No. COA 15-1229 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff-Appellee, v. THE STATE OF NORTH CAROLINA and THE NORTH CAROLINA RULES REVIEW COMMISSION, Defendants-Appellants.	)	From Wake County

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BRIEF OF PLAINTIFF-APPELLEE
NORTH CAROLINA STATE BOARD OF EDUCATION

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BRIEF OF PLAINTIFF-APPELLEE NORTH CAROLINA STATE BOARD OF EDUCATION

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ISSUES PRESENTED

I. Did the trial court correctly grant summary judgment to the North Carolina State Board of Education on its claim under Article IX, Section 5 of the North Carolina Constitution?

II. Did the trial court correctly grant summary judgment to the Board on its non-delegation doctrine claim under the North Carolina Constitution?

III. Should the Court reject Defendants' procedural argument because, as Defendants concede, the trial court's order did not find that that an act of the legislature was facially unconstitutional?

INTRODUCTION

This appeal involves 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 an issue of first-impression in North Carolina, but the issue is controlled by the plain language of the North Carolina Constitution and the expressly stated intent of the framers.

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 has long provided:

> 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.

Unlike the Board, the RRC is a statutorily created administrative agency. Unlike the Board, the North Carolina Constitution does not

mention the RRC. Nevertheless, the RRC believes the North Carolina Constitution allows it to strike down the Board's rules.

The Board brought this declaratory judgment action to confirm that the North Carolina Constitution does not allow the RRC to strike down the Board's rules. The trial court agreed, and it granted summary judgment for the Board.

For the reasons that follow, this Court should affirm the trial court.

STATEMENT OFFACTS

Constitutional Composition of the Board

Article IX, Section 4 of the North Carolina Constitution states that the Board is composed of the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor. N.C. Const. art. IX, § 4. In addition, the Superintendent of Public Instruction serves as the secretary and chief administrative officer of the Board. *Id.*

The Board was intended to maintain its institutional knowledge in the field of public education, as the members of the Board each serve "overlapping terms of eight years." *Id.*

The Board was also intended to be representative of the State's eight educational districts. N.C. Const. art. IX, § 4(2). Eight of the Governor's eleven appointments must be made from each of the eight educational districts. *Id.*

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 this duty, 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 15-18.

Commensurate with this responsibility, the 1868 Constitution conferred broad, sweeping, "legislative" rulemaking power on the Board. 1868 N.C. Const. art. IX, § 9. 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.* Only an act of the General Assembly "altering, amending, or repealing" a particular rule adopted by the Board could nullify that

rule. *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 Board's creation in 1868, no state constitutional amendment or judicial decision has diminished the Board's "legislative" rulemaking power.

History and Overview of the RRC 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*, 82 N.C.L. Rev. 2092, 2099 (2004). To perform this advisory function, the General Assembly in 1977 created the Administrative Rules Review Committee. *Id.* The Committee was composed of nine legislators. *Id.* It functioned in an oversight capacity, identifying potential problems with agency regulations and recommending to the General Assembly that it enact

corrective legislation. *Id.* The Committee was purely advisory, however, and it 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, like the Committee before it, it also lacked authority to veto administrative rules. *Id.*

In 1985, soon after Governor Jim Martin took office, the General Assembly established the current RRC. The RRC is composed of ten individuals who are not members of the General Assembly. N.C.G.S. § 143B-30.1(a). Its members are appointed by the General Assembly. *Id.* The President Pro Tempore of the Senate makes five of these appointments. *Id.* The Speaker of the House makes the other five appointments. *Id.*

Under the RRC's enabling statutes, an agency that adopts a rule must file that rule with the RRC within 30 days. N.C.G.S. § 150B-21.2(g). The RRC in its sole discretion then decides whether the rule is enacted. N.C.G.S. § 150B-21.10. Unless the RRC approves the rule, the agency's adopted rule is of no force and effect—that is, the rule is void

ab initio. N.C.G.S. § 150B-21.3(b)(2). Likewise, if the RRC objects to the agency's adopted rule, then the rule cannot be implemented unless the agency revises the rule to satisfy the RRC's objections. N.C.G.S. § 150B-21.19(4).

The RRC's Encroachment on the Board's Constitutionally Delegated Powers

In the 30 years since the RRC's inception, the RRC or its staff has objected to or modified every rule adopted by the Board. (R p 14 ¶ 25). In addition, the Board has declined to adopt a number of rules it otherwise would have adopted but for the fact that the RRC would have objected to these rules. *Id.*

The RRC review process typically takes a minimum of six months, and often longer. (R p 15 ¶ 26). Thus, because the Board's rules are void *ab initio* without RRC approval, statewide public education policy is effectively enjoined for months or years at a time. *Id.*

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. (R p 14 ¶ 24). In November 2014, the members of the currently constituted Board—sworn to defend the North Carolina Constitution—resolved that

the Board is compelled to exercise the full extent of its constitutional powers and duties.[1] (R p 15 ¶ 27-28).

The Board recognized that this decision conflicted with the RRC's views about whether it can exercise authority over the Board. (R p 15 ¶ 29). For that reason, the Board sought a judicial determination to resolve the issue. *Id.*

The Board's Declaratory Judgment Action

The Board's declaratory judgment action did not seek damages, and it did not seek retroactive relief to address past constitutional violations. (R p 12 ¶¶ 14-15). Rather, the Board merely sought prospective relief to ensure that the Board's rules would immediately have the force of law, and to ensure that the RRC would not strike down those rules. *Id.*

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[1] Defendants note several prior statements by previous members or representatives of the Board that differ with those of the currently constituted Board. Defendants tried the same tack in the trial court, moving to dismiss on estoppel grounds. The Board pointed out that no North Carolina court had ever estopped a rulemaking body from exercising its powers. (R pp 146-49). The trial court refused to be the first, and it denied the motion to dismiss. On appeal, Defendants try the same tack without calling it "estoppel." The result, however, is the same. Just as the currently constituted legislature cannot be bound by previous legislatures, the currently constituted Board cannot be bound by previous Boards. *Id.* (summarizing North Carolina law).

The Board brought seven claims against the RRC: a statutory construction claim (Count 1), two as-applied constitutional claims (Counts 2-3), and four facial constitutional challenges (Counts 4-7). (R pp 15-20). As part of an unsuccessful effort to settle this dispute, the Board voluntarily dismissed its facial constitutional challenges (Counts 4 through 7) (R p 29). In light of a bill introduced in February 2015 that could have mooted the Board's statutory construction claim (Count 1), the Board voluntarily dismissed that claim as well.[2] (R p 34).

As a result, by June 2015, the only claims before the trial court were the Board's as-applied constitutional challenges. Count 2 is a claim under Article IX, Section 5 of the North Carolina Constitution. Count 3 is a non-delegation doctrine claim under the North Carolina Constitution.

Both of these claims were as-applied challenges. (R p 11 ¶ 11-12). These claims were not facial challenges. *Id.* The Board did not contend

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[2] Among other things, Senate Bill 94 would have asked the voters to ratify a constitutional amendment eliminating the Board. Without any support, the RRC claims that Senate Bill 94 "was introduced as a result of the [Board's] position in this case." (RRC Br. at 15 n.4). The truth is that bills like this have been introduced for years—long before this action was filed. *See, e.g.*, Senate Bill 677 (1993 Session); Senate Bill 880 (2013 Session). They have failed every time.

in these claims that the RRC process is always unconstitutional under every conceivable set of circumstances. (R pp 17-18).

The Trial Court's Decision

On 12 January 2015, Defendants moved to dismiss the Board's claims. (R p 25). On 20 March 2015, the Board moved for summary judgment on its remaining as-applied challenges: its Article IX, Section 5 claim and its non-delegation doctrine claim. (R p 31).

On 24 April 2015, the parties jointly requested that Wake County's Resident Superior Court Judge appoint the Honorable Paul G. Gessner to rule on their dispositive motions. (R Supp p 179-83). In their joint motion, the parties expressed that "Judge Gessner would be particularly well-suited to hear these motions because of his past experience with state constitutional litigation, his experience in cases involving important state governmental matters, and his well-earned reputation for fairness and impartiality." (R Supp pp 181). Consequently, Judge Gessner was assigned to preside over the case. (R p 33).

On 25 June 2015, Judge Gessner received extensive briefs and exhibits from the parties on their dispositive motions. (R pp 36-155).

On 29 June 2015, a hearing was held on the parties' dispositive motions. (T pp 1-101).[3] The hearing lasted several hours. *Id.*

On 2 July 2015, Judge Gessner granted summary judgment for the Board on its Article IX, Section 5 claim and its non-delegation doctrine claim. This appeal followed.

STANDARD OF REVIEW

This Court reviews the trial court's grant of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO THE BOARD ON ITS CLAIM UNDER ARTICLE IX, SECTION 5 OF THE NORTH CAROLINA CONSTITUTION.

A. Under the plain language of Article IX, Section 5, the RRC's decisions to strike down the Board's rules are not "laws enacted by the General Assembly."

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. *Id.*; *Martin v. State*, 330 N.C. 412, 416, 410 S.E.2d

[3] The hearing transcript lists 19 June 2015 as the date of the hearing. However, the hearing was actually held on 29 June 2015.

474, 476 (1991); *In re Appeal of Univ. of N.C.*, 300 N.C. 563, 573, 268 S.E.2d 472, 478 (1980).

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

> 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.

The Supreme Court has noted that this plain language "confer[s] upon the State Board of Education . . . the powers to . . . make needful rules and regulations in relation to . . . the administration of the public school system." *Guthrie v. Taylor*, 279 N.C. 703, 710, 185 S.E.2d 193, 198-99 (1971). The Court has also explained that the remaining plain language means what it says: only "laws enacted by the General Assembly" can nullify the Board's rules. *Id.*

This plain language presents two realities: (1) When the RRC strikes down the Board's rules, its decision is not a "law enacted"; and (2) When the RRC strikes down the Board's rules, it is not "the General Assembly."

First, the RRC's decisions to strike down the Board's rules are not "laws enacted." All "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. The RRC's decisions are not presented to the Governor. Instead, they are administrative decisions by a ten-member administrative agency. For this reason alone, the RRC's decisions to strike down the Board's rules are not "laws enacted" under the plain language of Article IX, Section 5.

Second, when the RRC strikes down the Board's rules, it is not "the General Assembly." The RRC is not a subdivision of the General Assembly. N.C. Const. art. II, § 1. The RRC is a separate administrative agency that is neither representative of the people of North Carolina nor accountable to them. It is composed of ten appointed individuals who are not members of the General Assembly. N.C.G.S. § 143B-30.1(a). These unelected individuals act on their own accord when they decide to strike down the Board's rules. Thus, the RRC is not "the General Assembly" under the plain language of Article IX, Section 5.

For these two reasons, the plain language of Article IX, Section 5 forbids the RRC from striking down the Board's rules. On these grounds alone, the Court should affirm the trial court.

B. The framers' intent confirms that the trial court's decision was correct.

When courts interpret the North Carolina Constitution, they "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)).

The RRC contends that there is no constitutional problem because, in its view, the legislature intended for the RRC to exercise authority over the Board. (RRC Br. at 9-16). When interpreting the North Carolina Constitution, however, this "legislative intent" argument is useless. It is the *framers'* intent, not the legislature's intent, that matters. After all, the legislature's intent can never trump the North Carolina Constitution. *See, e.g.*, *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 892 (1961).

Defendants seem to have forgotten this fundamental principle. They spend the bulk of their briefs arguing about the intent of the

legislature, yet not once do they mention the intent of the *framers*. This is consistent with their approach in the trial court, where their lawyers told Judge Gessner that the intent of the framers of the 1868 Constitution did not matter. (T p 12).

Defendants run from the framers' intent because it reveals that their position is untenable.

1. The framers' intent is clear and well-documented.

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. Since then, they have remained part of the Constitution without change.

These words are uniquely North Carolinian. No other state constitution includes these words. No other state constitution includes any right to education in its bill of citizens' rights.

To ensure that the State lived up to its promise to "guard and maintain" the right to public education, the people of North Carolina in their 1868 Constitution created the Board. *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) (observing that the Board has "constitutional obligations to provide the state's school children with an opportunity for a sound basic education").

As the Supreme Court succinctly explained a few years later, 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).

As described above, the 1868 Constitution conferred broad, sweeping power 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). The 1868 Constitution further stated that only an act of the General Assembly "altering, amending, or repealing" a particular rule adopted by the Board could nullify that rule. *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.").

Since 1868, no state constitutional amendment or judicial decision has diminished the Board's broad constitutional powers and duties. In fact, the Board's broad powers were expanded further in 1942.

Between 1868 and 1942, various administrative agencies had inserted themselves into matters that had traditionally been handled by the Board. *Report and Recommendations of the Governor's Commission on Education* at 30 (1938); (R pp 127-28). In 1938, the Governor's Commission on Education reported that "[t]here 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." *Id.* The Commission recommended that "all these boards should be consolidated under [the Board] and that the direction of all activities of the teaching profession should come from this central board." *Id.* The Commission reasoned 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." *Id.* at 31.

Consequently, in 1942, the people of North Carolina voted to amend the North Carolina Constitution to list a number of additional areas in which the Board—rather than other, "scattered"

administrative agencies—would have exclusive authority.[4] Pub. Laws 1941, ch. 151 (amending 1868 N.C. Const. art. IX, § 9). The 1942 amendment expressly stated, moreover, that the Board "shall succeed to all the powers . . . of the State Board of Education as heretofore constituted." *Id.* In doing so, the people clarified that the Board retained all the powers it held under the 1868 Constitution—including the power under the 1868 Constitution to "legislate" on matters regarding North Carolina's free public schools. *Id.*

Today, the broad powers of the Board remain as extensive as they were under the 1868 Constitution. When the North Carolina Constitution underwent "editorial revisions" in 1971, only non-substantive revisions were made to Article IX, Section 5. *N.C. State Bar v. DuMont*, 304 N.C. 627, 640, 286 S.E.2d 89, 97 (1982). Like the people of North Carolina did in 1942, the editors of the 1971 Constitution clarified that the "legislative" rulemaking powers of the Board would remain as extensive as they were under the 1868

[4] These 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." Pub. Laws 1941, ch. 151 (amending 1868 N.C. Const. art. IX, § 9).

Constitution. To that end, the 1968 State Constitutional Study Commission expressly stated that the revision to 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." *Report of the State Constitutional Study Commission* at 87 (1968); (R p 129) (emphasis added).

The same year these "editorial revisions" were made, the Supreme Court decided *Guthrie*. The Court in *Guthrie* observed that under Article IX, Section 5, the Board possessed "legislative power." 279 N.C. at 712, 185 S.E.2d at 202. The Court further held that the Board's rules were "subject to limitation and revision" only "by acts of the General Assembly." *Id.* at 710, 185 S.E.2d at 198. Thus, the Court held, "[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* also recognized that, under Article IX, Section 5, the Board's powers and duties were just as extensive as they

were in 1868.[5] *Id.* at 710, 185 S.E.2d at 199 ("[T]here is no difference in substance between the powers of the State Board of Education with reference to this matter under the old and the new Constitutions."). In other words, only an act of the General Assembly "altering, amending, or repealing" a particular rule adopted by the Board could nullify that rule. 1868 N.C. Const. art. IX, § 9; *see supra* at 16.

Guthrie recognizes that the framers established a two-part constitutional framework:

First, if the Board adopts a rule, the legislature may veto that particular rule by revising or repealing it. *Guthrie*, 279 N.C. at 710, 185 S.E.2d at 198; s*ee also* 1868 N.C. Const. art. IX, § 9 ("[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.").

Second, if the legislature preemptively enacts a law on a particular matter concerning the public schools, the Board cannot

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[5] At the time of *Guthrie*, this recognition—that the substantive rights, powers, and duties in the 1868 Constitution survived "editorial" changes in the 1971 Constitution and must be enforced—may have been a new concept. Since *Guthrie*, however, the Supreme Court has made this an established principle of North Carolina state constitutional law. *See, e.g.*, *DuMont*, 304 N.C. at 640, 286 S.E.2d at 97.

nullify the law by adopting a contrary rule. *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, however, *Guthrie* holds that the Board has broad, sweeping, "legislative" power to make whatever rules are 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").

2. The RRC process defies the framers' intent.

The RRC process turns the framers' constitutional framework on its head. It does this in three ways:

First, as described above, the RRC process frustrates the framers' intent to confine veto power to the legislature alone. The framers did not envision—and the people even sought to eliminate in 1942—the potential for administrative agencies like the RRC to interfere with the

Board's broad rulemaking powers. *See supra* at 17-19. As one North Carolina Attorney General's Opinion put it: "[T]he 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." 1995 Op. N.C. Att'y Gen. 32 at 5 (May 1, 1995) (emphasis added).

Second, the RRC process frustrates the framers' intent to leave public school rulemaking to the education experts at the Board. *See supra* at 15-16. When a state constitution commits the "governance of schools and education" to a constitutionally created state board of education, it does so for a reason: because "[d]ecisions that pertain to education must be faced by those who possess expertise in the educational area." *W. Va. Bd. of Educ. v. Hechler*, 376 S.E.2d 839, 842 (W. Va. 1988). This is "critical to the progress of schools in this state, and, ultimately, the welfare of its citizens." *Id.*

Here, however, the RRC's members are not required to have any background or experience in public education. They need only be endorsed by the Speaker of the House or the President of the Senate. N.C.G.S. § 143B-30.1(a). This is directly contrary to the framers' intent

to leave public education rules to the public education experts at the Board.

Finally, the RRC process frustrates the framers' intent by impeding the Board's ability to react to the challenges facing our public schools. The Court in *Guthrie* noted that the Board's "rules and regulations" are "needed for the effective supervision and administration of the public school system." *Id.* at 710, 185 S.E.2d at 199. These rules "are integral to the day-to-day operation of schools." *Hechler* at 842.

Here, however, the RRC process erodes the Board's ability to supervise and administer the public school system because the RRC consistently finds reasons to strike down the Board's rules. 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. (R p 14 ¶ 25). In addition, the Board has declined to adopt a number of rules it otherwise would have adopted but for the fact that the RRC would have objected to these rules. *Id.*

Moreover, the RRC process causes severe delay. It is undisputed that the process of seeking RRC approval typically takes a minimum of

six months and often much longer. (R p 15 ¶ 26). In the meantime, the Board's rules are of no force or effect. *Id.*

As a result, the framers' constitutional process for making statewide public education policy is effectively enjoined for many months—if not years—at a time. *Id.* Not only is this not good constitutional law, it is not good government. It is the opposite of what the framers intended.

For all of these reasons, the framers' intent confirms that the trial court's decision was correct. This is yet another reason that the trial court's decision should be affirmed.

C. Under the direct-delegation principle, the North Carolina Constitution's direct delegation of power to the Board prohibits the transfer of that power to the RRC.

It is a "basic principle of constitutional construction" that when a state constitution directly delegates certain powers to a particular entity, those powers cannot be transferred—either directly or indirectly—to a different entity. 1995 Op. N.C. Att'y Gen. 32 at 5 (quoting *Cooley's Constitutional Limitations*, vol. 1, at 215) (1927) ("[I]f powers are specifically conferred by the constitution upon [a] specified officer [or authority], the legislature cannot require or authorize [those

powers] to be performed by any other officer or authority."); *see also Guthrie*, 279 N.C. at 712-713, 185, S.E.2d at 200 (holding that when there is "a *direct delegation* by the people, themselves, in the Constitution of the State, of any portion of their power, legislative or other . . . we look only to the Constitution to determine what power has been delegated") (emphasis added). Under this direct-delegation principle, "[t]hose matters which the constitution specifically confides to [an entity], the legislature cannot directly or indirectly take from [its] control." *Cooley's* at 225.

Applied to the Board's Article IX, Section 5 claim, this direct-delegation principle confirms that the trial court should be affirmed.

1. Article IX, Section 5 expressly delegates to the Board the power to decide whether certain rules are enacted.

When the people of North Carolina created the Board in 1868, they could have made the Board like most other constitutionally created entities. They could have said nothing about the Board's powers, made the Board's powers "prescribed by law," and allowed future generations to "fill in the blanks." For most of the entities created by the North Carolina Constitution, that is exactly what the people did. *See, e.g.*,

N.C. Const. art. III, § 7 (creating the Office of the Secretary of State and the Office of the Attorney General without delegating specific powers to either and, instead, stating that "their respective duties shall be prescribed by law").

When the people of North Carolina created the Board, however, they made an important decision: they included a "direct delegation" of certain powers to the Board. *Guthrie*, 279 N.C. at 710, 712, 185 S.E.2d at 198-99. They directly 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. This language was carried over to the current North Carolina Constitution, which confers on the Board the broad "power to make rules and regulations" for the "free public school system." N.C. Const. art. IX, § 5.

By directly delegating this broad, sweeping power to the Board in the Constitution itself, the people elevated the Board to a unique status. They ensured that under the direct-delegation principle, the rulemaking power they gave the Board would stay with the Board. *Guthrie*, 279 N.C. at 710, 712, 185 S.E.2d at 198-99.

2. Taking away the Board's final rulemaking authority and transferring it to the RRC goes far beyond a "limitation" or "revision."

The "limitation" or "revision" language in Article IX, Section 5 has no bearing on the direct-delegation principle. When a state constitution delegates rulemaking power to a constitutionally created state board of education, the transfer of this power to another entity goes far beyond a "limitation and revision." 1994 Op. N.C. Att'y Gen. 41 (1994); 1995 Op. N.C. Att'y Gen. 32 (1995); *Hechler*, 376 S.E.2d at 840-41; *Mont. Bd. of Pub. Educ. v. Mont. Adm. Code Comm.*, 1992 Mont. Dist. LEXIS 204, at *8 (D. Mont. 1992); *State v. State Bd. of Educ.*, 196 P. 201, 204 (Idaho 1921).

Defendants seem to acknowledge that it would violate the direct-delegation principle if the RRC exercised "veto" authority over the Board's rules. For the first time in this litigation, however, the RRC argues that it does not actually exercise "veto" power because it only nullifies rules for "procedural, not substantive" reasons. (RRC Br. at 18).

It makes no difference whether the RRC strikes down rules based on "procedural" reasons, "substantive" reasons, or other reasons. The

direct-delegation principle is not concerned with *why* the RRC denies the Board its rulemaking powers. It is concerned with *whether* the RRC denies the Board its rulemaking powers.

On that question, there is no room for debate. 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 RRC does not approve the Board's rule, the Board is prohibited from enacting the rule. N.C.G.S. § 150B-21.19(4). This is the very definition of "veto power."

Worse still, the "default" under the RRC process is that the Board's rules have no force or effect on their own unless the RRC decides for itself that a particular rule should be enacted. N.C.G.S. § 150B-21.3(b)(1). In other words, the Board's rules are void *ab initio*.

In these ways, the RRC process defies the direct-delegation principle. If the direct-delegation principle means anything, it means that the Board's constitutionally delegated rulemaking powers cannot be replaced by a system where its rules are always dead on arrival.

Two Opinions of the North Carolina Attorney General prove this point. In both of these Opinions, the Attorney General explained that

Article IX, Section 5 prohibited the legislature from letting an administrative agency have the final say over the Board's rules.

The first of these Attorney General Opinions addresses the constitutionality of a bill to create a Professional Teaching Standards Board. 1994 Op. N.C. Att'y Gen. 41. That board was charged with setting standards for licensing teachers and issuing, renewing, and revoking licenses "independently of the State Board of Education." *Id.* The Attorney General explained that this legislation would be unconstitutional.

While the General Assembly could specifically "limit" or "revise" the Board's rules, the Opinion held, the General Assembly cannot take away the Board's final say and give it to a separate entity. *Id.* at 3-4. The Opinion explained 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" under Article IX, Section 5. *Id.* (emphasis added). Thus, the Attorney General determined, "[i]t would amount to the *denial* to the State Board of a power conferred on the State Board by the people." *Id.* (emphasis

added). The key, the Attorney General observed, was whether "some form of final approval" or final "authority"—that is, the final say—remained with the State Board. *Id.* at 4-5.

The following year, a second Attorney General's Opinion addressed this same issue. 1995 Op. N.C. Att'y Gen. 32. This time the inquiry came from the Board. The General Assembly had created the Professional Teaching Standards Commission, which was charged with "prepar[ing] a plan for how it [the Commission] could establish high standards for teachers and the teaching profession." *Id.* at 1. The Board wanted to know whether this new Commission could have final say about whether a rule is enacted. *Id.* at 4.

The Attorney General's Opinion said no. *Id.* at 4. In the Opinion, the Attorney General contrasted a law requiring the Board to consider *non-binding* recommendations of an independent body versus a law forcing the Board to submit to another entity's *binding* decision of whether to adopt a rule. *Id.* Requiring the Board to submit to another entity's *binding* decision, the Opinion held, would be unconstitutional under Article IX, Section 5.

The Opinion explained that "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 Opinion relied on the direct-delegation principle described above: 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." *Id.* (quoting *Cooley's* at 215).

As the Attorney General recognized, this decision is "consistent with the decisions of the courts of other states." *Id.* (citing out-of-state authority).

For example, the decision in *Hechler*, 376 S.E.2d 839, which was cited by the North Carolina Attorney General in the 1995 Opinion, involved issues similar to those here. There, a constitutionally created state board of education challenged legislation requiring it to submit its rules to an "oversight commission for review." *Id.* at 840. The state constitutional language at issue contained a delegation of power like Article IX, Section 5, although not as strong or direct. It stated that

"[t]he general supervision of the free schools of the State shall be vested in the West Virginia board of education which shall perform such duties as may be prescribed by law." *Id.* at 841.

Even under this weaker constitutional language, the Court held that it would be unconstitutional for the oversight commission to exercise authority over the state board. As the Court explained, the oversight commission "pose[d] an interference with the Board's rule-making power, and consequently, the Board's general supervisory functions." *Id.* at 843. Therefore, the Court held, the requirement that the board submit its rules to the oversight commission was "unconstitutional." *Id.*

Other out-of-state decisions have joined *Hechler* in striking down encroachments on the rulemaking authority of constitutionally created state boards of education. *See, e.g.*, *Mont. Bd. of Pub. Educ.*, 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."); *State Bd. of Educ.*, 196 P. at 204-05 (construing similar state constitutional provision making the

State Board of Education's rules 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").

In sum, the North Carolina Constitution expressly delegates to the Board the power to decide whether certain rules concerning our free public schools are ultimately enacted. Under the direct-delegation principle, this power cannot be taken away and given to the RRC.

For this additional reason, this Court should affirm the trial court.

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO THE BOARD ON ITS NON-DELEGATION DOCTRINE CLAIM UNDER THE NORTH CAROLINA CONSTITUTION.

In addition to correctly granting summary judgment to the Board on its Article IX, Section 5 claim, the trial court correctly granted summary judgment to the Board on its non-delegation doctrine claim.

As described above, Article IX, Section 5 is 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 Nat. & 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 purported exercise of authority over the Board fails each one.

A. The RRC is not an agency equipped to adapt legislation to complex conditions which the legislature cannot deal with directly.

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*, 295 N.C. at 697, 249 S.E.2d at 410 (quoting *Turnpike Auth.*, 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 Board is constitutionally committed to 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 to complex conditions" in the field of public education. As described above, the members of the RRC are not required to have any particular expertise, knowledge, or background in public education at all. As a result, the RRC process takes away final decision-making authority from the Board and gives it to non-experts.

B. The General Assembly has not provided the RRC with adequate guidance to evaluate the Board's rules.

Second, the General Assembly has not provided the RRC with appropriate 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.G.S. § 150B-21.9(a). 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 the Board by the General Assembly like it is for a typical administrative agency. Rather, as discussed above, the Board's 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. The Board does not need the RRC's help to find the source of its rulemaking powers.

In response, the RRC posits—for the first time in this litigation—that its authority-examining services might still be useful even though the Board derives its powers from the North Carolina Constitution. The RRC cites *State v. Whittle Commc'ns*, 328 N.C. 456, 402 S.E.2d 556 (1991), in support of this new theory. (RRC Br. at 28).

Whittle says nothing, of course, about the RRC. The Supreme Court in *Whittle* held that under Article IX, Section 5 of the North Carolina Constitution, the Board's rules about certain teaching materials were preempted because the General Assembly had already enacted contrary legislation about those same teaching materials.[6] *Whittle* merely confirms that the judicial branch, as the arbiter of the North Carolina Constitution, gets to decide whether the Board's rules are preempted under Article IX, Section 5.

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[6] In this regard, *Whittle* is another example of how the two-part constitutional framework discussed above at pages 20-21 is supposed to work.

It is unclear whether Defendants are now suggesting that the RRC ought to perform this traditional judicial function too. If Defendants are suggesting that the RRC's authority-examining services should extend to constitutional interpretation, they do so without any legal authority. Even if such authority existed, moreover, the RRC could not perform this function. Its own enabling statute limits it to striking down rules that it believes are beyond an agency's *statutory* (as opposed to constitutional) authority. N.C.G.S. § 150B-21.9(a).

There is yet another reason why the legislature's "guidance" to the RRC makes no sense here. 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.* at 697-98, 249 S.E.2d at 411.

Here, the General Assembly gives the RRC no meaningful guidance on how to evaluate the Board's rules. As a result, the RRC 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 permits the RRC to nullify rules "based on ideology and political pressure." Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 Admin. L. Rev. 551, 563 (2001). Thus, the General Assembly's "guidance" to the RRC is so vague that it allows the RRC to make important policy choices that ought to be made by elected representatives in the legislature.

C. The RRC's decisions are not subject to adequate procedural safeguards.

Third, and finally, there are no "adequate procedural safeguards . . . 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. N.C.G.S. § 150B-21.8(d).

In its brief, the RRC suggests a lawsuit is a "significant procedural safeguard." (RRC Br. at 27). This is a difficult proposition to accept for rulemaking entities that want to avoid the time and expense of protracted litigation every time they adopt a rule.

In any event, this option is never "adequate" for the Board. As described above, the "default" provisions of the RRC 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. (R p 15 at ¶ 26). In the meantime, 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 a violation of the Constitution "for even minimal periods of time, unquestionably constitutes irreparable injury"); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520-21 (4th Cir. 2002) (same).

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. Accordingly, the trial court correctly granted summary judgment to the Board on its non-delegation doctrine claim.

III. THE COURT SHOULD REJECT DEFENDANTS' PROCEDURAL ARGUMENT BECAUSE, AS DEFENDANTS CONCEDE, THE TRIAL COURT'S ORDER DID NOT FIND THAT AN ACT OF THE LEGISLATURE WAS FACIALLY UNCONSTITUTIONAL.

For the reasons set forth in the Board's separately filed motion to dismiss, the Court should either: (1) dismiss Defendants' unpreserved

procedural argument; or (2) dismiss the entire appeal. If the Court reaches the merits, however, this new procedural argument fails under the weight of Defendants' concessions.

Defendants argue, in essence, that the trial court triggered the three-judge panel provisions of N.C.G.S. § 1-267.1 when it issued an order that did not expressly declare an act of the legislature to be facially unconstitutional. (RRC Br. at 30-36). Defendants' argument misunderstands the test for when the three-judge panel statute is triggered.

The Supreme Court recently explained this test in *Town of Boone v. State of North Carolina*, 777 S.E.2d 759 (N.C. 2015), a case that neither the RRC or the State cited in their briefs. There, the State appealed two orders of a three-judge panel to the Supreme Court. *Id.* The statute at issue permitted appeals "to the Supreme Court from any order or judgment of a court, either final or interlocutory, that holds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution." N.C.G.S. § 7A-27(a1). As the Court explained, however, the statute is only triggered when the

trial court specifically "'*holds* that an act of the General Assembly is facially unconstitutional." *Boone*, 777 S.E.2d at 759.

Neither of the trial court's orders, the Supreme Court explained, "included such a holding." *Id.* Rather, "[t]he order denying the State's and the County's motions to dismiss did not provide the panel's rationale for denying the motions." *Id.* The other order merely "concluded that the Town 'has shown a likelihood of success on the merits of its case.'"[7] *Id.* at 760. Therefore, the Supreme Court dismissed the State's appeal from the two orders that did not clearly "hold" an act of the General Assembly to be facially unconstitutional. *Id.*

Here, the three-judge panel statute Defendants are claiming was triggered is N.C.G.S. § 1-267.1(c), a companion statute enacted in the same Session Law as the statute at issue in *Town of Boone*. N.C. Session Law 2014-100 §§ 18B.16(a)-(e). The statute here, N.C.G.S. § 1-267.1(c), is virtually identical to the statute in *Town of Boone*. However, instead of using the word "holds," it uses the word "finds."

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[7] The Supreme Court contrasted these orders with another order appealed in the case, which clearly held that a particular act of the General Assembly—the so-called "Boone Act of 2014"—was "unconstitutional."

Thus, the statute reads: "No order or judgment shall be entered [that] *finds*[8] that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution." N.C.G.S. § 1-267.1(c).

Therefore, just as the trial court's order in *Town of Boone* did not specifically "*hold* that an act of the General Assembly is facially' unconstitutional," the trial court's order here did not specifically "*find* that an act of the General Assembly is facially invalid." *Id.*

On this dispositive issue, Defendants make several fatal concessions. Defendants concede that:

- a finding that an act of the General Assembly is facially invalid "cannot be discerned from the language of the order";
- "the two counts of the complaint" decided on summary judgment "were worded in such a way as to avoid asking the Superior Court to declare legislation to be facially invalid"; and
- "the Superior Court did *not* expressly declare any specific statute to be facially invalid."

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[8] Notably, when the RRC quoted the statute in its brief, it omitted this key word: "finds." (RRC Br. at 30-31) ("No order or judgment shall be entered . . . that [~~**finds**~~] that an act of the General Assembly is facially invalid . . . .") (emphasis and strikethrough added).

(RRC Br. at 31-32) (emphasis added); (State's Br. at 7) (incorporating RRC brief). Under the Supreme Court's recent *Town of Boone* decision, these concessions are fatal.

Accordingly, Defendants' new procedural argument fails.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court affirm the trial court.

Respectfully submitted, this the 26th day of January, 2016.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, the undersigned certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.

s/ Andrew H. Erteschik
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CERTIFICATE OF SERVICE

I do 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 persons at the following addresses, which are the last addresses known to me:

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CONTENTS OF APPENDIX

CONSTITUTION

OF THE

STATE OF NORTH-CAROLINA,

TOGETHER WITH THE

ORDINANCES AND RESOLUTIONS

OF THE

CONSTITUTIONAL CONVENTION,

Assembled in the City of Raleigh, Jan. 14th, 1868.

RALEIGH:
JOSEPH W. HOLDEN, CONVENTION PRINTER.
1868.

companies, having any of the powers and privileges of corporations, not possessed by individuals or partnerships. And all corporations shall have the right to sue, and shall be subject to be sued in all courts, in like cases as natural persons.

Legislature to provide for organizing cities, towns, &c.

SEC. 4. It shall be the duty of the Legislature to provide for the organization of cities, towns and incorporated villages, and to restrict their power of taxation, assessments, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporation.

ARTICLE IX.

EDUCATION.

Education shall be encouraged.

SECTION 1. Religion, morality, and knowledge being necessary to good government and happiness of mankind, schools and the means of education shall forever be encouraged.

General Assembly shall provide for schools.

SEC. 2. The General Assembly at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of Public Schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years.

Counties to be divided into districts.

SEC. 3. Each County of the State shall be divided into a convenient number of Districts, in which one or more Public Schools shall be maintained, at least four months in every year; and if the Commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment.

What property shall be devoted to educational purposes.

SEC. 4. The proceeds of all lands that have been, or hereafter may be granted by the United States to this State and not otherwise specially appropriated by the United States or heretofore by this State; also, all moneys, stocks, bonds, and other property now belonging to any fund for

purposes of education; also, the net proceeds that may accrue to the State from sales of estrays, or from fines, penalties and forfeitures; also, the proceeds of all sales of the swamp lands belonging to the State; also, all money that shall be paid as an equivalent for exemption from military duty; also, all grants, gifts or devises that may hereafter be made to this State, and not otherwise appropriated by the grant, gift or devise, shall be securely invested, and sacredly preserved as an irreducible educational fund, the annual income of which, together with so much of the ordinary revenue of the State as may be necessary, shall be faithfully appropriated for establishing and perfecting in this State a system of Free Public Schools, and for no other purposes or uses whatsoever.

University and Public Schools not to be separated.

SEC. 5. The University of North-Carolina, with its lands, emoluments and franchises, is under the control of the State, and shall be held to an inseparable connection with the Free Public School system of the State.

Benefits of the University.

SEC. 6. The General Assembly shall provide that the benefits of the University, as far as practicable, be extended to the youth of the State free of expense for tuition; also, that all the property which has heretofore accrued to the State, or shall hereafter accrue from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons, shall be appropriated to the use of the University.

Board of Education.

SEC. 7. The Governor, Lieutenant-Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction and Attorney General, shall constitute a State Board of Education.

President and Secretary.

SEC. 8. The Governor shall be President, and the Superintendent of Public Instruction shall be Secretary of the Board of Education.

Power of Board.

SEC. 9. 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.

First session of Board.

SEC. 10. The first session of the Board of Education shall be held at the Capital of the State, within fifteen days after the organization of the State government under this Constitution; the time of future meeting may be determined by the Board.

Quorum

SEC. 11. A majority of the Board shall constitute a quorum for the transaction of business.

Expenses

SEC. 12. The contingent expenses of the Board shall be provided for by the General Assembly.

Trustees for the University.

SEC. 13. The Board of Education shall elect Trustees for the University, as follows: one Trustee for each County in the State, whose term of office shall be eight years. The first meeting of the Board shall be held within ten (10) days after their election, and at this and every subsequent meeting, ten Trustees shall constitute a quorum. The Trustees, at their first meeting, shall be divided, as equally as may be, into four classes. The seats of the first class shall be vacated at the expiration of two years; of the second class, at the expiration of four years; of the third class, at the expiration of six years; of the fourth class, at the expiration of eight years; so that one-fourth may be chosen every second year.

Board of Trustees.

SEC. 14. The Board of Education and the President of the University, shall be *ex officio* members of the Board of Trustees of the University; and shall, with three other Trustees, to be appointed by the Board of Trustees, constitute the Executive Committee of the Trustees of the University of North-Carolina, and shall be clothed with the powers delegated to the Executive Committee under the existing organization of the Institution. The Governor shall be *ex officio* President of the Board of Trustees and Chairman of the Executive Committee of the University. The Board of Education shall provide for the more perfect organization of the Board of Trustees.

Privileges and rights vested in new Board.

SEC. 15. All the privileges, rights, franchises and endowments heretofore granted to, or conferred upon, the Board

of Trustees of the University of North-Carolina by the charter of 1789, or by any subsequent legislation, are hereby vested in the Board of Trustees, authorized by this Constitution, for the perpetual benefit of the University.

Agricultural department.

SEC. 16. As soon as practicable after the adoption of this Constitution, the General Assembly shall establish and maintain in connection with the University, a Department of Agriculture, of Mechanics, of Mining, and of Normal Instruction.

Children must attend school.

SEC. 17. The General Assembly is hereby empowered to enact that every child of sufficient mental and physical ability, shall attend the Public Schools during the period between the ages of six and eighteen years, for a term of not less than sixteen months, unless educated by other means.

ARTICLE X.

HOMESTEADS AND EXEMPTIONS.

Exemption.

SECTION 1. The personal property of any resident of this State, to the value of five hundred dollars, to be selected by such resident, shall be, and is hereby exempted from sale under execution, or other final process of any court, issued for the collection of any debt.

Homestead.

SEC. 2. Every Homestead, and the dwelling and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempted from sale under execution, or other final process, obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises.

Homestead exempted from debt.

SEC. 3. The Homestead, after the death of the owner thereof, shall be exempt from the payment of any debt, during the minority of his children, or any one of them.

REPORT AND RECOMMENDATIONS

of

THE GOVERNOR'S COMMISSION ON EDUCATION

Authorized by an Act of the General Assembly
March 22, 1937, and Appointed by
Governor Clyde R. Hoey

DECEMBER 1, 1938

operators of licensed business or commercial schools that have been in operation within the State for five years.

The State Textbook Commission was also created by the General Assembly of 1935. This commission consists of five members; the State Superintendent of Public Instruction as ex-officio chairman, the Attorney General, the Director of the Division of Purchase and Contract, and two members, to be appointed by the Governor, for a term of two years each. It is the duty of this commission to purchase the necessary textbooks, operate a rental system of textbook distribution to the children in the public high schools of this State, and provide free basal textbooks to the children in the elementary grades.

This commission should not be confused with the (Elementary) Textbook Commission and the State Committee for high school textbooks, which are in fact sub-committees of the State Board of Education, composed of persons actually engaged in school work, whose duties are to examine the books and materials submitted for adoption and to prepare a multiple list from which the State Board makes the adoption."

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 the report of the North Carolina Constitutional Commission of 1932, there is a recommendation with reference to an amendment to the Constitution providing for the administration of the public school system by one central State Board of Education. We recommend that the General Assembly make provision to submit to a vote of the people an amendment to the Constitution as suggested by said Constitutional Commission, as follows:

"State Board of Education. The general supervision and administration of the free public school system, and of the educational funds provided for the support thereof, shall be vested in a State Board of Education, to consist of seven members. The State Superintendent of Public Instruction shall be a member of said board, and its chairman and chief executive officer. The other members of the board shall be appointed by the Governor, subject to confirmation by the General Assembly in joint session. The first appointment under this section shall be three members for two years, and three members for four years, and thereafter all appointments shall be made for a term of four years. All appointments to fill vacancies shall be made by the Governor for the unexpired term. The board shall elect a vice-chairman who shall preside in the absence of the chairman, and also shall elect a secretary, who need not be a member of the board. A majority of

the board shall constitute a quorum for the transaction of business. The per diem and expenses of the members of the board shall be provided by the General Assembly.

Powers and Duties of the Board. The State Board of Education shall have power to divide the State into a convenient number of school districts without regard to township or county lines; 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."

We are of the opinion that if such amendment to the Constitution were submitted to the people, after a campaign of enlightenment as to the necessity for such amendment, and such amendment were submitted at an election, when it is not entangled with other amendments which might be less worthy, the people of the state will adopt the amendment.

The Commission, feeling that it is for the best interest of the public school system to have immediate relief from scattered administration rather than wait for the long time goal of the proposed constitutional amendment, recommends that the General Assembly of 1939 provide that for the present the administration of the public schools be placed under the State Board of Education and that there be provided an advisory commission to the State Board of Education to consist of seven members to be appointed by the Governor, and that the work of the various boards and agencies, referred to in this report, be consolidated and administered by the State Board of Education and that such advisory commission to be composed of the seven members appointed by the Governor become the advisory commission to the Board of Education.

It is suggested that the State Superintendent of Public Instruction, the Lieutenant Governor, and Treasurer become *ex-officio* members of the proposed Advisory Board.

It is noted that certain counties and cities have consolidated their administrative organizations. The Commission recommends this plan to those units which due to local conditions would find it economical and efficient.

The Commission desires to commend the work of the State

STATE OF NORTH CAROLINA

PUBLIC LAWS AND RESOLUTIONS

PASSED BY THE

GENERAL ASSEMBLY

AT ITS

SESSION OF 1941

HELD IN THE CITY OF RALEIGH

BEGINNING ON

WEDNESDAY, THE EIGHTH DAY OF JANUARY, A. D. 1941

PUBLISHED BY AUTHORITY

CHARLOTTE
THE OBSERVER PRINTING HOUSE, INC.
1941

Conflicting laws repealed.

SEC. 3. That all laws and clauses of laws in conflict with this Act are hereby repealed.

SEC. 4. That this Act shall be in full force and effect from and after its ratification.

In the General Assembly read three times and ratified, this the 12th day of March, 1941.

H. B. 783 CHAPTER 150

AN ACT TO AMEND HOUSE BILL NUMBER TWO HUNDRED AND NINETY-FIVE, RELATING TO PUBLIC DRUNKENNESS, SO AS TO ELIMINATE BURKE COUNTY FROM THE PROVISIONS THEREOF.

The General Assembly of North Carolina do enact:

H. B. 295 (Ch. 82, Public Laws, 1941), amended, eliminating Burke County from law.

SECTION 1. That House Bill Number two hundred and ninety-five, ratified March fifth, one thousand nine hundred and forty-one, be, and the same is hereby, amended by striking out the word "Burke" wherever the same appears therein.

Conflicting laws repealed.

SEC. 2. That all laws and clauses of laws in conflict with this Act are hereby repealed.

SEC. 3. That this Act shall be in full force and effect from and after its ratification.

In the General Assembly read three times and ratified, this the 12th day of March, 1941.

S. B. 107 CHAPTER 151

AN ACT TO AMEND THE CONSTITUTION PROVIDING FOR THE ORGANIZATION OF THE STATE BOARD OF EDUCATION AND THE POWERS AND DUTIES OF THE SAME.

The General Assembly of North Carolina do enact:

Proposed amendment of Article IX, N. C. Constitution.

SECTION 1. That Article IX, Sections eight and nine, of the Constitution of North Carolina be amended by substituting for the said sections the following:

Creation of State Board of Education.

"SEC. 8. State Board of Education. The general supervision and administration of the free public school system, and of the educational funds provided for the support thereof, shall, from and after the first day of April, one thousand nine hundred and forty-three, be vested in a State Board of Education to consist of the Lieutenant Governor, State Treasurer, the Superintendent of Public Instruction, and one member from each Congressional

Membership.

District to be appointed by the Governor. The State Superintendent of Public Instruction shall have general supervision of the public schools and shall be secretary of the board. There shall be a comptroller appointed by the Board, subject to the approval of the Governor as director of the Budget, who shall serve at the will of the board and who, under the direction of the board, shall have supervision and management of the fiscal affairs of the board. The appointive members of the State Board of Education shall be subject to confirmation by the General Assembly in joint session. A majority of the members of said board shall be persons of training and experience in business and finance, who shall not be connected with the teaching profession or any educational administration of the State. The first appointments under this section shall be members from odd numbered Congressional Districts for two years, and members from even numbered Congressional Districts for four years and, thereafter, all appointments shall be made for a term of four years. All appointments to fill vacancies shall be made by the Governor for the unexpired term, which appointments shall not be subject to confirmation. The board shall elect a chairman and a vice-chairman. A majority of the board shall constitute a quorum for the transaction of business. The per diem and expenses of the appointive members of the board shall be provided by the General Assembly."

Secretary.

Appointment and term of Comptroller.

Duties.

Confirmation of appointive members.

Type of members.

Appointment and terms of members.

Vacancy appointments.

Chairman and Vice-Chairman.

Quorum at meetings.

Compensation of appointive members.

SEC. 2. That Article IX, Sections ten, eleven, twelve and thirteen, of the Constitution of North Carolina, be amended by substituting thereof one section, to be designated as Section nine, which shall be as follows:

Further proposed amendment of Art. IX, N. C. Constitution.

"SEC. 9. Powers and Duties of the Board. 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."

Powers and duties of State Board of Education.

Exercise of powers in conformity with Constitution and Statutes.

SEC. 3. That Sections fourteen and fifteen of Article IX of the Constitution of North Carolina shall be changed to Sections ten and eleven of Article IX of the Constitution of North Carolina.

Further proposed amendment of Art. IX, renumbering certain sections.

SEC. 4. That Sections one, two and three of this Act shall be submitted at the next general election of the qualified voters in the State, in the same way and manner, and under the same

Referendum on proposed amendments.

rules and regulations as provided in the laws governing general elections in this State.

Form of ballots.

SEC. 5. That electors favoring the adoption of the amendments in Sections one, two and three of this Act shall vote ballots, on which shall be printed or written the words "For State Board of Education Amendments," and those opposed shall vote ballots, on which shall be printed or written the words "Against State Board of Education Amendments."

Conduct of election.

SEC. 6. That the election upon these amendments shall be conducted in the same manner and under the same rules and regulations as provided by the laws governing general elections, and if a majority of the votes cast be in favor of these amendments, it shall be the duty of the Governor of the State to certify the amendments under the Seal of the State to the Secretary of State, who shall enroll said amendments so certified among the permanent records of his office, and the amendments so certified, and every part thereof, shall be in force from and after the date of such certification.

Upon ratification, amendments certified by Governor to Secretary of State.

Conflicting laws repealed.

SEC. 7. That all laws and clauses of laws in conflict with this Act are hereby repealed.

SEC. 8. That this Act shall be in full force and effect from and after its ratification.

In the General Assembly read three times and ratified, this the 13th day of March, 1941.

S. B. 137 CHAPTER 152

AN ACT TO AMEND CONSOLIDATED STATUTES FIVE THOUSAND ONE HUNDRED AND SIXTY-EIGHT (e), AS AMENDED, FIVE THOUSAND ONE HUNDRED AND SIXTY-EIGHT (i), AS AMENDED, FIVE THOUSAND ONE HUNDRED AND SIXTY-EIGHT (r), VOLUME THREE, ONE THOUSAND NINE HUNDRED TWENTY-FOUR, AND CHAPTER ONE HUNDRED AND EIGHTY-SEVEN OF THE PUBLIC LAWS OF ONE THOUSAND NINE HUNDRED AND THIRTY-NINE, RELATING TO CONFEDERATE PENSIONS AND THE PAYMENT OF FUNERAL EXPENSES OF DECEASED PENSIONERS.

The General Assembly of North Carolina do enact:

C.S. 5168 (e), amended, as to examination and classification of applicants for Confederate pensions.

SECTION 1. That Consolidated Statutes five thousand one hundred and sixty-eight (e) of Volume three, one thousand nine hundred and twenty-four, as amended by Chapter one hundred and six of the Public Laws, Extra Session, one thousand nine hundred and twenty-four, be, and the same is hereby, amended by striking out after the word "pensions" in line two and before

Report of the

NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION

Raleigh / 1968

A final Sec. 3 is added to make it clear that a merged or consolidated city-county shall be deemed to be both a city and county for such constitutional purposes as legislative representation and restrictions on the power of local governments to tax and incur debt.

Article VIII. Corporations

Present Article VIII contains three sections dealing with business corporations and other non-municipal corporations and a fourth section dealing with cities and towns. This last section (Sec. 4) we recommend be transferred to Article VII (Local Government) with some modifications.

The three sections dealing with non-municipal corporations date from 1868, with an amendment adopted in 1916 requiring in effect that business corporations be incorporated under general laws, rather than by special act of the General Assembly as had been the frequent practice prior to that time. We have retained present Secs. 1 and 3, with no substantive change. Present Sec. 2 is obsolete and meaningless and is deleted.

Article IX. Education

Article IX has been rearranged to improve the order of treatment of the subjects dealt with by that article, and its language has been modified to eliminate obsolete provisions and to make the article reflect current practice in the administration and financing of schools.

Proposed Sec. 1 adds "libraries" to the list of institutions that the General Assembly is urged to encourage.

Proposed Sec. 2 extends the mandatory school term from six months to a minimum of nine months and eliminates the possibly restrictive age limits on tuition-free public schooling. It also authorizes units of local government to which the General Assembly assigns a share of the

responsibility for financing public education to finance educational programs (including both public schools and technical institutes and community colleges) from local revenues. It omits the now-unconstitutional language on the separation of the races in the public schools.

Proposed Sec. 3 makes it mandatory (rather than permissive) that the General Assembly require public school attendance and omits the obsolete limitation on compulsory attendance to a total of sixteen months.

Proposed Sec. 4(1) modifies the State Board of Education slightly by eliminating the Superintendent of Public Instruction as a voting member of the Board while retaining him as the Board's secretary and chief administrative officer. He is replaced by an additional at-large appointee. Continuity of board membership is not otherwise affected. The Superintendent of Public Instruction will continue to be popularly elected, as required by Art. III, § 7(1). A potential conflict of authority between the Superintendent and the Board is eliminated by making clear that he is the administrative officer of the Board (Sec. 4[2]), which is to administer the public schools (Sec. 5).

Proposed Sec. 5 restates, in much abbreviated form, the duties of the State Board of Education, but without any intention that its authority be reduced.

Proposed Sec. 6 restates present Sec. 4, dealing with the state school fund, without substantive change.

Proposed Sec. 7 restates present Sec. 5, dealing with the county school fund, without change except to delete obsolete references to "proceeds from the sale of estrays" and militia exemption payments.