.C. Bar No. 35269
(919) 783-2895

Poyner Spruill LLP
P.O. Box 1801
Raleigh, NC 27602-1801

PROPOSED ISSUES ON APPEAL

Pursuant to North Carolina Rule of Appellate Procedure 10, Defendant-Appellants intend to present the following proposed issues on appeal:

1. Did the Superior Court err in granting summary judgment in favor of Plaintiff-Appellee?
2. Did the Superior Court err in concluding that Article IX, Section 5 of the North Carolina Constitution exempts Plaintiff-Appellee from the procedures enacted by the General Assembly in the Administrative Procedure Act, N.C. Gen. Stat. § 150B-1 *et seq.*, with respect to the promulgation of administrative rules?
3. Did the Superior Court err in concluding that the Defendant-Appellant the North Carolina Rules Review Commission's interpretation and application of the Administrative Procedure Act, N.C. Gen. Stat. § 150B-1 *et seq.*, as to Plaintiff-Appellee violates Article I, Section 6, Article II, Section 1, and Article IX, Section 5 of the North Carolina Constitution?
4. Did the Superior Court err by failing to grant summary judgment in favor of Defendants-Appellants?
5. Did the Superior Court err by failing to grant the motion to dismiss of Defendants-Appellants?
6. Is the decision of the Superior Court ambiguous and unclear as to whether it declares facially invalid N.C. Gen. Stat. §§ 115C-2, 115C-17, 115C-106.3(19), 115C-106.3(19), 115C-150.13 and 115C-218.1(c), such that remand is appropriate to require clarification by the Superior Court?

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

14 CVS 014791

NORTH CAROLINA STATE BOARD OF
EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA and
THE NORTH CAROLINA RULES REVIEW
COMMISSION,

Defendants.

ORDER ALLOWING WITHDRAWAL
AND SUBSTITUTION OF COUNSEL


This matter is before the Court upon the Motion for Withdrawal and Substitution of Counsel ("Motion") submitted by Amar Majmundar, Olga Vysotskaya de Brito, the North Carolina Attorney General, Christopher G. Browning, Jr., C. Elizabeth Hall and Troutman Sanders LLP.

It appears to the Court that good cause exists to grant the Motion, and that Christopher G. Browning, Jr., C. Elizabeth Hall and the law firm of Troutman Sanders LLC request to be substituted as counsel of record for Defendant North Carolina Rules Review Commission.

IT IS THEREFORE ORDERED that the Motion is GRANTED. Amar Majmundar, Olga Vysotskaya de Brito, the North Carolina Attorney General are hereby granted permission to withdraw as counsel for Defendant North Carolina Rules Review Commission and Christopher G. Browning, Jr., C. Elizabeth Hall and the law firm of Troutman Sanders LLC are substituted as counsel of record for Defendant North Carolina Rules Review Commission. Amar Majmundar, Olga Vysotskaya de Brito and the North Carolina Attorney General shall continue to serve as counsel for Defendant State of North Carolina.

to serve as counsel for Defendant State of North Carolina.

This 1 day of SEPT, 2015.



Superior Court Judge

IDENTIFICATION OF COUNSEL FOR THE APPEAL

For Defendant-Appellant North Carolina Rules Review Commission:

Christopher G. Browning, Jr.
N.C. Bar No. 13436
(919) 835-4100
chris.browning@troutmansanders.com

C. Elizabeth Hall
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Troutman Sanders, LLP
434 Fayetteville Street, Suite 1900
Raleigh, NC 27601

For Defendant-Appellant State of North Carolina:

Amar Majmundar
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amajmundar@ncdoj.gov

Olga E. Vysotskaya de Brito
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(919) 716-0185
ovysotskaya@ncdoj.gov

N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602

For Plaintiff-Appellee North Carolina State Board of Education:

Robert F. Orr
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(919) 608-5335
orr@rforrlaw.com

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674 Merrimon Avenue, Suite 210
Asheville, NC 28804

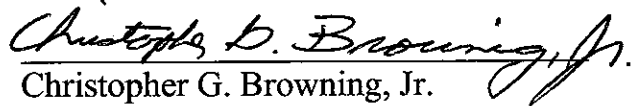
Andrew H. Erteschik
N.C. Bar No. 35269
(919) 783-2895
derteschik@poynerspruill.com

Poyner Spruill LLP
P.O. Box 1801
Raleigh, NC 27602-1801

Robert F. Orr
Campbell Statley, PLLC
674 Merrimon Avenue, Suite 210
Asheville, NC 28804
For Plaintiff-Appellee N.C. State Board of Education

Andrew H. Erteschik
Poyner Spruill LLP
Post Office Box 1801
Raleigh, NC 27602-1801
For Plaintiff-Appellee N.C. State Board of Education

This the 12th day of November, 2015.


Christopher G. Browning, Jr.