

No. \_\_P17

TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA STATE	)	
BOARD OF EDUCATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	<u>From Wake County</u>
	)	16-CVS-15607
THE STATE OF NORTH CAROLINA, and	)	COA P17-687
MARK JOHNSON, in his official capacity,	)	
	)	
Defendants.	)	
	)	

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**PLAINTIFF'S MOTION FOR TEMPORARY STAY AND  
PETITION FOR WRIT OF SUPERSEDEAS**

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**PLAINTIFF'S MOTION FOR TEMPORARY STAY AND  
PETITION FOR WRIT OF SUPERSEDEAS**

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Pursuant to Rules 8 and 23 of the North Carolina Rules of Appellate Procedure, Plaintiff respectfully moves the Court for a temporary stay and writ of supersedeas during the pendency of its appeal.

**INTRODUCTION**

For nearly 150 years, the State Board of Education has supervised and administered the State's public schools, as the North Carolina Constitution expressly requires. In December 2016, however, the General Assembly passed a law stating that the Board would no longer supervise and

administer the public schools, and that the Superintendent of Public Instruction would do so instead.

This law used essentially the same language from the North Carolina Constitution stating that the Board must supervise and administer the public schools, only it replaced the words “State Board of Education” with “Superintendent of Public Instruction,” as this comparison shows:

Article IX, Section 5 of the North Carolina Constitution	N.C. Sess. Law 2016-126 § 4
It shall be the “dut[y]” of “ <i>the State Board of Education</i> . . . [to] supervise and administer the free public school system[.]”	“It shall be the duty of <i>the Superintendent of Public Instruction</i> . . . to have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system.”

The Board immediately challenged the law, and the trial court issued a temporary restraining order preventing the law from going into effect.

A three-judge panel was later appointed to hear the case. At a hearing on the merits, at least one member of the three-judge panel recognized that the text of the law was “very troubling.” Nevertheless, the three-judge panel upheld the law, concluding that it was unnecessary to consider the Board’s primary argument: that when a constitution expressly confers powers and

duties on a specific entity, those powers and duties cannot be transferred to someone else without a constitutional amendment.

The Board immediately appealed and, shortly thereafter, moved for a stay of the decision during the pendency of the appeal. At the hearing on the motion, at least one member of the three-judge panel acknowledged that the law represented a “sea change,” and that allowing the law to take effect before the appeal is resolved would be akin to “cutting down trees”—in other words, it would be exceptionally difficult to restore the status quo if the appellate courts reversed on the merits. Indeed, the State did not even oppose the Board’s request for a stay.

Nevertheless, the three-judge panel declined to issue a stay, and it gave the Board 30 days to seek a stay in the appellate courts before the law goes into effect.

The Board then sought a temporary stay and writ of supersedeas from the Court of Appeals, which granted a partial stay on a narrow, limited issue: the Board’s power and duty to execute contracts for the public schools.

The Board now seeks a temporary stay and writ of supersedeas from this Court. For the reasons that follow, the Court should issue a temporary stay and writ of supersedeas to preserve the North Carolina Constitution’s nearly 150-year old status quo while the Board’s appeal is pending.

## **FACTUAL AND PROCEDURAL BACKGROUND**<sup>1</sup>

This constitutional challenge involves a bedrock principle of constitutional law: that when a constitution expressly confers powers and duties on a specific entity, those powers and duties cannot be transferred to someone else without a constitutional amendment.

Article IX, Section 5 of the North Carolina Constitution expressly confers certain “powers and duties” on the Board. Those constitutional powers and duties include:

- the power and duty to “supervise . . . the free public school system”;
- the power and duty to “administer the free public school system”;
- the power and duty to “supervise . . . the educational funds provided for [the free public school system’s] support”; and
- the power and duty to “administer . . . the educational funds provided for [the free public school system’s] support.”

The Board has exercised those powers and fulfilled those duties since its creation in 1868. For the first time in North Carolina history, however,

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<sup>1</sup> For brevity, the Board has provided only the most relevant facts in this filing, which includes a verification by the Board’s counsel as required by Rule 23. In addition, the Board incorporates by reference the verified factual allegations of the amended complaint. Ex. A, Amended Complaint (without exhibits) ¶¶ 11-26.



the General Assembly passed legislation in December 2016 that attempted to transfer the Board's constitutional powers and duties to a single individual: the Superintendent of Public Instruction ("SPI").

Without an opportunity for input from the Board, the education community, or the public, the General Assembly introduced this legislation (hereinafter "the Transfer Legislation") in a special legislative session intended to address disaster relief. Less than 48 hours after the Transfer Legislation was first introduced, it passed both the House and the Senate. Three days later, it was signed into law. Ex. B, Session Law 2016-126.

On 29 December 2016, the Board brought this constitutional challenge. Ex. A. The Board sought a temporary restraining order, a preliminary injunction, and a permanent injunction. *Id.*

### ***The Trial Court's Decisions***

On the same day that the Board filed the complaint, Judge Donald W. Stephens held a hearing on the Board's TRO motion. At the hearing, Judge Stephens remarked that the Board's entitlement to relief was "straightforward," that he "[did not] see any ambiguity," and that the law is "significantly likely to be unconstitutional on its face." Ex. C, TRO Hearing Transcript at 6, 13, 24. That same day, Judge Stephens issued a TRO enjoining the Transfer Legislation. Ex. D, Temporary Restraining Order.

After the TRO was entered, a three-judge panel was appointed to hear the parties' cross-dispositive motions. At the hearing on those motions, one member of the panel acknowledged that the General Assembly's cutting and pasting of the text of the North Carolina Constitution into legislation and replacing the words "State Board of Education" with "Superintendent" was "very troubling."<sup>2</sup>

Nevertheless, the three-judge panel issued a decision on 24 July 2017 upholding the Transfer Legislation. Ex. E, 14 July 2017 Order and Memorandum Opinion. The decision did not address the majority of the Board's arguments—most notably, the Board's primary argument that the legislature cannot transfer express constitutional powers and duties without a constitutional amendment. *Id.* Instead, the three-judge panel concluded that the Transfer Legislation—including the copied-and-pasted language shown in the comparison above—"does not transfer the State Board's power." *Id.* at 5.

The Board on 20 July 2017 gave notice of appeal. Ex. F, Notice of Appeal. Although the three-judge panel's decision contained some determinations that would seem to favor the Board, its overall decision—and

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<sup>2</sup> *Three judge panel hears arguments on education governance authority*, available at [www.ednc.org/2017/06/29/three-judge-panel-hears-arguments-education-governance-authority/](http://www.ednc.org/2017/06/29/three-judge-panel-hears-arguments-education-governance-authority/) (last visited September 18, 2017).

its determination that the Transfer Legislation “does not transfer the State Board’s power”—simply cannot be squared with the legislation itself:

Article IX, Section 5 of the North Carolina Constitution	N.C. Sess. Law 2016-126 § 4
It shall be the “dut[y]” of “ <i>the State Board of Education</i> . . . [to] supervise and administer the free public school system[.]” <sup>3</sup>	“It shall be the duty of <i>the Superintendent of Public Instruction</i> . . . to have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system.”

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<sup>3</sup> In the SPI’s filing with the Court of Appeals, and for the first time in this litigation, the SPI accused the Board of “misquot[ing]” Article IX, Section 5 in the comparison above by including the word “duty.” Def. Res. at 6. The SPI’s accusation was unfounded. Article IX, Section 5 is entitled “Powers and *duties* of Board.” N.C. Const. art. IX, § 5 (emphasis added).

Also for the first time in this litigation, the SPI criticized the Board for adding a period at the end of this sentence—an odd criticism given that the obvious purpose of the comparison was to show the copied-and-pasted language in the statute, not to compare the entire constitutional provision with the entire statute. Similarly, the SPI also told the Court of Appeals that the Board had “fail[ed] to account” for the entire language of Article IX, Section 5 (“subject to laws enacted by the General Assembly”) throughout “all of its arguments in the case going back to the beginning.” Def. Res. at 7. Again, the SPI’s accusation was unfounded: The Board supplied 13 pages of briefing to the three-judge panel on this very issue. Ex. G, Excerpts from Board’s Summary Judgment Memoranda. For an in-depth discussion of why the phrase “subject to laws” in Article IX, Section 5 does not support the SPI’s view that the General Assembly can do whatever it wants, the Board commends its prior briefing to the Court for further review. *See id.*

***The Trial Court's Decisions on a Temporary Stay***

In its 14 July 2017 order, the trial court temporarily stayed its decision “for a period of 60 days pending further orders of this court or any appellate court having jurisdiction over this matter so as to allow any motions by any of the parties herein requesting additional stays or dissolution of this stay pending appeal of this matter.” Ex. E at 1.

The Board did not immediately seek a temporary stay pending the appeal, however, because within hours of the Court’s July 14, 2017 decision, counsel for both the Board and the SPI began a series of discussions about whether they could join in a motion to this Court for a temporary stay on agreed-upon terms that both parties could accept. By August 29, 2017, however, the parties had determined that they would not be able to come to an agreement on the terms of a temporary stay pending the Board’s appeal.

Immediately thereafter, the Board filed a motion for temporary stay with the trial court. Ex. H, Board’s Motion for Temporary Stay (without exhibits). Notably, the State did not oppose the Board’s motion at all. Ex. I, Email from State’s Counsel. Only the SPI opposed the Board’s motion. *Id.*

On 14 September 2017, the trial court issued an order staying its decision for another 30 days to allow the Board the opportunity to pursue a

temporary stay and writ of supersedeas from the appellate courts. Ex. J, Order on Motion for Temporary Stay.

The Board then sought a temporary stay and writ of supersedeas from the Court of Appeals, which granted a narrow, partial stay on a limited issue. Ex. K, Court of Appeals' 5 October 2017 Order. The Court of Appeals' order reads as follows:

The petition filed in this cause by petitioner on 20 September 2017 and designated 'Petition for Writ of Supersedeas' is allowed, in part, to the extent that the challenged provisions of S.L. 2016-126 empower the Superintendent of Public Instruction to enter into statewide contracts for the public school system which could not be terminated by the Board immediately upon any decision by our Court in this matter which determines that the Board has the authority under our State Constitution to enter into such contracts. The petition is otherwise denied.

*Id.*

The Board now seeks a temporary stay and writ of supersedeas from this Court to stay the trial court's decision during the pendency of the Board's appeal.

### **ARGUMENT**

#### **I. A stay of the trial court's decision during the Board's appeal is necessary to preserve the North Carolina Constitution's nearly 150-year-old status quo.**

This Court has held that the purpose of a temporary stay and writ of supersedeas is to preserve the status quo while cases are on appeal. *See Craver v. Craver*, 298 N.C. 231, 237–38, 258 S.E.2d 357, 362 (1979)

(explaining that the purpose of the writ of supersedeas “is to preserve the *status quo* pending the exercise of appellate jurisdiction”) (citing *New Bern v. Walker*, 255 N.C. 355, 121 S.E.2d 544 (1961) (per curiam)).

The standard for issuing a temporary stay and writ of supersedeas is flexible: The Rule asks only whether “the writ should issue *in justice* to the applicant,” and, therefore, confers broad discretion on the appellate courts to protect the rights of litigants while a case is on appeal. N.C. R. App. P. 23(c) (emphasis added).

Here, a stay of the trial court’s decision during the appeal is warranted because it is necessary to preserve the Board’s constitutional power and duty to supervise and administer the State’s public schools—a nearly 150-year-old responsibility.

**A. The Board has managed North Carolina’s public schools for nearly 150 years.**

In 1868, the North Carolina Constitution proclaimed 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.” 1868 N.C. Const. art. I, § 15. These words have remained unchanged in the North Carolina Constitution since 1868, and they are unique to North Carolina. No other state constitution includes these words or includes any right to education in its citizens’ bill of rights.

To ensure that the State lived up to this promise to “guard and maintain” the right to public education, the people of North Carolina in their 1868 Constitution established the public school system and created the Board.

Article IX, Section 2 of the 1868 Constitution required the General Assembly to “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.” Ex. L, 1868 N.C. Const. art. IX. In turn, Article IX, Section 7 conferred broad, sweeping power on a State Board of Education composed of “[t]he Governor, Lieutenant Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction and Attorney General.” Under Article IX, Section 9, the people conferred on the Board the “full power to legislate and make all needful rules and regulations in relation to Free Public Schools, and the Educational Fund of the State.”

In sum, the people of North Carolina in their 1868 Constitution “establishe[d] the public school system,” then required that the “General Assembly provid[e] for it” and “the State Board of Education . . . manage it.” *Lane v. Stanly*, 65 N.C. 153, 157 (1871). For the past 148 years, this constitutional structure has remained unchanged. Since 1868, the Board has supervised and administered all facets of public education in North Carolina.

Today, the North Carolina Constitution continues to confer these broad, sweeping powers and duties on the Board. The current North Carolina Constitution was ratified by the voters in 1971. Article IX, Section 5 of the current 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.

Ex. M, 1971 N.C. Const. art. IX.

That constitutional provision means exactly what it says: “The State Board of Education is in charge of the public school system.” John V. Orth and Justice Paul M. Newby, *The North Carolina State Constitution*, at 180 (2d ed. 2013).

The weight of this constitutional responsibility to the people is reflected in the Board’s composition. Under Article IX, Section 4 of the North Carolina Constitution, the Board is composed of “the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session.” Article IX, Section 4 requires that these Board members serve “overlapping terms of eight years.” These lengthy, overlapping terms ensure that the Board maintains its institutional knowledge and expertise in public education.



In addition, Article IX, Section 4 requires that eight of the Governor's eleven appointments must be made from each of the eight educational districts. This geographic diversity ensures that the Board is representative of the people.

In stark contrast to the broad, sweeping powers and duties that the North Carolina Constitution confers on the Board, the North Carolina Constitution has always confined the SPI to a limited role. Article IX, Section 8 of the 1868 Constitution established the SPI as a member "*of the Board*" who served as the Board's "Secretary." 1868 N.C. Const. art. IX, § 8 (emphasis added). Today, Article IX, Section 4 of the North Carolina Constitution clarifies that the SPI is not even a voting member of the Board, and serves only as the "secretary and chief administrative officer *of the State Board of Education.*" N.C. Const. art. IX, § 4(2) (emphasis added).

Despite this clear delineation, however, the Transfer Legislation attempts to flip flop the Board's and the SPI's constitutionally mandated roles, as described below.

**B. The Transfer Legislation unconstitutionally transfers the Board's constitutional powers and duties to the SPI.**

It is a bedrock principle of constitutional law that when a constitution expressly confers certain powers and duties on an entity, those powers and duties cannot be transferred to a different entity without a constitutional

amendment. *See, e.g., Guthrie v. Taylor*, 279 N.C. 703, 712-13, 185 S.E.2d 193, 200 (1971) (explaining that Article IX, Section 5 is “a direct delegation by the people, themselves, in the Constitution of the State, of [a] portion of their power,” and, therefore, “we look only to the Constitution to determine what power has been delegated”); *State v. Camacho*, 329 N.C. 589, 597, 406 S.E.2d 868, 871 (1991) (holding that when the North Carolina Constitution expressly confers powers and duties on a constitutional officer, any “encroachment” by the other branches “invade[s] the province of an independent constitutional officer” and violates the North Carolina Constitution); *Wilmington, C. & A. R. Co. v. Board of Comm’rs*, 72 N.C. 10, 13 (1875) (holding that the General Assembly could not legislatively transfer local officers’ constitutional powers to Governor, Auditor and Treasurer because “[s]uch power is by the Constitution vested in the [local officers] alone, and cannot be taken away from them”); *King v. Hunter*, 65 N.C. 603, 612 (1871) (holding that the General Assembly could not legislatively

transfer sheriff's constitutional powers).<sup>4</sup> In short, constitutional powers and duties cannot be transferred by statute.

As described in the amended complaint, however, the Transfer Legislation transfers the Board's constitutional powers and duties to the SPI. The Transfer Legislation does so in two ways:

First, the Transfer Legislation attempts to transfer the powers and duties of the Board to supervise and administer the public schools. Ex. A ¶¶ 25(a)-(b). Most notably, Section 4 of the Transfer Legislation states: "It shall be the duty of the Superintendent of Public Instruction . . . to have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system." Ex. B § 4 (amending N.C. Gen. Stat. § 115C-21(a)(5)). Thus, the Transfer Legislation

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<sup>4</sup> Secondary authority also supports the voluminous case law on this point. See 1995 Op. N.C. Att'y Gen. 32 at 5 (quoting Thomas M. Cooley, A Treatise on Constitutional Limitations 215 (8th ed. 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."); Patrick C. McGinley, Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?, 99 W. VA. L. REV. 721, 760 (1997) (stating the "fundamental proposition that when a state constitution creates a constitutional office, the legislature may not by mere statute alter the core functions of that office"); Thomas M. Cooley, A Treatise on Constitutional Limitations 136 (5th ed. 1883) (stating that when "powers . . . are specially conferred by the constitution upon . . . [a] specified officer, the legislature cannot require or authorize [those powers] to be performed by any other officer or authority").

attempts to transfer to the SPI the same powers and duties that the people expressly conferred on the Board in their Constitution.

Second, the Transfer Legislation attempts to transfer the powers and duties of the Board to supervise and administer the educational funds provided for the public school system's support. Ex. A ¶¶ 25(c)-(d). Most notably, the Transfer Legislation states that "it shall be the duty of the Superintendent of Public Instruction to . . . administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units." Ex. B § 4 (amending N.C. Gen. Stat. § 115C-21(b)(1b)). Likewise, Sections 3 and 4 state that the SPI, as the head of the Department of Public Instruction, will "administer the funds appropriated for [the Department's] operation." *Id.* § 3 (amending N.C. Gen. Stat. § 115C-19); *id.* § 4 (amending N.C. Gen. Stat. § 115C-21(a)(1)). Thus, the Transfer Legislation attempts to transfer to the SPI the same powers and duties that the people expressly conferred on the Board in their Constitution.

These constitutional conflicts are readily apparent. As described above, the General Assembly essentially copied and pasted the constitutional text into the Transfer Legislation, then replaced the words "State Board of Education" with "Superintendent of Public Instruction." *See supra* at 2.

As Judge Stephens noted at the TRO hearing, this constitutional flaw makes this case "straightforward." Ex. C, TRO Hearing Transcript at 6.

After all, “[i]f there is a conflict between a statute and the Constitution, [the] Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation.” *City of Asheville v. North Carolina*, No. 391PA15, 794 S.E.2d 759, 766 (N.C. Dec. 21, 2016).

Yet the trial court upheld the Transfer Legislation, as described above. Then the trial court declined to grant a stay of its decision pending the Board’s appeal, even after one member of the three-judge panel (correctly) noted that allowing the law to take effect before the appeal is resolved would be akin to “cutting down trees,” and would amount to a “sea change.”

This Court, however, has broad discretion under Rules 8 and 23 to preserve the status quo for the State’s \$10 billion public school system and its 1.5 million children while the appeal is pending. *See, e.g., Craver*, 298 N.C. at 237–38, 258 S.E.2d at 362 (explaining that the purpose of the writ of supersedeas “is to preserve the *status quo* pending the exercise of appellate jurisdiction”).

As described below, the circumstances here warrant such a stay.

**C. The need to preserve the status quo pending appeal warrants a temporary stay and writ of supersedeas.**

As described above, the Board has supervised and administered the state’s public schools since 1868. While the General Assembly has attempted

in the past to delineate the relationship between the Board and the SPI—in ways that were unconstitutional, but went unchallenged—never has the Board been completely written out of the constitutional governance of the public schools, as the Transfer Legislation attempts to do here.

Without a stay of the trial court’s decision pending appeal, however, the Transfer Legislation will move the entire \$10 billion public school system under the control of a single individual for the first time in North Carolina history. Ex. N, 1/4/17 Cobey Affidavit ¶ 9. This seismic shift will generate enormous disruption for our State’s public schools. *Id.* Worse, this seismic shift would occur overnight, without any transition period whatsoever. *Id.*

As part of this disruption, the SPI would be immediately empowered to take drastic actions that could not be undone. Under the new law, the SPI could immediately and unilaterally designate up to 140 of the public school system’s key senior policymaking and managerial leaders as “exempt” from the State Personnel Act, then fire them at will. Ex. B §§ 3-4, 7-8; Ex. O, 9/1/17 Cobey Affidavit ¶¶ 5-11. The affected policymaking and managerial leaders include the Deputy State Superintendent, the Chief Financial Officer, the Chief Academic Officer, the Director of Communications, the Director of Human Resources, the Chief Information Technology Officer, the Internal Auditor, the Executive Director of the Office of Charter Schools, and the Superintendent of Innovative School Districts. Ex. O ¶¶ 5-11. These senior

policymaking and managerial leaders could not realistically be “unfired,” of course, if the trial court’s decision is ultimately reversed on appeal. *Id.*

The SPI would also be immediately empowered to unilaterally take other drastic actions. For example, the SPI could immediately and unilaterally reorganize the Department of Public Instruction. Ex. § 4. The SPI could also execute new statewide contracts for the public school system, and jeopardize the Board’s ability to manage more than 150 existing contracts involving tens of millions of dollars. Ex. N, 1/4/17 Cobey Affidavit ¶ 10. These actions would be impossible to undo after the fact. *Id.*

Simply put, if the trial court’s decision is reversed on appeal but is not stayed during the appeal, it will be virtually impossible in the instances described above to “unring the bell.” Sparing the litigants—and here, the 1.5 million public school children—from this situation is precisely why the appellate rules provide for a temporary stay and writ of supersedeas to stay trial court decisions pending appeal. N.C. R. App. P. 8, 23.

Lastly, a balancing of the equities weighs heavily in favor of a stay pending appeal. The State even conceded as much at the TRO hearing:

[THE COURT]: And that [would be] a fairly easy balancing test, wouldn’t it? A theoretical harm to the State and a real, practical harm to an agency that’s constitutionally mandated to care for the public school children of the state.

[THE STATE'S COUNSEL]: Yes, sir.

Ex. C at 34.

This concession makes sense, because a temporary stay pending the Board's appeal would not harm Defendants at all. The Board has exercised its constitutional powers and fulfilled its constitutional duties for nearly a century and a half. Surely Defendants would not be harmed by maintaining this longstanding status quo during the comparatively brief period of months that it will take for the appellate courts to resolve this dispute.

Notably, the State did not even oppose the Board's request for a stay—either before the three-judge panel or before the Court of Appeals. Presumably, the State does not oppose the Board's requested stay before this Court either.

For all of these reasons, the need to preserve the status quo pending appeal warrants a temporary stay and writ of supersedeas.

### **CONCLUSION**

The Board respectfully requests that the Court issue a temporary stay and writ of supersedeas staying the trial court's 14 July 2017 decision during the pendency of the Board's appeal.



Respectfully submitted the 5th day of October, 2017.

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*N.C. R. App. P. 33(b) Certification:  
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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was served by e-mail and U.S. Mail to the following:

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Blanchard, Miller, Lewis & Isley P.A.  
1117 Hillsborough Street  
Raleigh, NC 27603  
*Counsel for The Honorable Mark Johnson,  
Superintendent of Public Instruction*

This the 5th day of October, 2017.

s/ Andrew H. Erteschik  
Andrew H. Erteschik

VERIFICATION

The undersigned attorney for Plaintiff, after being duly sworn, says that the material allegations of this motion and petition are true to his personal knowledge, except those matters stated upon information and belief and, as to those matters, I believe them to be true.

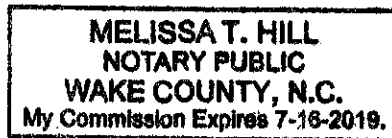
Saad Gul

Saad Gul

Wake County, North Carolina

Sworn to and subscribed before me:

Date: 9/19/2017



Melissa T. Hill, Notary Public

My Commission Expires: 7/16/2019

# Exhibit A

NORTH CAROLINA

WAKE COUNTY

NORTH CAROLINA STATE  
BOARD OF EDUCATION,

v.

THE STATE OF NORTH CAROLINA and  
MARK JOHNSON, in his official capacity,

Defendants.

FILED GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16-CVS-15607

2017 MAR 10 P 1:58

WAKE COUNTY, C.S.C.

Plaintiff,

**VERIFIED AMENDED COMPLAINT  
FOR DECLARATORY AND  
INJUNCTIVE RELIEF AND  
MOTION FOR PRELIMINARY  
INJUNCTIVE RELIEF**

### INTRODUCTION

1. This declaratory judgment action seeks a judicial determination on whether the North Carolina Constitution prohibits the General Assembly from attempting to transfer the State Board of Education's constitutional powers and duties to the Superintendent of Public Instruction ("the SPI").

2. Article IX, Section 5 of the North Carolina Constitution expressly confers certain "powers and duties" on the Board. Those constitutional powers and duties include:

- the power and duty to "supervise . . . the free public school system";
- the power and duty to "administer the free public school system";
- the power and duty to "supervise . . . the educational funds provided for [the free public school system's] support"; and
- the power and duty to "administer . . . the educational funds provided for [the free public school system's] support."

3. On December 16, 2016, for the first time in the Board's 148-year history, the General Assembly attempted to transfer these powers and duties from the Board to a single individual: the SPI.

4. The constitutional conflict caused by this attempted transfer is readily apparent:

<b>Article IX, Section 5 of the North Carolina Constitution</b>	<b>House Bill 17, Section 4 (N.C. Sess. Law 2016-126 § 4)</b>
It shall be the “duty” of “ <i>the State Board of Education</i> . . . [to] supervise and administer the free public school system.” (Emphasis added).	“It shall be the duty of <i>the Superintendent of Public Instruction</i> . . . to have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system.” (Emphasis added).

5. The members of the Board swore an oath to support and maintain the North Carolina Constitution. They also swore an oath to faithfully discharge the duties of their office, which include supervising and administering North Carolina’s \$10 billion public school system in the best interests of its 1.5 million students. Compelled by those duties to the people of North Carolina, the Board brings this action for declaratory and injunctive relief.

### **PARTIES**

6. The Board is a constitutional body that derives its powers and duties directly from the people through the North Carolina Constitution. This makes the Board unique among state government entities in North Carolina.

7. The State of North Carolina, through its General Assembly, enacts legislation, including the legislation described in this complaint.

8. Mark Johnson is a resident of Winston-Salem and the current SPI. As reflected in the Court’s March 1, 2017 order, SPI Johnson has indicated his intent to intervene as a party to this action. The Board has no objection to SPI Johnson’s intervention, and agrees with SPI

Johnson that he is a “person . . . whose rights, status or other legal relations are affected” under N.C. Gen. Stat. § 1-254. Accordingly, SPI Johnson is named as a party to this declaratory judgment action in his official capacity pursuant to N.C. Gen. Stat. § 1-254.

### **JURISDICTION AND VENUE**

9. This Court has subject matter jurisdiction over this action because the Board seeks declaratory and injunctive relief pursuant to the North Carolina Constitution, N.C. Gen. Stat. § 1-253, and N.C. Gen. Stat. § 7A-245. The purpose of a declaratory judgment is “to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations.” *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E.2d 654, 657 (1964). In a declaratory judgment action, “[i]f there is a conflict between a statute and the Constitution, [the] Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation.” *City of Asheville v. North Carolina*, No. 391PA15, slip op. at 13 (N.C. Dec. 21, 2016).

10. Venue is proper in Wake County Superior Court pursuant to N.C. Gen. Stat. § 1-77 because the Board seeks a declaratory judgment regarding legislation enacted by the General Assembly in Wake County.

### **FACTUAL ALLEGATIONS**

#### **The Constitutional Powers and Duties of the Board**

11. Article I, Section 15 of the North Carolina Constitution states 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.” These words first appeared in the 1868 North Carolina Constitution, and they have remained unchanged. These words are unique to North Carolina: No other state constitution includes these words or includes any right to education in its citizens’ bill of rights.



12. To ensure that the State lived up to this promise to “guard and maintain” the right to public education, the people of North Carolina in their 1868 Constitution established the public school system and created the Board. Article IX, Section 2 of the 1868 Constitution required the General Assembly to “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.” In turn, Article IX conferred broad, sweeping power on a State Board of Education composed of “[t]he Governor, Lieutenant Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction, and Attorney General.” Article IX, Section 9 of the 1868 Constitution, entitled “Power of Board,” conferred on the Board the “full power to legislate and make all needful rules and regulations in relation to Free Public Schools, and the Educational Fund of the State.”

13. Thus, the people of North Carolina in their 1868 Constitution “establishe[d] the public school system,” then required that the “General Assembly provid[e] for it” and “the State Board of Education . . . manage it.” *Lane v. Stanly*, 65 N.C. 153, 157 (1871). For the past 148 years, this constitutional structure has remained unchanged. Since 1868, the Board has supervised and administered all facets of public education in North Carolina.

14. Today, the North Carolina Constitution continues to confer these broad, sweeping powers and duties on the Board. The current North Carolina Constitution was ratified by the voters in 1971. Article IX, Section 5 of the current 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.

15. Today, the Board’s composition continues to reflect the weight of the Board’s constitutional responsibility to the people. Under Article IX, Section 4 of the North Carolina Constitution, the Board is composed of “the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session.” Article IX, Section 4 requires that these Board members serve “overlapping terms of eight years.” These lengthy, overlapping terms ensure that the Board maintains its institutional knowledge and expertise in public education. In addition, Article IX, Section 4 requires that eight of the Governor’s eleven appointments must be made from each of the eight educational districts. This geographic diversity ensures that the Board is representative of the people.

16. In contrast to the broad, sweeping powers and duties conferred on the Board, the North Carolina Constitution has always confined the SPI to a limited role. Article IX, Section 8 of the 1868 Constitution established the SPI as a member “*of the Board*” (emphasis added), who served as the Board’s “Secretary.” Today, Article IX, Section 4 of the North Carolina Constitution clarifies that the SPI is not even a voting member of the Board, and serves only as the “secretary and chief administrative officer *of the State Board of Education.*” (Emphasis added).

17. In short, the constitutional powers and duties of the Board are fixed by the North Carolina Constitution. It is a bedrock principle of constitutional law that when a constitution expressly confers certain powers and duties on an entity, those powers and duties cannot be transferred to someone else without a constitutional amendment.

### **The Transfer Legislation**

18. In 2004, June Atkinson was elected SPI. She was re-elected in 2008 and 2012.

19. On November 8, 2016, Mark Johnson was elected SPI.

20. On December 14, 2016, House Bill 17 was introduced in the General Assembly. Within two days, it passed both the House of Representatives and the Senate.

21. Three days later, on December 19, 2016, House Bill 17 was signed into law as Session Law 2016-126. A copy of Session Law 2016-126 is attached as Exhibit A.

22. Part I, Sections 1-6 and 8-32 of Session Law 2016-126 have an effective date of January 1, 2017. The remaining portions of Session Law 2016-126 became effective when it was signed into law on December 19, 2016.

23. As described above, the North Carolina Constitution expressly confers certain “powers and duties” on the Board: to “supervise and administer the free public school system and the educational funds provided for its support.” N.C. Const. art. IX, § 5. Session Law 2016-126 contains provisions, however, that attempt to transfer those powers and duties from the Board to the SPI (“the Transfer Legislation”).

24. The Transfer Legislation appears in Part I, Sections 1-12, 14-17, 24-25, and 28-30 of Session Law 2016-126, which amend existing statutes. Historically, these statutes stood as a legislative recognition—albeit an unnecessary one—that the North Carolina Constitution expressly confers certain powers and duties on the Board. The Transfer Legislation amends these statutes with precision, however, to replace the words “State Board of Education” with “Superintendent of Public Instruction.” Thus, the Transfer Legislation attempts to use the same statutes that recognize the Board’s constitutional powers and duties as a vehicle for transferring those powers and duties away.

25. The Transfer Legislation attempts to accomplish two unconstitutional objectives:

(a) First, the Transfer Legislation attempts to transfer the powers and duties of the Board to supervise and administer the public schools. Most notably, Section 4 of Session Law

2016-126 states: “It shall be the duty of the Superintendent of Public Instruction . . . to have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system.” N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(a)(5)). Thus, the Transfer Legislation attempts to transfer the same powers and duties that the people expressly conferred on the Board in their Constitution.

(b) In addition to this full transfer, the Transfer Legislation includes other provisions that attempt to transfer the powers and duties of the Board to supervise and administer the public school system. Those provisions include:

- N.C. Sess. Law 2016-126 § 1 (creating N.C. Gen. Stat. § 115C-11(i));
- N.C. Sess. Law 2016-126 § 1 (creating N.C. Gen. Stat. § 115C-11(j));
- N.C. Sess. Law 2016-126 § 2 (amending N.C. Gen. Stat. § 115C-12);
- N.C. Sess. Law 2016-126 § 3 (amending N.C. Gen. Stat. § 115C-19);
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(a)(1));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(a)(2));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(a)(3));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(a)(4));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(a)(5));
- N.C. Sess. Law 2016-126 § 4 (creating N.C. Gen. Stat. § 115C-21(a)(8));
- N.C. Sess. Law 2016-126 § 4 (creating N.C. Gen. Stat. § 115C-21(a)(9));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(b));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(b)(2));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(b)(3));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(b)(4));

- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(b)(5));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(b)(6));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(b)(7));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(b)(8));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(b)(9));
- N.C. Sess. Law 2016-126 § 6 (amending N.C. Gen. Stat. § 115C-410);
- N.C. Sess. Law 2016-126 § 7 (amending N.C. Gen. Stat. § 126-5(d));
- N.C. Sess. Law 2016-126 § 8 (amending N.C. Gen. Stat. § 126-5(d)(2));
- N.C. Sess. Law 2016-126 § 8 (amending N.C. Gen. Stat. § 126-5(d)(2a));
- N.C. Sess. Law 2016-126 § 8 (amending N.C. Gen. Stat. § 126-5(d)(4));
- N.C. Sess. Law 2016-126 § 8 (amending N.C. Gen. Stat. § 126-5(d)(5));
- N.C. Sess. Law 2016-126 § 8 (amending N.C. Gen. Stat. § 126-5(d)(6));
- N.C. Sess. Law 2016-126 § 9 (amending N.C. Gen. Stat. § 143-745(a)(1));
- N.C. Sess. Law 2016-126 § 10 (amending N.C. Gen. Stat. § 143A-44.1);
- N.C. Sess. Law 2016-126 § 11 (repealing N.C. Gen. Stat. § 143A-44.2);
- N.C. Sess. Law 2016-126 § 12 (amending N.C. Gen. Stat. § 143A-44.3);
- N.C. Sess. Law 2016-126 § 14 (amending N.C. Gen. Stat. § 115C-75.5(4));
- N.C. Sess. Law 2016-126 § 15 (amending N.C. Gen. Stat. § 115C-75.6);
- N.C. Sess. Law 2016-126 § 16 (amending N.C. Gen. Stat. § 115C-150.11);
- N.C. Sess. Law 2016-126 § 17 (amending N.C. Gen. Stat. § 115C-218);
- N.C. Sess. Law 2016-126 § 24 (amending N.C. Gen. Stat. § 115C-521);
- N.C. Sess. Law 2016-126 § 25 (amending N.C. Gen. Stat. § 115C-535);
- N.C. Sess. Law 2016-126 § 28 (amending Section 8.37(a) of S.L. 2015-241);

- N.C. Sess. Law 2016-126 § 29; and
- N.C. Sess. Law 2016-126 § 30.

(c) Second, the Transfer Legislation attempts to transfer the powers and duties of the Board to supervise and administer the educational funds provided for the public school system's support. Most notably, Session Law 2016-126 states that "it shall be the duty of the Superintendent of Public Instruction to . . . administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units." N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(b)(1b)). Likewise, Sections 3 and 4 state that the SPI, as the head of the Department of Public Instruction, will "administer the funds appropriated for [the Department's] operation." *Id.* § 3 (amending N.C. Gen. Stat. § 115C-19); *id.* § 4 (amending N.C. Gen. Stat. § 115C-21(a)(1)). Thus, the Transfer Legislation attempts to transfer the same powers and duties that the people expressly conferred on the Board in their Constitution.

(d) In addition to this full transfer, the Transfer Legislation includes other provisions that attempt to transfer the Board's constitutional powers and duties to supervise and administer the educational funds provided for the public school system's support. Those provisions include:

- N.C. Sess. Law 2016-126 § 1 (creating N.C. Gen. Stat. § 115C-11(i));
- N.C. Sess. Law 2016-126 § 1 (creating N.C. Gen. Stat. § 115C-11(j));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(a)(1));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(a)(6));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(a)(9));
- N.C. Sess. Law 2016-126 § 4 (creating N.C. Gen. Stat. § 115C-21(b)(1b));
- N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(b)(5));

- N.C. Sess. Law 2016-126 § 5 (amending N.C. Gen. Stat. § 115C-408(a));
- N.C. Sess. Law 2016-126 § 6 (amending N.C. Gen. Stat. § 115C-410);
- N.C. Sess. Law 2016-126 § 7 (amending N.C. Gen. Stat. § 126-5(d));
- N.C. Sess. Law 2016-126 § 12 (amending N.C. Gen. Stat. § 143A-44.3);
- N.C. Sess. Law 2016-126 § 14 (amending N.C. Gen. Stat. § 115C-75.5(4));
- N.C. Sess. Law 2016-126 § 15 (amending N.C. Gen. Stat. § 115C-75.6);
- N.C. Sess. Law 2016-126 § 16 (amending N.C. Gen. Stat. § 115C-150.11);
- N.C. Sess. Law 2016-126 § 17 (amending N.C. Gen. Stat. § 115C-218);
- N.C. Sess. Law 2016-126 § 24 (amending N.C. Gen. Stat. § 115C-521);
- N.C. Sess. Law 2016-126 § 25 (amending N.C. Gen. Stat. § 115C-535);
- N.C. Sess. Law 2016-126 § 28 (amending Section 8.37(a) of S.L. 2015-241);
- N.C. Sess. Law 2016-126 § 28 (amending Section 8.37(b) of S.L. 2015-241);
- N.C. Sess. Law 2016-126 § 28 (amending Section 8.37(c) of S.L. 2015-241);
- N.C. Sess. Law 2016-126 § 29; and
- N.C. Sess. Law 2016-126 § 30.

26. In sum, the Transfer Legislation attempts to transfer the Board’s constitutional powers and duties to the SPI. This transfer is in direct conflict with Article IX, Section 5 of the North Carolina Constitution. The Board seeks a judicial determination resolving this conflict.

**COUNT 1 – DECLARATORY AND INJUNCTIVE RELIEF**  
**Article IX, Section 5 of the North Carolina Constitution**

27. The Board re-alleges and incorporates by reference all preceding paragraphs.

28. Article IX, Section 5 expressly confers on the Board the “power and duty” to “supervise . . . the free public school system.” N.C. Const. art. IX, § 5. As described above,

however, the Transfer Legislation attempts to transfer that power and duty from the Board to the SPI.

29. Accordingly, the Board is entitled to a declaratory judgment and permanent injunction on the grounds that the Transfer Legislation violates Article IX, Section 5 of the North Carolina Constitution.

**COUNT 2 – DECLARATORY AND INJUNCTIVE RELIEF**  
**Article IX, Section 5 of the North Carolina Constitution**

30. The Board re-alleges and incorporates by reference all preceding paragraphs.

31. Article IX, Section 5 expressly confers on the Board the “power and duty” to “administer the free public school system.” N.C. Const. art. IX, § 5. As described above, however, the Transfer Legislation attempts to transfer that power and duty from the Board to the SPI.

32. Accordingly, the Board is entitled to a declaratory judgment and permanent injunction on the grounds that the Transfer Legislation violates Article IX, Section 5 of the North Carolina Constitution.

**COUNT 3 – DECLARATORY AND INJUNCTIVE RELIEF**  
**Article IX, Section 5 of the North Carolina Constitution**

33. The Board re-alleges and incorporates by reference all preceding paragraphs.

34. Article IX, Section 5 expressly confers on the Board the “power and duty” to “supervise . . . the educational funds provided for [the free public school system’s] support.” N.C. Const. art. IX, § 5. As described above, however, the Transfer Legislation attempts to transfer that power and duty from the Board to the SPI.



35. Accordingly, the Board is entitled to a declaratory judgment and permanent injunction on the grounds that the Transfer Legislation violates Article IX, Section 5 of the North Carolina Constitution.

**COUNT 4 – DECLARATORY AND INJUNCTIVE RELIEF**  
**Article IX, Section 5 of the North Carolina Constitution**

36. The Board re-alleges and incorporates by reference all preceding paragraphs.

37. Article IX, Section 5 expressly confers on the Board the “power and duty” to “administer . . . the educational funds provided for [the free public school system’s] support.” N.C. Const. art. IX, § 5. As described above, however, the Transfer Legislation attempts to transfer that power and duty from the Board to the SPI.

38. Accordingly, the Board is entitled to a declaratory judgment and permanent injunction on the grounds that the Transfer Legislation violates Article IX, Section 5 of the North Carolina Constitution.

**MOTION FOR PRELIMINARY INJUNCTIVE RELIEF**

39. The Board re-alleges and incorporates by reference all preceding paragraphs.

40. As described above, the Transfer Legislation violates the North Carolina Constitution. As a matter of law, this constitutional violation constitutes *per se* irreparable harm. Thus, no further showing of irreparable harm is required.

41. Moreover, even if a further showing of irreparable harm were required, the Transfer Legislation threatens to cause irreparable harm to the Board, the employees of the public school system, and—most importantly—North Carolina’s 1.5 million public school students. That irreparable harm includes:

- uncertainty over whether the Board will continue to supervise and administer the public school system's \$10 billion budget, or whether the SPI-Elect, Mark Johnson, will do so instead;
- uncertainty in employment status for dozens of state employees;
- uncertainty for the nearly 1,000 state employees whose job responsibilities will be implicated by the Transfer Legislation;
- the harm to North Carolina's 1.5 million students caused by the uncertainties described above.

42. On December 29, 2016, the Court issued a temporary restraining order enjoining the effectiveness, implementation, and enforcement of the Transfer Legislation. On January 6, 2017, by consent of the parties, the Court extended that temporary restraining order until a decision on the Board's motion for preliminary injunction. The Board now seeks a preliminary injunction enjoining the effectiveness, implementation, and enforcement of the Transfer Legislation.

### **REQUEST FOR RELIEF**

The Board respectfully requests that the Court:

- (a) declare that the Transfer Legislation violates Article IX, Section 5 of the North Carolina Constitution and issue a permanent injunction enjoining its implementation or enforcement;
- (b) grant the Board's motion for preliminary injunction and enjoin the Transfer Legislation during the pendency of this action;
- (c) assess costs against the State pursuant to N.C. Gen. Stat. § 1-263;
- (d) award reasonable attorneys' fees to the Board, as permitted by law; and

(e) grant the Board any and all other relief which the Court deems just and proper.

Respectfully submitted the 10th day of March, 2017.

**ROBERT F. ORR, PLLC**

By:



*for* Robert F. Orr *by AHE w/permission*  
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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**

The undersigned hereby certifies that a copy of the foregoing document was served by  
U.S. Mail and e-mail to the following:

Amar Majmundar  
Olga E. Vysotskaya de Brito  
N.C. Department of Justice  
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Raleigh, NC 27603  
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Philip R. Miller, III  
E. Hardy Lewis  
Blanchard, Miller, Lewis & Isley P.A.  
1117 Hillsborough Street  
Raleigh, NC 27603  
*Counsel for The Honorable Mark Johnson,  
Superintendent of Public Instruction*

This the 10th day of March, 2017.

  
\_\_\_\_\_  
Andrew H. Erteschik

STATE OF NORTH CAROLINA

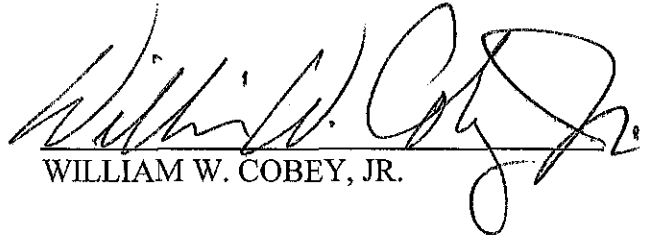
VERIFICATION

COUNTY OF ~~WAKE~~ Durham

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 *Verified Amended Complaint for Declaratory and Injunctive Relief and Motion for Preliminary Injunctive Relief* 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 10th day of March, 2017.

  
WILLIAM W. COBEY, JR.

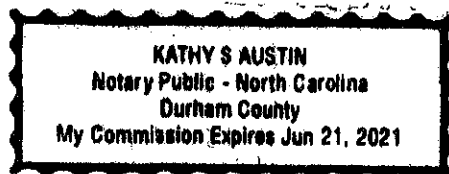
WAKE COUNTY, NORTH CAROLINA

Sworn to and subscribed before me this the 10th day of March, 2017.

  
Notary Public

My commission expires: 6-21-2021

[SEAL]



# Exhibit B

**GENERAL ASSEMBLY OF NORTH CAROLINA  
FOURTH EXTRA SESSION 2016**

**SESSION LAW 2016-126  
HOUSE BILL 17**

AN ACT TO CLARIFY THE SUPERINTENDENT OF PUBLIC INSTRUCTION'S ROLE AS THE ADMINISTRATIVE HEAD OF THE DEPARTMENT OF PUBLIC INSTRUCTION, TO CHANGE THE APPOINTMENTS PROCESS FOR THE BOARDS OF TRUSTEES FOR THE CONSTITUENT INSTITUTIONS OF THE UNIVERSITY OF NORTH CAROLINA, TO MODIFY THE APPOINTMENT OF HEADS OF PRINCIPAL STATE DEPARTMENTS, AND TO ESTABLISH TASK FORCE FOR SAFER SCHOOLS.

The General Assembly of North Carolina enacts:

**PART I. CLARIFY ROLES/DPI/SBE**

**SECTION 1.** G.S. 115C-11 reads as rewritten:

**"§ 115C-11. Organization and internal procedures of Board.**

...

(a1) Student advisors. – The ~~Governor~~ Superintendent of Public Instruction is hereby authorized to appoint two high school students who are enrolled in the public schools of North Carolina as advisors to the State Board of Education. The student advisors shall participate in State Board deliberations in an advisory capacity only. The State Board may, in its discretion, exclude the student advisors from executive sessions.

~~The Governor shall make initial appointments of student advisors to the State Board as follows:~~

- (1) ~~One high school junior shall be appointed for a two year term beginning September 1, 1986, and expiring June 14, 1988; and~~
- (2) ~~One high school senior shall be appointed for a one year term beginning September 1, 1986, and expiring June 14, 1987. When an initial or subsequent term expires, the Governor~~ The Superintendent of Public Instruction shall appoint a stagger the appointments of the two student advisors so that a high school junior ~~for~~ is serving in the first year of a two-year term and a high school senior is serving in the second year of a two-year term simultaneously. The appointment of a high school junior shall be made beginning June 15 of ~~that~~ each year. If a student advisor is no longer enrolled in the public schools of North Carolina or if a vacancy otherwise occurs, the ~~Governor~~ Superintendent of Public Instruction shall appoint a student advisor for the remainder of the unexpired term.

Student advisors shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

...

(a3) Superintendent Advisor. – The ~~Governor~~ Superintendent of Public Instruction shall appoint a superintendent of a local school administrative unit as an advisor to the State Board of Education. The superintendent advisor shall serve for a term of one year. The superintendent advisor shall participate in State Board deliberations and committee meetings in an advisory



capacity only. The State Board may, in its discretion, exclude the superintendent advisor from executive sessions.

In the event that a superintendent advisor ceases to be a superintendent in a local school administrative unit, the position of superintendent advisor shall be deemed vacant. In the event that a vacancy occurs in the position for whatever reason, the ~~Governor~~ Superintendent of Public Instruction shall appoint a superintendent advisor for the remainder of the unexpired term. The superintendent advisor to the State Board shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

...  
(i) Administrative Assistance. – The Superintendent of Public Instruction shall provide technical assistance and administrative assistance, including all personnel except as otherwise provided in subsection (j) of this section, to the State Board of Education through the Department of Public Instruction.

(j) Certain Personnel Appointed by the State Board. – The State Board may appoint only the following personnel positions to support the operations of the State Board of Education through the Department of Public Instruction:

	<u>Position number</u>	<u>Title</u>
(1)	<u>65023576</u>	<u>Attorney I.</u>
(2)	<u>60009384</u>	<u>Attorney II.</u>
(3)	<u>65003194</u>	<u>Paralegal II.</u>
(4)	<u>60095070</u>	<u>Administrative Assistant I."</u>

**SECTION 2.** G.S. 115C-12 reads as rewritten:

**"§ 115C-12. Powers and duties of the Board generally.**

The general supervision and administration of the free public school system shall be vested in the State Board of Education. The State Board of Education shall establish ~~policy~~ all needed rules and regulations for the system of free public schools, subject to laws enacted by the General Assembly. In accordance with Sections 7 and 8 of Article III of the North Carolina Constitution, the Superintendent of Public Instruction, as an elected officer and Council of State member, shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction. The powers and duties of the State Board of Education are defined as follows:

...."

**SECTION 3.** G.S. 115C-19 reads as rewritten:

**"§ 115C-19. Chief administrative officer of the State Board of Education.**

As provided in Article IX, Sec. 4(2) of the North Carolina Constitution, the Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education. ~~As secretary and chief administrative officer of the State Board of Education, the Superintendent manages on a day to day basis the administration of the free public school system, subject to the direction, control, and approval of the State Board. Subject to the direction, control, and approval of the State Board of Education, the Superintendent of Public Instruction~~ As provided in Sections 7 and 8 of Article III of the North Carolina Constitution, the Superintendent of Public Instruction shall be an elected officer and Council of State member and shall carry out the duties prescribed under G.S. 115C-21. G.S. 115C-21 as the administrative head of the Department of Public Instruction. The Superintendent of Public Instruction shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction."

**SECTION 4.** G.S. 115C-21 reads as rewritten:

**"§ 115C-21. Powers and duties generally.**

(a) Administrative Duties. – ~~Subject to the direction, control, and approval of the State Board of Education, it~~ It shall be the duty of the Superintendent of Public Instruction:



- (1) To organize and establish a Department of Public Instruction which shall include ~~such~~ divisions and departments as ~~the State Board considers necessary~~ for supervision and administration of the public school ~~system~~, to administer the funds appropriated for the operation of the Department of Public Instruction, in accordance with all needed rules and regulations adopted by the State Board of Education, and to enter into contracts for the operations of the Department of Public Instruction. All appointments of administrative and supervisory personnel to the staff of the Department of Public Instruction ~~are subject to the approval of the State Board of Education, which~~ Instruction and the State Board of Education, except for certain personnel appointed by the State Board of Education as provided in G.S. 115C-11(j), shall be under the control and management of the Superintendent of Public Instruction who may terminate these appointments ~~for cause~~ in conformity with Chapter 126 of the General Statutes, the North Carolina Human Resources Act.
  - (2) To keep the public informed as to the problems and needs of the public schools by constant contact with all school administrators and teachers, by personal appearance at public gatherings, and by information furnished to the press of the State.
  - (3) To report biennially to the Governor 30 days prior to each regular session of the General Assembly, such report to include information and statistics of the public schools, with recommendations for their improvement and for changes in the school law.
  - (4) To have printed and distributed such educational bulletins as are necessary for the professional improvement of teachers and for the cultivation of public sentiment for public education, and to have printed all forms necessary and proper for the administration of the Department of Public Instruction.
  - (5) To ~~manage~~ have under his or her direction and control, all ~~those~~ matters relating to the direct supervision and administration of the public school system that the State Board delegates to the Superintendent of Public Instruction.
  - (6) To create ~~and administer~~ special ~~fund~~ funds within the Department of Public Instruction to manage funds received as grants from nongovernmental sources in support of public education. ~~Effective July 1, 1995, this special fund is transferred to the State Board of Education and shall be administered by the State Board~~ education in accordance with G.S. 115C-410.
  - (7) Repealed by Session Laws 1995, c. 72, s. 2.
  - (8) To administer, through the Department of Public Instruction, all needed rules and regulations established by the State Board of Education.
  - (9) To have under his or her direction and control all matters relating to the provision of staff services, except certain personnel appointed by the State Board as provided in G.S. 115C-11(j), and support of the State Board of Education, including implementation of federal programs on behalf of the State Board.
- (b) Duties as Secretary to the State Board of Education. – ~~Subject to the direction, control, and approval of the State Board of Education,~~ As secretary to the State Board of Education, it shall be the duty of the Superintendent of Public Instruction:
- (1) ~~To administer through the Department of Public Instruction, the instructional policies established by the Board.~~
  - (1a) Repealed by Session Laws 1995, c. 72, s. 2.

- (1b) To administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units.
- (2) To keep the Board informed regarding developments in the field of public education.
- (3) To make recommendations to the Board with regard to the problems and needs of education in North Carolina.
- (4) To make available to the public schools a continuous program of comprehensive supervisory services.
- (5) To collect and organize information regarding the public schools, on the basis of which he or she shall furnish the Board such tabulations and reports as may be required by the Board.
- (6) To communicate to the public school administrators all information and instructions regarding ~~instructional policies and procedures~~ needed rules and regulations adopted by the Board.
- (7) To have custody of the official seal of the Board and to attest all deeds, leases, or written contracts executed in the name of the Board. All deeds of conveyance, leases, and contracts affecting real estate, title to which is held by the Board, and all contracts of the Board required to be in writing and under seal, shall be executed in the name of the Board by the chairman and attested by the secretary; and proof of the execution, if required or desired, may be had as provided by law for the proof of corporate instruments.
- (8) To attend all meetings of the Board and to keep the minutes of the proceedings of the Board in a well-bound and suitable book, which minutes shall be approved by the Board prior to its adjournment; and, as soon thereafter as possible, to furnish to each member of the Board a copy of said minutes.
- (9) To perform such other duties as may be necessary and appropriate for the Superintendent of Public Instruction in the role as secretary to the Board ~~may assign to him from time to time.~~ Board."

**SECTION 5.** G.S. 115C-408(a) reads as rewritten:

"(a) It is the policy of the State of North Carolina to create a public school system that graduates good citizens with the skills demanded in the marketplace, and the skills necessary to cope with contemporary society, using State, local and other funds in the most cost-effective manner. The Board shall have general supervision and administration of the educational funds provided by the State and federal governments, except those mentioned in Section 7 of Article IX of the State Constitution, and also excepting such local funds as may be provided by a county, city, or district. The Superintendent of Public Instruction shall administer any available educational funds through the Department of Public Instruction in accordance with all needed rules and regulations adopted by the State Board of Education."

**SECTION 6.** G.S. 115C-410 reads as rewritten:

**"§ 115C-410. Power to accept gifts and grants.**

The Board is authorized to adopt all needed rules and regulations related to the creation and administration of special funds within the Department of Public Instruction to manage any funds received as grants from nongovernmental sources in support of public education. In accordance with the State Board's rules and regulations, the Superintendent of Public Instruction is authorized to create and administer such special funds and to accept, receive, use, or reallocate to local school administrative units any gifts, donations, grants, devises, or other forms of voluntary contributions."

**SECTION 7.** G.S. 126-5(d) reads as rewritten:

- "(d) (1) Exempt Positions in Cabinet Department. – Subject to the provisions of this Chapter, which is known as the North Carolina Human Resources Act, the

Governor may designate a total of ~~4,500~~ 425 exempt positions throughout the following departments and offices:

- a. Department of Administration.
- b. Department of Commerce.
- c. Repealed by Session Laws 2012-83, s. 7, effective June 26, 2012, and by Session Laws 2012-142, s. 25.2E(a), effective January 1, 2013.
- d. Department of Public Safety.
- e. Department of Natural and Cultural Resources.
- f. Department of Health and Human Services.
- g. Department of Environmental Quality.
- h. Department of Revenue.
- i. Department of Transportation.
- j. Repealed by Session Laws 2012-83, s. 7, effective June 26, 2012, and by Session Laws 2012-142, s. 25.2E(a), effective January 1, 2013.
- k. Department of Information Technology.
- ~~l. Office of State Budget and Management.~~
- ~~m. Office of State Human Resources.~~
- n. Department of Military and Veterans Affairs.

- (2) Exempt Positions in Council of State Departments and Offices. – The Secretary of State, the Auditor, the Treasurer, the Attorney General, the Commissioner of Agriculture, the Commissioner of Insurance, and the Labor Commissioner may designate exempt positions. The State Board of Education may designate exempt positions in the Department of Public Instruction. The number of exempt policymaking positions in each department headed by an elected department head listed above in this ~~sub-subdivision~~ sub-subdivision, other than the Department of Public Instruction, shall be limited to ~~20-25~~ exempt policymaking positions or ~~one~~ two percent ~~(1%)(2%)~~ of the total number of full-time positions in the department, whichever is greater. The number of exempt managerial positions shall be limited to ~~20-25~~ positions or ~~one~~ two percent ~~(1%)(2%)~~ of the total number of full-time positions in the department, whichever is greater. The number of exempt policymaking positions designated by the State Board of Education shall be limited to 70 exempt policymaking positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater. The number of exempt managerial positions designated by the State Board of Education shall be limited to 70 exempt managerial positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater.

...

- (2c) Changes in Cabinet Department Exempt Position Designation. – If the status of a position designated exempt pursuant to subsection (d)(1) of this section is changed and the position is made subject to the provisions of this Chapter, an employee occupying the position who has been continuously employed in a permanent position for the immediate 12 preceding months, shall be deemed a career State employee as defined by G.S. 126-1.1(a) upon the effective date of the change in designation.

...."

**SECTION 8.** G.S. 126-5(d), as amended by Section 7 of this act, reads as rewritten:

- "(d) (1) Exempt Positions in Cabinet Department. – Subject to the provisions of this Chapter, which is known as the North Carolina Human Resources Act, the Governor may designate a total of 425 exempt positions throughout the following departments and offices:
- a. Department of Administration.
  - b. Department of Commerce.
  - c. Repealed by Session Laws 2012-83, s. 7, effective June 26, 2012, and by Session Laws 2012-142, s. 25.2E(a), effective January 1, 2013.
  - d. Department of Public Safety.
  - e. Department of Natural and Cultural Resources.
  - f. Department of Health and Human Services.
  - g. Department of Environmental Quality.
  - h. Department of Revenue.
  - i. Department of Transportation.
  - j. Repealed by Session Laws 2012-83, s. 7, effective June 26, 2012, and by Session Laws 2012-142, s. 25.2E(a), effective January 1, 2013.
  - k. Department of Information Technology.
  - l. Repealed.
  - m. Repealed.
  - n. Department of Military and Veterans Affairs.
- (2) Exempt Positions in Council of State Departments and Offices. – The Secretary of State, the Auditor, the Treasurer, the Attorney General, the Superintendent of Public Instruction, the Commissioner of Agriculture, the Commissioner of Insurance, and the Labor Commissioner may designate exempt positions. ~~The State Board of Education may designate exempt positions in the Department of Public Instruction.~~ The number of exempt policymaking positions in each department headed by an elected department head listed above in this sub-subdivision, ~~other than the Department of Public Instruction, sub-subdivision~~ shall be limited to 25 exempt policymaking positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater. The number of exempt managerial positions shall be limited to 25 positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater. The number of exempt policymaking positions designated by the ~~State Board of Education~~ Superintendent of Public Instruction shall be limited to 70 exempt policymaking positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater. The number of exempt managerial positions designated by the ~~State Board of Education~~ Superintendent of Public Instruction shall be limited to 70 exempt managerial positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater.
- (2a) Designation of Additional Positions. – ~~The Governor, Governor or~~ Governor or elected department head, ~~or State Board of Education head~~ may request that additional positions be designated as exempt. The request shall be made by sending a list of exempt positions that exceed the limit imposed by this subsection to the Speaker of the North Carolina House of Representatives and the President of the North Carolina Senate. A copy of the list also shall be sent to the Director of the Office of State Human Resources. The General Assembly may authorize all, or part of, the additional positions to be

designated as exempt positions. If the General Assembly is in session when the list is submitted and does not act within 30 days after the list is submitted, the list shall be deemed approved by the General Assembly, and the positions shall be designated as exempt positions. If the General Assembly is not in session when the list is submitted, the 30-day period shall not begin to run until the next date that the General Assembly convenes or reconvenes, other than for a special session called for a specific purpose not involving the approval of the list of additional positions to be designated as exempt positions; the policymaking positions shall not be designated as exempt during the interim.

- (2b) Designation of Liaison Positions. – Liaisons to the Collaboration for Prosperity Zones set out in G.S. 143B-28.1 for the Departments of Commerce, Environmental Quality, and Transportation are designated as exempt.
- (2c) Changes in Cabinet Department Exempt Position Designation. – If the status of a position designated exempt pursuant to subsection (d)(1) of this section is changed and the position is made subject to the provisions of this Chapter, an employee occupying the position who has been continuously employed in a permanent position for the immediate 12 preceding months, shall be deemed a career State employee as defined by G.S. 126-1.1(a) upon the effective date of the change in designation.
- (3) Letter. – These positions shall be designated in a letter to the Director of the Office of State Human Resources, the Speaker of the House of Representatives, and the President of the Senate by July 1 of the year in which the oath of office is administered to each Governor unless the provisions of subsection (d)(4) apply.
- (4) Vacancies. – In the event of a vacancy in the Office of Governor or in the office of a member of the Council of State, the person who succeeds to or is appointed or elected to fill the unexpired term shall make such designations in a letter to the Director of the Office of State Human Resources, the Speaker of the House of Representatives, and the President of the Senate within 180 days after the oath of office is administered to that person. ~~In the event of a vacancy in the Office of Governor, the State Board of Education shall make these designations in a letter to the Director of the Office of State Human Resources, the Speaker of the House of Representatives, and the President of the Senate within 180 days after the oath of office is administered to the Governor.~~
- (5) Creation, Transfer, or Reorganization. – ~~The Governor,~~Governor or elected department head, ~~or State Board of Education~~head may designate as exempt a position that is created or transferred to a different department, or is located in a department in which reorganization has occurred, after October 1 of the year in which the oath of office is administered to the Governor. The designation must be made in a letter to the Director of the Office of State Human Resources, the Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate within 180 days after such position is created, transferred, or in which reorganization has occurred.
- (6) Reversal. – Subsequent to the designation of a position as an exempt position as hereinabove provided, the status of the position may be reversed and made subject to the provisions of this Chapter by the ~~Governor,~~Governor or by an elected department head, ~~or by the State Board~~

~~of Education head~~ in a letter to the Director of the Office of State Human Resources, the Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate.

- (7) Hearing Officers. – Except for deputy commissioners appointed pursuant to G.S. 97-79 and as otherwise specifically provided by this section, no employee, by whatever title, whose primary duties include the power to conduct hearings, take evidence, and enter a decision based on findings of fact and conclusions of law based on statutes and legal precedents shall be designated as exempt. This subdivision shall apply beginning July 1, 1985, and no list submitted after that date shall designate as exempt any employee described in this subdivision."

**SECTION 9.** G.S. 143-745(a)(1) reads as rewritten:

- "(1) "Agency head" means the Governor, a Council of State member, a cabinet secretary, the President of The University of North Carolina, the President of the Community College System, the State Controller, and other independent appointed officers with authority over a State agency. ~~The agency head for the Department of Public Instruction shall be the State Board of Education.~~"

**SECTION 10.** G.S. 143A-44.1 reads as rewritten:

**"§ 143A-44.1. Creation.**

There is hereby created a Department of Public Instruction. The head of the Department of Public Instruction is the ~~State Board of Education. Any provision of G.S. 143A-9 to the contrary notwithstanding, the appointment of the State Board of Education shall be as prescribed in Article IX, Section (4)(1) of the Constitution.~~Superintendent of Public Instruction."

**SECTION 11.** G.S. 143A-44.2 is repealed.

**SECTION 12.** G.S. 143A-44.3 reads as rewritten:

**"§ 143A-44.3. Superintendent of Public Instruction; creation; transfer of powers and duties.**

The office of the Superintendent of Public Instruction, as provided for by Article III, Section 7 of the Constitution, and the Department of Public Instruction are transferred to the Department of Public Instruction. The Superintendent of Public Instruction shall be the Secretary and Chief Administrative Officer of the State Board of Education, and shall have all powers and duties conferred by this Chapter and the Constitution, delegated to him or her by the Governor and by the State Board of Education, and conferred by Chapter 115C of the General Statutes, Statutes and the laws of this State."

**SECTION 13.** G.S. 14-234(d6) is repealed.

**SECTION 14.** G.S. 115C-75.5(4) reads as rewritten:

- "(4) ASD Superintendent. – The superintendent of the ASD appointed by the ~~State Board of Education~~Superintendent of Public Instruction in accordance with G.S. 115C-75.6(b)."

**SECTION 15.** G.S. 115C-75.6 reads as rewritten:

**"§ 115C-75.6. Achievement School District.**

(a) There is established the Achievement School District (ASD) under the administration of the State Board of ~~Education~~Education and the Superintendent of Public Instruction. The ASD shall assume the supervision, management, and operation of elementary schools that have been selected as achievement schools pursuant to this Article.

(b) ~~An ASD Superintendent Selection Advisory Committee shall be established to make a recommendation to the State Board of Education on appointment of a superintendent to serve as the executive officer of the ASD. The Committee shall ensure that the individual recommended has qualifications consistent with G.S. 115C-271(a). The Lieutenant Governor shall serve as chair of the Committee and shall appoint the following additional members:~~

- (1) ~~Three members of the State Board of Education.~~
- (2) ~~One teacher or retired teacher.~~
- (3) ~~One principal or retired principal.~~
- (4) ~~One superintendent or retired superintendent.~~
- (5) ~~One parent of a student currently enrolled in a low performing school, as defined in G.S. 115C-105.37.~~

(c) ~~The State Board of Education shall consider the recommendation of the ASD Superintendent Selection Advisory Committee and Superintendent of Public Instruction shall~~ appoint a superintendent to serve as the executive officer of the ASD. The ASD Superintendent shall serve at the pleasure of the ~~State Board of Education~~ Superintendent of Public Instruction at a salary established by the ~~State Board of Education~~ Superintendent of Public Instruction within the funds appropriated for this purpose. The ASD Superintendent shall have qualifications consistent with G.S. 115C-271(a) and report directly to the ~~State Board of Education~~ Superintendent of Public Instruction.

(d) By January 15 annually, the State Board of ~~Education~~ Education, ~~Superintendent of Public Instruction~~, and the ASD Superintendent shall report to the Joint Legislative Education Oversight Committee on all aspects of operation of ASD, including the selection of achievement schools and their progress."

**SECTION 16.** G.S. 115C-150.11 reads as rewritten:

**"§ 115C-150.11. State Board of Education as governing agency.**

The State Board of Education shall be the sole governing agency for the Governor Morehead School for the Blind, the Eastern North Carolina School for the Deaf, and the North Carolina School for the Deaf. The ~~Department~~ Superintendent of Public Instruction through the Department of Public Instruction shall be responsible for the ~~administration~~ administration, including appointment of staff, and oversight of a school governed by this Article."

**SECTION 17.** G.S. 115C-218 reads as rewritten:

**"§ 115C-218. Purpose of charter schools; establishment of North Carolina Charter Schools Advisory Board and North Carolina Office of Charter Schools.**

...

(b) North Carolina Charter Schools Advisory Board. –

- (1) Advisory Board. – There is created the North Carolina Charter Schools Advisory Board, hereinafter referred to in this Article as the Advisory Board. The Advisory Board shall be located administratively within the Department of Public Instruction and shall report to the State Board of Education.
- (2) Membership. – The State Superintendent of Public Instruction, or the Superintendent's designee, shall be the secretary of the Advisory Board and a nonvoting member. ~~The Chair of the State Board of Education shall appoint a member of the State Board to serve as a nonvoting member of the Advisory Board.~~ The Advisory Board shall consist of the following 11 voting members:
  - a. ~~Three members appointed by the Governor, including the chair of the Advisory Board.~~
  - b. ~~Three~~ Four members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, in accordance with G.S. 120-121.
  - c. ~~Three~~ Four members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, in accordance with G.S. 120-121.
  - d. ~~One member~~ Two members appointed by the State Board of Education who ~~is~~ are not a ~~current member~~ members of the State

Board of Education and who ~~is~~are charter school ~~advocate~~advocates in North Carolina.

e. The Lieutenant Governor or the Lieutenant Governor's designee.

- (3) Covered board. – The Advisory Board shall be treated as a board for purposes of Chapter 138A of the General Statutes.
  - (4) Qualifications of members. – Members appointed to the Advisory Board shall collectively possess strong experience and expertise in public and nonprofit governance, management and finance, assessment, curriculum and instruction, public charter schools, and public education law. All appointed members of the Advisory Board shall have demonstrated an understanding of and a commitment to charter schools as a strategy for strengthening public education.
  - (5) Terms of office and vacancy appointments. – Appointed members shall serve four-year terms of office beginning on July 1. No appointed member shall serve more than eight consecutive years. Vacancy appointments shall be made by the appointing authority for the remainder of the term of office.
  - (6) Presiding officers and quorum. – The Advisory Board shall annually elect a chair and a vice-chair from among its membership. The chair shall preside over the Advisory Board's meetings. In the absence of the chair, the vice-chair shall preside over the Advisory Board's meetings. A majority of the Advisory Board constitutes a quorum.
  - (7) Presiding officers and quorum. – Meetings. – Meetings of the Advisory Board shall be held upon the call of the chair or the vice-chair with the approval of the chair.
  - (8) Expenses. – Members of the Advisory Board shall be reimbursed for travel and subsistence expenses at the rates allowed to State officers and employees by G.S. 138-6(a).
  - (9) Removal. – Any appointed member of the Advisory Board may be removed by a vote of at least two-thirds of the members of the Advisory Board at any duly held meeting for any cause that renders the member incapable or unfit to discharge the duties of the office.
  - (10) Powers and duties. – The Advisory Board shall have the following duties:
    - a. To make recommendations to the State Board of Education on the adoption of rules regarding all aspects of charter school operation, including time lines, standards, and criteria for acceptance and approval of applications, monitoring of charter schools, and grounds for revocation of charters.
    - b. To review applications and make recommendations to the State Board for final approval of charter applications.
    - c. To make recommendations to the State Board on actions regarding a charter school, including renewals of charters, nonrenewals of charters, and revocations of charters.
    - d. To undertake any other duties and responsibilities as assigned by the State Board.
  - (11) Duties of the chair of the Advisory Board. – In addition to any other duties prescribed in this Article, the chair of the Advisory Board, or the chair's designee, shall advocate for the recommendations of the Advisory Board at meetings of the State Board upon the request of the State Board.
- (c) North Carolina Office of Charter Schools. –
- (1) Establishment of the North Carolina Office of Charter Schools. – There is established the North Carolina Office of Charter Schools, hereinafter



referred to in this Article as the Office of Charter Schools. The Office of Charter Schools shall be administratively located in the Department of Public Instruction, ~~subject to the supervision, direction, and control of the State Board of Education.~~Instruction. The Office of Charter Schools shall consist of an executive director appointed by the ~~State Board of Education~~Superintendent of Public Instruction and such other professional, administrative, technical, and clerical personnel as may be necessary to assist the Office of Charter Schools in carrying out its powers and duties.

- (2) Executive Director. – The Executive Director shall report to and serve at the pleasure of the ~~State Board of Education~~Superintendent of Public Instruction at a salary established by the ~~State Board~~Superintendent within the funds appropriated for this purpose. The duties of the Executive Director shall include presenting the recommendations of the Advisory Board at meetings of the State Board upon the request of the State Board.
- (3) Powers and duties. – The Office of Charter Schools shall have the following powers and duties:
  - a. Serve as staff to the Advisory Board and fulfill any task and duties assigned to it by the Advisory Board.
  - b. Provide technical assistance and guidance to charter schools operating within the State.
  - c. Provide technical assistance and guidance to nonprofit corporations seeking to operate charter schools within the State.
  - d. Provide or arrange for training for charter schools that have received preliminary approval from the State Board.
  - e. Assist approved charter schools and charter schools seeking approval from the State Board in coordinating services with the Department of Public Instruction.
  - f. Other duties as assigned by the ~~State Board~~Superintendent of Public Instruction.
- (4) Agency cooperation. – All State agencies and departments shall cooperate with the Office of Charter Schools in carrying out its powers and duties as necessary in accordance with this Article."

**SECTION 18.** G.S. 115C-218.20(b) reads as rewritten:

"(b) No civil liability shall attach to the State Board of Education, the Superintendent of Public Instruction, or to any of their members or employees, individually or collectively, for any acts or omissions of the charter school."

**SECTION 19.** G.S. 115C-238.73(g) reads as rewritten:

"(g) There shall be no liability for negligence on the part of the board of directors, or its employees, or the State Board of Education, the Superintendent of Public Instruction, or ~~its any of their members or~~ employees, individually or collectively, arising from any act taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance, indemnification under Articles 31A and 31B of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Article 31 of Chapter 143 of the General Statutes."

**SECTION 20.** G.S. 115C-332(g) reads as rewritten:

"(g) There shall be no liability for negligence on the part of a local board of education, or its employees, or the State Board of Education, the Superintendent of Public Instruction, or ~~its any of their members or~~ employees, individually or collectively, arising from any act taken

or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance, indemnification under Articles 31A and 31B of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Chapter 31 of Chapter 143 of the General Statutes."

**SECTION 21.** G.S. 115C-333(e) reads as rewritten:

"(e) Civil Immunity. – There shall be no liability for negligence on the part of the State Board of ~~Education~~Education, the Superintendent of Public Instruction, or a local board of education, or their members or employees, individually or collectively, arising from any action taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance, indemnification under Articles 31A and 31B of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Article 31 of Chapter 143 of the General Statutes."

**SECTION 22.** G.S. 115C-333.1(g) reads as rewritten:

"(g) Civil Immunity. – There shall be no liability for negligence on the part of the State Board of ~~Education~~Education, the Superintendent of Public Instruction, or a local board of education, or their members or employees, individually or collectively, arising from any action taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance, indemnification under Articles 31A and 31B of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Article 31 of Chapter 143 of the General Statutes."

**SECTION 23.** G.S. 115C-390.3(c) reads as rewritten:

"(c) Notwithstanding any other law, no ~~officer~~officer, member, or employee of the State Board of ~~Education~~Education, the Superintendent of Public Instruction, or of a local board of ~~education~~education, individually or collectively, shall be civilly liable for using reasonable force in conformity with State law, State or local rules, or State or local policies regarding the control, discipline, suspension, and expulsion of students. Furthermore, the burden of proof is on the claimant to show that the amount of force used was not reasonable."

**SECTION 24.** G.S. 115C-521 reads as rewritten:

**"§ 115C-521. Erection of school buildings.**

...

(b) It shall be the duty of the local boards of education ~~of the several local school administrative school units of the State~~ to make provisions for the public school term by providing adequate school buildings equipped with suitable school furniture and apparatus. The needs and the cost of those buildings, equipment, and apparatus, shall be presented each year when the school budget is submitted to the respective tax-levying authorities. The boards of commissioners shall be given a reasonable time to provide the funds which they, upon investigation, shall find to be necessary for providing their respective units with buildings suitably equipped, and it shall be the duty of the several boards of county commissioners to provide funds for the same.

Upon determination by a local board of education that the existing permanent school building does not have sufficient classrooms to house the pupil enrollment anticipated for the school, the local board of education may acquire and use as temporary classrooms for the

operation of the school, relocatable or mobile classroom units, whether built on the lot or not, which units and method of use shall meet the approval of the School Planning Division of the ~~State Board of Education~~, Department of Public Instruction, and which units shall comply with all applicable requirements of the North Carolina State Building Code and of the local building and electrical codes applicable to the area in which the school is located. These units shall also be anchored in a manner required to assure their structural safety in severe weather. The acquisition and installation of these units shall be subject in all respects to the provisions of Chapter 143 of the General Statutes. The provisions of Chapter 87, Article 1, of the General Statutes, shall not apply to persons, firms or corporations engaged in the sale or furnishing to local boards of education and the delivery and installation upon school sites of classroom trailers as a single building unit or of relocatable or mobile classrooms delivered in less than four units or sections.

...  
 (f) A local board of education may use prototype designs from the clearinghouse established under subsection (e) of this section that is a previously approved and constructed project by the School Planning Division of the ~~State Board of Education~~, Department of Public Instruction and other appropriate review agencies. The local board of education may contract with the architect of record to make changes and upgrades as necessary for regulatory approval.

...."

**SECTION 25.** G.S. 115C-535 reads as rewritten:

**"§ 115C-535. Authority and rules for organization of system.**

The ~~State Board of Education~~Superintendent of Public Instruction is hereby authorized, directed and empowered to establish a division to manage and operate a system of insurance for public school ~~property~~-property in accordance with all needed rules and regulations adopted by the ~~State Board of Education~~. The Board shall adopt such rules and regulations as, in its discretion, may be necessary to provide all details inherent in the insurance of public school property. The ~~Board~~Superintendent of Public Instruction shall employ a director, safety inspectors, engineers and other personnel with suitable training and experience, which in ~~its~~his or her opinion is necessary to insure and protect effectively public school property, and ~~the~~ she or he shall fix their compensation consistent with the ~~approval~~policies of the ~~Personnel~~State Human Resources Commission."

**SECTION 26.** G.S. 116-239.12(g) reads as rewritten:

"(g) There shall be no liability for negligence on the part of the board of trustees, or its employees, or the State Board of ~~Education~~Education, the Superintendent of Public Instruction, or ~~its~~their members or employees, individually or collectively, arising from any act taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance, indemnification under Articles 31A and 31B of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Article 31 of Chapter 143 of the General Statutes."

**SECTION 27.** G.S. 143B-146.16(g) reads as rewritten:

"(g) There shall be no liability for negligence on the part of the Secretary, the Department of Health and Human Services or its employees, a residential school or its employees, or the State Board of ~~Education~~Education, Superintendent of Public Instruction, or ~~its~~their members or employees, individually or collectively, arising from any act taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance,

indemnification under Articles 31A and 31B of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Article 31 of Chapter 143 of the General Statutes."

**SECTION 28.** Section 8.37 of S.L. 2015-241, as amended by Section 8.30 of S.L. 2016-94, reads as rewritten:

**"BUDGET REDUCTIONS/DEPARTMENT OF PUBLIC INSTRUCTION**

**"SECTION 8.37.(a)** Notwithstanding G.S. 143C-6-4, the ~~State Board of Education~~ Department of Public Instruction may, after consultation with the Office of State Budget and Management and the Fiscal Research Division, reorganize the Department of Public Instruction, if necessary, to implement the budget reductions for the 2015-2017 fiscal biennium. Consultation shall occur prior to requesting budgetary and personnel changes through the budget revision process. The ~~State Board~~ Department of Public Instruction shall provide a current organization chart for the Department of Public Instruction in the consultation process and shall report to the Joint Legislative Commission on Governmental Operations on any reorganization.

**"SECTION 8.37.(b)** In implementing budget reductions for the 2015-2017 fiscal biennium, the ~~State Board of Education~~ Department of Public Instruction shall make no reduction to funding or positions for (i) the North Carolina Center for Advancement of Teaching and (ii) the Eastern North Carolina School for the Deaf, the North Carolina School for the Deaf, and the Governor Morehead School, except that the ~~State Board~~ Superintendent of Public Instruction may, in its discretion, reduce positions at these institutions that have been vacant for more than 16 months. The ~~State Board~~ Department of Public Instruction shall also make no reduction in funding to any of the following entities:

- (1) Communities in Schools of North Carolina, Inc.
- (2) Teach For America, Inc.
- (3) Beginnings for Parents of Children who are Deaf or Hard of Hearing, Inc.

**"SECTION 8.37.(c)** In implementing budget reductions for the 2016-2017 fiscal year, the Department of Public Instruction shall do all of the following:

- (1) In addition to the prohibition on a reduction to funding and positions for the items listed in subsection (b) of this section, the Department shall make no transfers from or reduction to funding or positions for the following:
  - a. The Excellent Public Schools Act, Read to Achieve Program, initially established under Section 7A.1 of S.L. 2012-142.
  - b. The North Carolina School Connectivity Program.
- (2) The Department shall transfer the sum of fifty thousand dollars (\$50,000) to the Office of Administrative Hearings to be allocated to the Rules Review Commission, created by G.S. 143B-30.1, to pay for any litigation costs incurred in the defense of *North Carolina State Board of Education v. The State of North Carolina and The Rules Review Commission*, Wake County Superior Court, File No. 14 CVS 14791 (filed November 7, 2014). These funds shall not revert at the end of the 2016-2017 fiscal year but shall remain available during the 2017-2018 fiscal year for expenditure in accordance with the provisions of this subdivision."

**SECTION 29.** By May 15, 2017, the State Board of Education shall revise, as necessary, any of its rules and regulations to comply with the provisions of this Part.

**SECTION 30.** The Department of Public Instruction shall review all State laws and rules and regulations governing the public school system to ensure compliance with the intent of this Part to restore authority to the Superintendent of Public Instruction as the administrative head of the Department of Public Instruction and the Superintendent's role in the direct supervision of the public school system. By April 15, 2017, the Department of Public

Instruction shall report to the 2017 General Assembly on the results of its review, including any recommended legislation.

**SECTION 31.** Notwithstanding G.S. 115C-11, as amended by this act, the current student advisor and the local superintendent advisor members serving on the State Board of Education as of the effective date of this Part shall serve the remainder of their terms. Thereafter, as terms expire, or when a vacancy occurs prior to the expiration of a term, the student advisor and local superintendent advisor members on the State Board shall be appointed by the Superintendent of Public Instruction in accordance with G.S. 115C-11, as amended by this act.

**SECTION 32.** Notwithstanding G.S. 115C-218, as amended by this act, the current members serving on the North Carolina Charter Schools Advisory Board as of the effective date of this Part shall serve the remainder of their terms. For the two terms appointed by the Governor expiring in 2017, one member shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, in accordance with G.S. 120-121, and one member shall be appointed by the State Board of Education in accordance with G.S. 115C-218. For the one term appointed by the Governor expiring in 2019, that member shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, in accordance with G.S. 120-121. As terms expire thereafter or as vacancies occur prior to the expiration of a term, the members on the North Carolina Charter Schools Advisory Board shall be appointed in accordance with G.S. 115C-218, as amended by this act. If a vacancy occurs in a seat appointed by the Governor, the State Board of Education shall fill that vacancy for the remainder of that term. Upon expiration of that term, the member shall be appointed in accordance with G.S. 115C-218.

**SECTION 33.** Sections 1 through 6 and Sections 8 through 32 of this Part become effective January 1, 2017. The remainder of this Part is effective when it becomes law.

## **PART II. MODIFY APPOINTMENT OF UNC BOARDS OF TRUSTEES**

**SECTION 35.** G.S. 116-31 reads as rewritten:

### **"§ 116-31. Membership of the boards of trustees.**

(a) ~~All persons who, as of June 30, 1972, are serving as trustees of the regional universities and of the North Carolina School of the Arts, redesignated effective August 1, 2008, as the "University of North Carolina School of the Arts," except those who may have been elected to the Board of Governors, shall continue to serve for one year beginning July 1, 1972, and the terms of all such trustees shall continue for the period of one year.~~

(b) Effective July 1, 1972, a separate board of trustees shall be created for each of the following institutions: North Carolina State University at Raleigh, the University of North Carolina at Asheville, the University of North Carolina at Chapel Hill, the University of North Carolina at Charlotte, the University of North Carolina at Greensboro, and the University of North Carolina at Wilmington. ~~For the period commencing July 1, 1972, and ending June 30, 1973, each such board shall be constituted as follows:~~

(1) ~~Twelve or more persons elected prior to July 1, 1972, by and from the membership of the Board of Trustees of the University of North Carolina, and~~

(2) ~~The president of the student government of the institution, ex officio.~~

(c) ~~If any vacancy should occur in any board of trustees during the year beginning July 1, 1972, the Governor may appoint a person to serve for the balance of the year.~~

(d) Except as provided in G.S. 116-65, ~~effective July 1, 1973,~~ each of the 16 institutions of higher education set out in G.S. 116-2(4) shall have board of trustees composed of 13 persons chosen as follows:

(1) Eight elected by the Board of ~~Governors,~~Governors.

(2) ~~Four appointed by the Governor, and~~

(2a) Four members appointed by the General Assembly under G.S. 120-121, two of whom shall be appointed upon the recommendation of the President Pro Tempore of the Senate and two of whom shall be appointed upon the recommendation of the Speaker of the House of Representatives.

(3) The president of the student government ex officio.

The Board of Trustees of the North Carolina School of Science and Mathematics shall be established in accordance with G.S. 116-233.

(e) ~~From and after July 1, 1973, the~~The term of office of all trustees, except the ex officio member, shall be four years, commencing on July 1 of odd-numbered years. In every odd-numbered year the Board of Governors shall elect four persons to each board of trustees and the ~~Governor-General Assembly~~ shall appoint ~~two persons~~ one person upon the recommendation of the President Pro Tempore of the Senate and one person upon the recommendation of the Speaker of the House of Representatives to each such board.

(g) ~~From and after July 1, 1973, any~~Any person who has served two full four-year terms in succession as a member of a board of trustees shall, for a period of one year, be ineligible for election or appointment to the same board but may be elected or appointed to the board of another institution.

(h) No member of the General Assembly or officer or employee of the State, The University of North Carolina, or any constituent institution shall be eligible for election or appointment as a trustee. No spouse of a member of the General Assembly, or of an officer or employee of a constituent institution may be a trustee of that constituent institution. Any trustee who is elected or appointed to the General Assembly or who becomes an officer or employee of the State, The University of North Carolina, or any constituent institution or whose spouse is elected or appointed to the General Assembly or becomes an officer or employee of that constituent institution shall be deemed thereupon to resign from his or her membership on the board of trustees.

(i) No person may serve simultaneously as a member of a board of trustees and as a member of the Board of Governors. Any trustee who is elected or appointed to the Board of Governors shall be deemed to resign as a trustee effective as of the date that his or her term commences as a member of the Board of Governors.

(j) ~~From and after July 1, 1973, whenever~~Whenever any vacancy shall occur in the membership of a board of trustees among those appointed by the ~~Governor-General Assembly~~, it shall be the duty of the secretary of the board to inform the ~~Governor-General Assembly~~ of the existence of such vacancy, and the ~~Governor~~ shall appoint a person to fill the ~~unexpired term~~, vacancy shall be filled as provided in G.S. 120-122, and whenever any vacancy shall occur among those elected by the Board of Governors, it shall be the duty of the secretary of the board to inform the Board of Governors of the existence of the vacancy, and the Board of Governors shall elect a person to fill the unexpired term. Whenever a member shall fail, for any reason other than ill health or service in the interest of the State or nation, to be present for three successive regular meetings of a board of trustees, his or her place as a member shall be deemed vacant."

**SECTION 36.** G.S. 116-233 reads as rewritten:

**"§ 116-233. Board of Trustees; appointment; terms of office.**

(a) Notwithstanding the provisions of G.S. 116-31(d), there shall be a Board of Trustees of the School, which shall consist of up to 30 members as follows:

(1) Thirteen members who shall be appointed by the Board of Governors of The University of North Carolina, one from each congressional district.

(2) Four members without regard to residency who shall be appointed by the Board of Governors of The University of North Carolina.

- (3) Three members, ex officio, who shall be the chief academic officers, respectively, of constituent institutions. The Board of Governors shall in 1985 and quadrennially thereafter designate the three constituent institutions whose chief academic officers shall so serve, such designations to expire on June 30, 1989, and quadrennially thereafter.
- (4) The chief academic officer of a college or university in North Carolina other than a constituent institution, ex officio. The Board of Governors shall designate in 1985 and quadrennially thereafter which college or university whose chief academic officer shall so serve, such designation to expire on June 30, 1989, and quadrennially thereafter.
- (5) ~~Two~~ Three members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121.
- (6) ~~Two~~ Three members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121.
- ~~(7) Two members appointed by the Governor.~~
- (8) The president of the student government, ex officio, who shall be a nonvoting member.
- (9) Up to two additional nonvoting members selected at the discretion of the chancellor and the Board of Trustees, with terms expiring June 30 of each year.

(b) Appointed members of the Board of Trustees shall be selected for their interest in and commitment to public education and to the purposes of the School, and they shall be charged with the responsibility of serving the interests of the whole State. In appointing members, the objective shall be to obtain the services of the best qualified persons, taking into consideration the desirability of diversity of membership, including men and women, representatives of different races, and members of different political parties.

(c) No member of the General Assembly or officer or employee of the State, the School, The University of North Carolina, or of any constituent institution of The University of North Carolina, shall be eligible to be appointed to the Board of Trustees except as specified under subdivision (3) of subsection (a) of this section. No spouse of a member of the General Assembly, or of an officer or employee of the school may be a member of the Board of Trustees. Any appointed trustee who is elected or appointed to the General Assembly or who becomes an officer or employee of the State, except as specified under subdivision (3) of subsection (a) of this section, or whose spouse is elected or appointed to the General Assembly or becomes such an officer or employee of the School, shall be deemed thereupon to resign from his or her membership on the Board of Trustees. This subsection does not apply to ex officio members.

(d) Members appointed under subdivisions (1) or (2) of subsection (a) of this section shall serve staggered four-year terms expiring June 30 of odd numbered years.

(d1) Only an ex officio member shall be eligible to serve more than two successive terms.

(d2) Any vacancy in the membership of the Board of Trustees appointed under G.S. 116-233(a)(1) or (2) shall be reported promptly by the Secretary of the Board of Trustees to the Board of Governors of The University of North Carolina, which shall fill any such vacancy by appointment of a replacement member to serve for the balance of the unexpired term. Any vacancy in members appointed under G.S. 116-233(a)(5) or (6) shall be filled in accordance with G.S. 120-122. ~~Any vacancy in members appointed under G.S. 116-233(a)(7) shall be filled by the Governor for the remainder of the unexpired term. Reapportionment of~~

congressional districts does not affect the right of any member to complete the term for which the member was appointed.

(e) ~~Of the initial members appointed under G.S. 116-233(a)(5), G.S. 116-233(a)(5) in 1985, one member shall serve a term to expire June 30, 1987, and one member shall serve a term to expire June 30, 1989. Subsequent appointments shall be for four-year terms. The initial members appointed under G.S. 116-233(a)(6), G.S. 116-233(a)(6) in 1985 shall be appointed for terms to expire June 30, 1987. Subsequent appointments shall be for two-year terms. The initial members appointed under G.S. 116-233(a)(7) shall be appointed for terms to expire January 15, 1989. Successors shall be appointed for four-year terms until January 15, 2017, at which point subsequent appointments shall be for four-year terms.~~

(e1) The initial members appointed under G.S. 116-233(a)(5) and (6) in 2017, and successors of those members, shall serve four-year terms.

(f) Whenever an appointed member of the Board of Trustees shall fail, for any reason other than ill health or service in the interest of the State or nation, to be present at three successive regular meetings of the Board, his or her place as a member of the Board shall be deemed vacant."

**SECTION 37.** This Part is effective when it becomes law and applies to (i) vacancy appointments made on or after that date and (ii) appointments to fill terms expiring January 15, 2017, and thereafter. A vacancy by any board member appointed by the Governor to any board affected by this Part shall be filled by joint recommendation of the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as provided in G.S. 120-121. The terms of members holding office as of the effective date of this Part shall not be affected.

### **PART III. SENATE CONFIRMATION OF CABINET APPOINTEES**

**SECTION 38.** G.S. 143B-9 reads as rewritten:

#### **"§ 143B-9. Appointment of officers and employees.**

(a) The head of each principal State department, except those departments headed by popularly elected officers, shall be appointed by the Governor and serve at his-the Governor's pleasure. The salary of the head of each of the principal State departments shall be set by the Governor, and the salary of elected officials shall be as provided by law.

For each head of each principal State department covered by this subsection, the Governor shall notify the President of the Senate of the name of each person to be appointed, and the appointment shall be subject to senatorial advice and consent in conformance with Section 5(8) of Article III of the North Carolina Constitution unless (i) the senatorial advice and consent is expressly waived by an enactment of the General Assembly or (ii) a vacancy occurs when the General Assembly is not in regular session. Any person appointed to fill a vacancy when the General Assembly is not in regular session may serve without senatorial advice and consent for no longer than the earlier of the following:

- (1) The date on which the Senate adopts a simple resolution that specifically disapproves the person appointed.
- (2) The date on which the General Assembly shall adjourn pursuant to a joint resolution for a period longer than 30 days without the Senate adopting a simple resolution specifically approving the person appointed.

(b) The head of a principal State department shall appoint a chief deputy or chief assistant, and such chief deputy or chief assistant shall not be subject to the North Carolina Human Resources Act. The salary of such chief deputy or chief assistant shall be set by the Governor. Unless otherwise provided for in the Executive Organization Act of 1973, and subject to the provisions of the ~~Personnel~~ Human Resources Act, the head of each principal State department shall designate the administrative head of each transferred agency and all employees of each division, section, or other unit of the principal State department."



**SECTION 39.** This Part is effective when it becomes law.

**PART IV. ESTABLISH TASK FORCE FOR SAFER SCHOOLS; TRANSFER CENTER FOR SAFER SCHOOLS**

**SECTION 41.1.(a)** Effective December 15, 2016, the Center for Safer Schools is hereby moved to the Department of Public Instruction, Division of Safe and Healthy Schools Support. This transfer shall have all of the elements of a Type I transfer, as defined in G.S. 143A-6.

**SECTION 41.1.(b)** Article 8C of Chapter 115C of the General Statutes is amended by adding two new sections to read:

**"§ 115C-105.55. Establish Task Force for Safer Schools.**

(a) Task Force Established. – There is hereby created the Task Force for Safer Schools within the North Carolina Department of Public Instruction.

(b) Membership. – The Task Force shall consist of 25 members. The composition of the Task Force shall include all of the following:

- (1) The Secretary of the Department of Public Safety or the Secretary's designee.
- (2) The Secretary of the Department of Health and Human Services or the Secretary's designee.
- (3) A member of the State Board of Education appointed by the Governor.
- (4) Two local school board members appointed by the Chair of the State Board of Education.
- (5) A representative from the North Carolina Department of Public Safety, Division of Emergency Management, appointed by the Secretary of the Department of Public Safety.
- (6) A representative from the North Carolina Justice Academy appointed by the Attorney General.
- (7) A member of the Governor's Crime Commission appointed by the Governor.
- (8) Two local law enforcement officers appointed by the Governor.
- (9) Two public school administrators appointed by the Chair of the State Board of Education.
- (10) A public school teacher appointed by the Chair of the State Board of Education.
- (11) A public school psychologist appointed by the Governor.
- (12) A public school resource officer appointed by the Governor.
- (13) Two high school students currently enrolled at public high schools appointed by the Governor.
- (14) A parent of a currently enrolled public school student appointed by the Governor.
- (15) A juvenile justice professional appointed by the Governor.
- (16) A North Carolina licensed social worker appointed by the Governor.
- (17) A North Carolina licensed school counselor appointed by the Governor.
- (18) An expert in gang intervention and prevention in schools appointed by the Governor.
- (19) Three at-large members appointed by the Governor.

(c) Appointment of Chair and Vice-Chair. – The Governor shall appoint a Chair and Vice-Chair from among the membership of the Task Force. The Chair and Vice-Chair shall serve at the pleasure of the Governor.

(d) Terms; Vacancies. – Effective December 1, 2016, all members shall be appointed for a term of four years. Members may be reappointed to successive terms. Any appointment to

fill a vacancy on the Task Force created by the resignation, dismissal, death, disability, or disqualification of a member shall be for the balance of the unexpired term.

(e) Removal. – The Governor shall have the authority to remove any member of the Task Force for misfeasance, malfeasance, or nonfeasance, pursuant to the provisions of G.S. 143B-13.

(f) Per Diem, Etc. – Members of the Task Force may receive necessary per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate.

**"§ 115C-105.56. Task Force for Safer Schools; powers and duties.**

The Task Force shall have all of the following duties:

- (1) To serve as an advisory board to the Center for Safer Schools.
- (2) To provide guidance and recommendations to the Governor, Superintendent of Public Instruction, and the General Assembly to improve statewide policy to enhance statewide and local capacities to create safer schools.
- (3) To encourage interagency collaboration among State and local government agencies to achieve effective policies and streamline efforts to create safer schools.
- (4) To Assist the Center for Safer Schools in collecting and disseminating information on recommended best practices and community needs related to creating safer schools in North Carolina.
- (5) Other duties as assigned by the State Board of Education."

**PART V. SEVERABILITY CLAUSE AND EFFECTIVE DATE**

**SECTION 42.** If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end, the provisions of this act are severable.

**SECTION 43.** Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 16<sup>th</sup> day of December, 2016.

s/ Daniel J. Forest  
President of the Senate

s/ Tim Moore  
Speaker of the House of Representatives

s/ Pat McCrory  
Governor

Approved 4:30 p.m. this 19<sup>th</sup> day of December, 2016

# Exhibit C

NORTH CAROLINA STATE )  
BOARD OF EDUCATION, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
THE STATE OF NORTH )  
CAROLINA, )  
 )  
Defendant. )  
 )  
 )

RALEIGH, NORTH CAROLINA

800.955.0541

1 MS. VYSOTSKAYA: That is fine.

2 THE COURT: I apologize. That's not  
3 something that I would normally do. At least we'll  
4 know who I'm talking to. Otherwise, it might be  
5 confusing.

6 All right. I read the complaint. Looks kind  
7 of straightforward to me. So I don't know, I kind  
8 of had more questions about the specific injunctive  
9 relief that the Plaintiffs seek today, and whether  
10 or not this Court has jurisdiction to do anything in  
11 view of the past legislation that sort of gives the  
12 senior resident judge in the county of which an  
13 action like this is filed, the administrative use of  
14 notifying the Chief Justice that such a lawsuit is  
15 filed, that it is a claim that facially challenges  
16 the constitutionality of an act of the General  
17 Assembly, and to request the Chief Justice to  
18 appoint three judges to a panel of superior court to  
19 hear and consider the constitutional challenge.

20 The law is unclear as to what the presiding  
21 or senior resident judge in the county in which the  
22 action is filed has the authority to do beyond that.  
23 However, the law does not specifically say the court  
24 shall not, may not, cannot restrain legislation of  
25 the General Assembly that's challenged as

1 statute that may be, significantly likely to be,  
2 unconstitutional on its face.

3 I mean what happens in the middle of all that  
4 void? And why -- and that's, well, the first  
5 question. The second question is in terms of the  
6 immediacy of this law taking effect. What is the  
7 immediacy of this law needing to take effect from  
8 the interest of the people of North Carolina and the  
9 State of North Carolina? What is it about that,  
10 this law?

11 It will change dramatically the whole concept  
12 of how education is handled. And if it turns out  
13 the legislature got it wrong and we find out 6, 8,  
14 9, 10, 12 months later, just think about the  
15 disruption that that would cause. What is it that  
16 is so important about having this law put into  
17 effect on January the 1st of 2017?

18 MR. MAJMUNDAR: As to your first question,  
19 the General Assembly was silent as to what to do in  
20 these circumstance of -- situation, factual  
21 situation.

22 THE COURT: Sure.

23 MR. MAJMUNDAR: And so we can only infer from  
24 what the General Assembly did say and what they  
25 meant and who, which court would be responsible for

1 MR. ORR: -- the irreparable harm when you're  
2 ready.

3 THE COURT: Let me talk about, let me see,  
4 let me talk -- just a moment. Still got to decide  
5 you're right.

6 MR. ORR: Sure.

7 THE COURT: I see a lot of these challenges,  
8 alleged unconstitutional passages. Most of them,  
9 when you look at them it's clear on their face  
10 there's no basis to it at all, period. Period.  
11 Someone just trying to make a statement, trying to  
12 make a point, trying to show objection, but they  
13 don't have any place in a, in a court.

14 I don't see any ambiguity here. I don't know  
15 why all of a sudden one arose, and I don't know how  
16 it arose or where in the constitution that something  
17 would suggest that it arose. Can you help me  
18 understand this?

19 MR. MAJMUNDAR: I'll try, your Honor. The,  
20 the constitution does vest the Board of Education  
21 with authority, but the extent of the authority is  
22 subject to the laws in the General Assembly. The  
23 General Assembly has its own constitution.

24 THE COURT: Where?

25 MR. MAJMUNDAR: In Article IX, Section 5.

1 THE COURT: Okay. And that's a fairly easy  
2 balancing test, wouldn't it? A theoretical harm to  
3 the State and a real, practical harm to an agency  
4 that's constitutionally mandated to care for, care  
5 for the public school children of the state.

6 MR. MAJMUNDAR: Yes, sir.

7 THE COURT: So we're going to balance the  
8 harm to the public school children of this state  
9 based upon potential harm to them or the theoretical  
10 harm that the, would be caused by a declaration  
11 that, a potential declaration that the legislature  
12 built a bridge too far.

13 MR. MAJMUNDAR: That is the balancing test,  
14 your Honor. I would draw your attention to Page 12  
15 of the complaint.

16 THE COURT: All right.

17 MR. MAJMUNDAR: The damages cited by  
18 Plaintiffs on Page 12 relate to uncertainties  
19 associated with the making this portion of the  
20 statutes effective. There is no firm, fixed  
21 identifiable harm, but what might happen. And the  
22 Court of Appeals has said, you know, illusory-type  
23 damages are not sufficient with the TRO standards.

24 THE COURT: Well, sometimes when you close  
25 down an agency, it is almost impossible to quantify



1 STATE OF NORTH CAROLINA

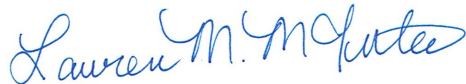
2 COUNTY OF WAKE

3  
4 REPORTER'S CERTIFICATE

5 I, LAUREN M. MCINTEE, Registered Professional  
6 Reporter and Notary Public for the State of North  
7 Carolina, certify that I was authorized to and did  
8 stenographically transcribe the foregoing proceeding  
9 from a video recording, and that the transcript is a  
10 true and accurate record of the testimony to the best of  
11 my ability.

12 I further certify that I am not a relative,  
13 employee, attorney, or counsel of any of the parties,  
14 nor am I a relative or employee of any of the parties'  
15 attorneys or counsels connected with the action, nor am  
16 I financially interested in the action.

17  
18 Dated this 3rd day of January, 2017.

19 

20 LAUREN MCINTEE, RPR, Notary Public  
21 Notary Number: 201616600044  
22  
23  
24  
25

# Exhibit D

FILED

NORTH CAROLINA

WAKE COUNTY

2016 DEC 29 PM 3: 54

GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

16-CVS-15607

NORTH CAROLINA STATE BOARD OF EDUCATION,

WAKE COUNTY, C.S.C.

BY         
Plaintiff,

v.

THE STATE OF NORTH CAROLINA,

Defendant.

**TEMPORARY RESTRAINING ORDER**

**THIS MATTER** is before the Court on the Plaintiff North Carolina State Board of Education's motion for temporary restraining order.

The Court has considered the verified complaint and the arguments and submissions of counsel in attendance at the hearing on this motion. The Board's counsel were present at the hearing, and advised the Court that they had given the Defendant, the State of North Carolina, notice of the Board's intent to seek a temporary restraining order. The State's counsel were present at the hearing.

**IT APPEARS** to the Court that good cause exists to grant the motion.

First, the Board has shown that it is likely to succeed on the merits. It is well-settled that when a constitution expressly confers certain powers and duties on an entity, those powers and duties cannot be transferred to someone else without a constitutional amendment. Article IX, Section 5 of the North Carolina Constitution expressly confers certain "powers and duties" on the Board. Those constitutional powers and duties include:

- the power and duty to "supervise . . . the free public school system";
- the power and duty to "administer the free public school system";

- the power and duty to “supervise . . . the educational funds provided for [the free public school system’s] support”; and
- the power and duty to “administer . . . the educational funds provided for [the free public school system’s] support.”

The provisions of Session Law 2016-126 challenged in the verified complaint (hereinafter “the Transfer Legislation”) attempt to transfer these constitutional powers and duties, however, from the Board to the Superintendent of Public Instruction. Thus, the Board is likely to succeed on the merits of its claims that the Transfer Legislation is unconstitutional.

Second, the Transfer Legislation will cause irreparable harm if not immediately enjoined. As a matter of law, violations of the North Carolina Constitution constitute *per se* irreparable harm. As described above, the Board is likely to succeed on the merits of its claims that the Transfer Legislation is unconstitutional. Therefore, no further showing of irreparable harm is required. Even if a further showing of irreparable harm were required, moreover, the Transfer Legislation threatens to cause irreparable harm to the Board, the employees of the public school system, and—most importantly—North Carolina’s 1.5 million public school students unless the status quo is preserved. Thus, there is sufficient irreparable harm to warrant immediate injunctive relief.

Third, the balance of equities also favors granting immediate injunctive relief. As described above, without immediate injunctive relief, the Transfer Legislation will cause irreparable harm. Conversely, immediate injunctive relief will not result in any harm. The Board has exercised its constitutional powers and fulfilled its constitutional duties for the past 148 years. Allowing the Board to continue doing so while this case is resolved only preserves this longstanding status quo.

**WHEREFORE**, the Board's motion for temporary restraining order is **GRANTED**.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that until a decision on the Board's motion for preliminary injunction:

- (a) The State is restrained and enjoined from taking any action to implement or enforce the Transfer Legislation.
- (b) Under Rule 65(d) of the North Carolina Rules of Civil Procedure, the State's "officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice in any manner of [this] order by personal service or otherwise" are likewise enjoined from taking any action to implement or enforce the Transfer Legislation.

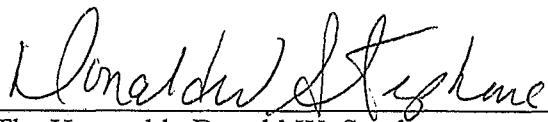
Counsel for the Board shall serve copies of this order on the Chief Deputy Attorney General, the President Pro Tempore of the North Carolina Senate, the Speaker of the North Carolina House of Representatives, and the Superintendent of Public Instruction-Elect.

Unless the State consents to an extension of this temporary restraining order, the Board's motion for preliminary injunction shall be heard before the undersigned Superior Court Judge

~~within ten days from the date of this order, or as soon thereafter as the Court may hear this matter.~~ *Friday January 6, 2017 at 9:30 Courtroom 10C.*

So ordered the 29th day of December at 4:00 p.m.

*WWS*

  
The Honorable Donald W. Stephens  
Senior Resident Superior Court Judge  
Wake County Superior Court

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was served by hand-delivery to the following:

State of North Carolina  
c/o Grayson G. Kelley  
Chief Deputy Attorney General  
North Carolina Attorney General's Office  
114 W Edenton Street  
Raleigh, North Carolina 27603

The Honorable Philip E. Berger  
President Pro Tempore of the North Carolina Senate  
Legislative Building  
16 W. Jones Street, Room 2007  
Raleigh, North Carolina 27601

The Honorable Timothy K. Moore  
Speaker of the North Carolina House of Representatives  
Legislative Building  
16 W. Jones Street, Room 2304  
Raleigh, North Carolina 27601

Mark Johnson  
2680 Arbor Place Ct.  
Winston-Salem, North Carolina 27104

This the 30th day of December, 2016.

  
Andrew H. Erteschik

# Exhibit E

FILED

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE  
COUNTY OF WAKE JUL 14 PM 2: 27 SUPERIOR COURT DIVISION  
FILE NO: 16 CVS 15607

WAKE COUNTY, C.S.C.

NORTH CAROLINA STATE BOARD-- )  
OF EDUCATION, )

Plaintiff, )

vs. )

**ORDER**

THE STATE OF NORTH CAROLINA )  
AND MARK JOHNSON, in his official )  
capacity, )

Defendants. )

---

This cause came on for hearing before the undersigned three-judge panel presiding at the 29 June 2017 special setting of the Wake County Superior Court upon the motion for summary judgment filed by the North Carolina State Board of Education ("State Board"), the motion to dismiss filed by the State of North Carolina, and the motion for summary judgment filed by the North Carolina Superintendent of Public Instruction, Mark Johnson ("Superintendent"). Given that the Court has considered matters outside the face of the pleadings with regard to each of the parties' arguments, and therefore upon its own motion converts the state's motion to dismiss into a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

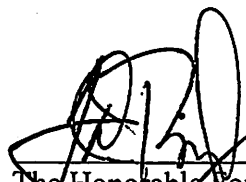
Whereupon, having considered arguments and materials submitted, the Court concludes that there is no genuine issue as to any material fact; that the State Board has failed to satisfy its burden of proof as to the facial unconstitutionality of any provision of the statute; and that the State of North Carolina and the Superintendent are entitled to judgment as a matter of law. For that reason, summary judgment is granted to the State of



North Carolina and the Superintendent, and the State Board's motion for summary judgment is denied.

This Court further notes that pending hearing in this matter there has been in effect a preliminary injunction whereby the implementation and enforcement of the statute has been enjoined. This Court notes that there is a likelihood of appeal from this order, including likely requests that the effect of this order be stayed pending such appeals. It is further ordered that the effect of this order and the implementation and enforcement of the challenged provisions of S.L. 2016-126 shall be and hereby are restrained and enjoined for a period of 60 days pending further orders of this court or any appellate court having jurisdiction over this matter so as to allow any motions by any of the parties herein requesting additional stays or dissolution of this stay pending appeal of this matter.

This the 30<sup>th</sup> day of June, 2017.



The Honorable Forrest Donald Bridges  
Senior Resident Superior Court Judge



The Honorable James F. Ammons, Jr.  
Senior Resident Superior Court Judge



The Honorable Martin B. McGee  
Senior Resident Superior Court Judge

FILED

STATE OF NORTH CAROLINA      IN THE GENERAL COURT OF JUSTICE  
COUNTY OF WAKE      SUPERIOR COURT DIVISION  
2017 JUL 14 PM 2: 27      FILE NO: 16 CVS 15607

WAKE COUNTY, C.S.C.

NORTH CAROLINA STATE BOARD	)	
OF EDUCATION,	)	
Plaintiff,	)	
	)	
vs.	)	<b>MEMORANDUM OF</b>
	)	<b>OPINION</b>
THE STATE OF NORTH CAROLINA	)	
AND MARK JOHNSON, in his Official	)	
Capacity,	)	
Defendants.	)	

---

This cause came on for hearing before the undersigned three-judge panel presiding at the 29 June 2017 special setting of the Wake County Superior Court, upon the motion for summary judgment filed by the North Carolina State Board of Education ("State Board"), the motion to dismiss filed by the State of North Carolina, converted on motion of the Court to a motion for summary judgment, and the motion for summary judgment filed by the North Carolina Superintendent of Public Instruction, Mark Johnson ("Superintendent"). In its Order, filed separately, this Court granted the motions for summary judgment filed by the Defendants and denied the Plaintiff's motion, for the reasons explained below.

Acts of the General Assembly are presumed constitutional, and courts will declare them unconstitutional only when "it [is] plainly and clearly the case." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *Glenn v. Bd. of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)). The party alleging the unconstitutionality of a statute has the burden of proving beyond a reasonable doubt that the statute is unconstitutional. *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887,

889 (1991). Where a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter.

*Wayne County Citizens Association for Better Tax Control v. Wayne County Board of Commissioners*, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991). Thus, courts afford great deference to acts of the General Assembly. The Court does not concern itself with political questions, nor with the wisdom of the legislation at hand. This Court has attempted to follow each of these principles in arriving at its decision.

This case involves a challenge to statutes which the Plaintiff alleges violate the following provisions of the North Carolina Constitution:

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 Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education.

N.C. Const. art. IX, § 4(2).

The legislation in question, Session Law 2016-126, transfers a number of powers and authorities from the State Board to the Superintendent. In addition to other changes, particular portions of the legislation provide as follows:

- 1) That the Superintendent “have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system.” (amending G.S. 115C-21(a)(5) and replacing prior language giving the Superintendent the power to “manage all those matters relating to the supervision and administration of the public school system that the State Board delegates to the Superintendent of Public Instruction.”).

- 2) That the Superintendent has the power to “administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units.” (amending G.S. 115C-21(b)(1b). Contemporaneously with this amendment, the General Assembly amended G.S. 115C-408(a) by adding the following language to that section: “The Superintendent of Public Instruction shall administer any available educational funds through the Department of Public Instruction in accordance with all needed rules and regulations adopted by the State Board of Education.”).
- 3) That the State Board shall establish “all needed rules and regulations” for the system of free public schools... (amending G.S. 115C-12 by substituting the words “all needed rules and regulations” for “policy” in the previous version. The Act also adds the following language to the same provisions: “In accordance with Sections 7 and 8 of Article III of the North Carolina Constitution, the Superintendent of Public Instruction, as an elected officer and Council of State member, shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction.”).

The State Board contends that these provisions, among others, are in violation of Article IX, § 5, of the North Carolina Constitution, arguing that the powers transferred are the State Board’s constitutional powers to supervise and administer the public school system. In its filings, the State Board complains of a total of 62 provisions of S.L. 2016-126, contending that its constitutional powers are diminished by such legislation. The State of North Carolina and the Superintendent argued that any diminution of authority

and powers is allowed by the final clause of Article IX, § 5, making the State Board's powers "subject to laws enacted by the General Assembly." This Court concludes that many of the provisions of S.L. 2016-126, particularly those which were not specifically addressed by the Plaintiffs in their briefs and oral arguments, simply shift the details of day-to-day operations, such as hiring authority, from the State Board to the Superintendent. This Court further concludes that those aspects of the legislation appear to fall well within the constitutional authority of the General Assembly to define specifics of the relationship between the State Board of Education and the Superintendent of Public Instruction.

North Carolina's Constitution establishes two entities responsible for the governance of the public school system: the State Board and the Superintendent. The allocation of powers and duties between these two constitutional entities has changed over time such that there has been an ebb and flow of the powers of each entity over the years, depending on various acts of legislation. Nevertheless, it appears to be the clear intent of the Constitution that the State Board shall have the primary authority to supervise and administer the free public school system and the educational funds provided for the support thereof, and that the State Board is empowered to make all needed rules and regulations related to each of those functions, subject to laws passed by the General Assembly. It also appears clear that as secretary to the State Board and chief administrative officer of the State Board, the Superintendent is primarily responsible for overseeing the day-to-day management and operations of the state's free public school system.

While the parties disagree as to what, if any, limits are placed on the power of the General Assembly to shift responsibilities back and forth between the State Board and Superintendent, this Court does not consider it necessary to articulate a precise definition on that boundary. Suffice it to say, it is at least abundantly clear to this Court that this action by the General Assembly in enacting S.L. 2016-126 is not such a pervasive transfer of powers and authorities so as to transfer the inherent powers of the State Board to supervise and administer the public schools, nor does it render the State Board an “empty shell,” nor does this action, which Plaintiffs contend to be an infringement upon the constitutional powers and duties of the State Board of Education, operate to “unnecessarily restrict [the State Board of Education] engaging in constitutional duties.” *State v. Camacho*, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991).

Because it considers the aforementioned itemized portions of the legislation as presenting the most serious constitutional challenge, this Court now addresses specifically each of those three provisions.

First, the State Board challenges the grant of power to the Superintendent under G.S. 115C-21(a)(5) to “have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system.” This Court concludes that this language does not transfer the State Board’s power, but rather empowers the Superintendent to manage the day-to-day operations of the school system, subject to general oversight by the State Board. Contemporaneously with this amendment, the General Assembly placed a limit on the Superintendent’s authority in this subsection through the requirement, in S.L. 2016-126 § 2 (amending N.C. Gen. Stat. § 115C-12), that “[t]he State Board of Education shall establish all needed rules and

regulations for the system of free public schools, subject to laws enacted by the General Assembly. In accordance with Sections 7 and 8 of Article III of the North Carolina Constitution, the Superintendent of Public Instruction, as an elected officer and Council of State member, shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction.” The legislation further clarifies the Superintendent’s role by providing in S.L. 2016-126, § 3, that “[t]he Superintendent of Public Instruction shall carry out the duties prescribed under G.S. 115C-21 as the administrative head of the Department of Public Instruction. The Superintendent of Public Instruction shall administer all needed rules and regulations adopted by the State Board of Education[.]” These subsections place a limit on the Superintendent’s power, leaving the ultimate authority to supervise and administer the public school system with the State Board.

Second, the State Board challenges the grant of authority to the Superintendent to “administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units.” Again, the statute provides a limiting principle for this exercise of authority by the Superintendent, providing in S.L. 2016-126 § 5 that “[t]he Superintendent of Public Instruction shall administer any available educational funds through the Department of Public Instruction in accordance with all needed rules and regulations adopted by the State Board of Education,” thereby leaving the ultimate authority to supervise and administer the school system’s funds with the State Board.

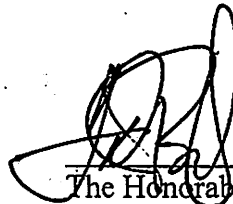
Third, the State Board challenges the removal of “policy,” and its replacement with “all needed rules and regulations” in G.S. 115C-12. This Court concludes that deletion of the word “policy” does not change the constitutional role of the State Board of

Education. The North Carolina Constitution does not provide that the State Board establish "policy," but rather "rules and regulations" related to its authority to supervise and administer the schools. This provision does not conflict with the roles of the parties as defined by the state constitution.

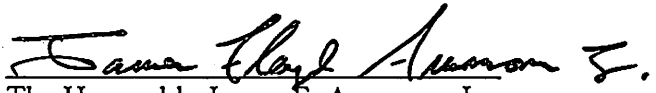
As noted previously, the State Board does not discuss in detail the additional provisions which it identifies in its complaint, and these provisions represent a permissible shift of day-to-day authority from the State Board to the Superintendent.

Because the statute continues to provide that the State Board supervise and administer the public schools and make all necessary rules and regulations to carry out that function, and because the Superintendent's duties are limited by that power of the State Board, the plaintiff has not shown that this legislation violates the North Carolina Constitution. Summary judgment is therefore granted in favor of the defendants.

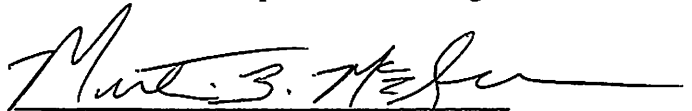
This the 6 day of July, 2017.



The Honorable Forrest Donald Bridges  
Senior Resident Superior Court Judge



The Honorable James F. Ammons, Jr.  
Senior Resident Superior Court Judge



The Honorable Martin B. McGee  
Senior Resident Superior Court Judge



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing document was served on all parties by serving counsel as indicated below by U.S. Mail, postage prepaid, addressed as follows, with a courtesy copy via electronic mail:

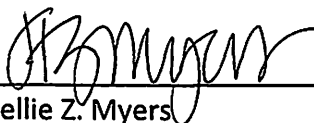
Robert F. Orr  
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[HLewis@bmlilaw.com](mailto:HLewis@bmlilaw.com)

This the 14<sup>th</sup> day of July, 2017.



---

Kellie Z. Myers  
Trial Court Administrator  
PO Box 1916, Raleigh, NC 27602  
[Kellie.Z.Myers@nccourts.org](mailto:Kellie.Z.Myers@nccourts.org)

# Exhibit F

STATE OF NORTH CAROLINA FILED IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
COUNTY OF WAKE 2017 JUL 20 P 2:42 16-CVS-15607

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

BY   
Plaintiff,

v.

### NOTICE OF APPEAL

THE STATE OF NORTH CAROLINA, and  
MARK JOHNSON, in his official capacity,

Defendants.

Plaintiff North Carolina State Board of Education hereby gives notice of appeal to the North Carolina Court of Appeals from the 14 July 2017 order of the three-judge panel of the Wake County Superior Court, which denied Plaintiff's motion for summary judgment and granted summary judgment to Defendants the State of North Carolina and Superintendent of Public Instruction Mark Johnson.

Respectfully submitted the 20th day of July, 2017.

ROBERT F. ORR, PLLC

POYNER SPRUILL LLP

By: 

*for* Robert F. Orr *by HFE*  
N.C. State Bar No. 6798  
orr@rforrlaw.com  
3434 Edwards Mill, Suite 112-372  
Raleigh, NC 27612  
Telephone: (919) 608-5335

COUNSEL FOR PLAINTIFF  
NORTH CAROLINA STATE  
BOARD OF EDUCATION

By: 

Andrew H. Erteschik  
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Raleigh, NC 27602-1801  
Telephone: (919) 783-2895  
Facsimile: (919) 783-1075

COUNSEL FOR PLAINTIFF  
NORTH CAROLINA STATE  
BOARD OF EDUCATION

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was served by e-mail and U.S. Mail to the following:

Amar Majmundar  
Olga E. Vysotskaya de Brito  
N.C. Department of Justice  
114 W. Edenton Street  
Raleigh, NC 27603  
*Counsel for the State of North Carolina*

Philip R. Isley  
Philip R. Miller, III  
E. Hardy Lewis  
Blanchard, Miller, Lewis & Isley P.A.  
1117 Hillsborough Street  
Raleigh, NC 27603  
*Counsel for The Honorable Mark Johnson,  
Superintendent of Public Instruction*

This the 20th day of July, 2017.

  
\_\_\_\_\_  
Andrew H. Erteschik

# Exhibit G

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16-CVS-15607

NORTH CAROLINA STATE  
BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA, and  
MARK JOHNSON, in his official capacity,

Defendants.

**MEMORANDUM IN SUPPORT  
OF PLAINTIFF’S MOTION  
FOR SUMMARY JUDGMENT  
AND MOTION FOR  
PRELIMINARY INJUNCTION**

Pursuant to the Court’s March 1, 2017 case management order, the North Carolina State Board of Education respectfully submits the following brief in support of its motion for summary judgment and motion for preliminary injunction.

**INTRODUCTION**

This constitutional challenge asks the Court to apply a bedrock principle of constitutional law: that when a constitution expressly confers powers and duties on a specific entity, those powers and duties cannot be transferred to a different entity without a constitutional amendment.

Article IX, Section 5 of the North Carolina Constitution expressly confers certain “powers and duties” on the Board. Those constitutional powers and duties include:

- the power and duty to “supervise . . . the free public school system”;
- the power and duty to “administer the free public school system”;

Transfer Legislation states that “it shall be the duty of the Superintendent of Public Instruction to . . . administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units.” N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(b)(1b)). Likewise, Sections 3 and 4 state that the SPI, as the head of the Department of Public Instruction, will “administer the funds appropriated for [the Department’s] operation.” *Id.* § 3 (amending N.C. Gen. Stat. § 115C-19); *id.* § 4 (amending N.C. Gen. Stat. § 115C-21(a)(1)). Thus, the Transfer Legislation attempts to transfer to the SPI the same powers and duties that the people expressly conferred on the Board in their Constitution.

These constitutional conflicts are readily apparent. As described above, the General Assembly essentially copied and pasted the constitutional text into the Transfer Legislation, then replaced the words “State Board of Education” with “Superintendent of Public Instruction.” *See supra* at 3.

As the Court noted at the TRO hearing, this obvious constitutional flaw makes this case “straightforward.” Exhibit D, Transcript of TRO Hearing at 6. After all, “[i]f there is a conflict between a statute and the Constitution, [the] Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation.” *City of Asheville v. North Carolina*, No. 391PA15, 794 S.E.2d 759, 766 (N.C. Dec. 21, 2016). That is the narrow, straightforward relief the Board seeks here.

For these reasons, the Board is entitled to summary judgment.

**C. The phrase “subject to laws enacted by the General Assembly” in Article IX, Section 5 does not permit the Board’s constitutional powers and duties to be stripped away.**

At the TRO hearing, the State initially suggested that the phrase “subject to laws enacted by the General Assembly” in Article IX, Section 5 is a “catchall” that allows the General Assembly to do anything it wants—including stripping the Board of its constitutional powers and duties altogether and transferring them to the SPI. Ex. D at 25.

Later in the hearing, however, the State conceded this issue:

[THE COURT]: Can the General Assembly enact laws that are contrary to the language of the constitution?

[THE STATE’S COUNSEL]: I do not believe they can, your Honor. Well, they can enact laws, but they can be stricken.

[THE COURT]: I don’t think they can either. It seems to me that this Article suggests that the Board shall administer and supervise and shall make rules and regulations consistent with their mandate under the constitution, which would be subject to the laws of the General Assembly, but the General Assembly cannot take away their constitutional mandates.

[THE STATE’S COUNSEL]: I do not believe the General Assembly can do that.

*Id.*

For purposes of summary judgment, that concession is fatal.

Moreover, the State was correct to concede this issue. For at least two distinct reasons, Article IX, Section 5 does not give the General Assembly the prerogative to strip the Board of its constitutional powers and duties and give them to someone else.



First and foremost, the State’s requested interpretation of Article IX, Section 5 must be rejected because it has no limiting principle. If the State’s requested interpretation were correct, the General Assembly could decide that North Carolina’s public school system would be supervised and administered by any government official or entity of its choice—even private entities or individuals.

Nevertheless, the SPI has suggested that he is an appropriate recipient of the Board’s constitutional powers and duties because he is a constitutional officer who is elected statewide. That logic is flawed. There are a number of constitutional officers who are elected statewide—for example, the Commissioner of Agriculture, the Commissioner of Labor, and the Commissioner of Insurance. By the SPI’s logic, the State’s requested interpretation would allow the General Assembly to decide that North Carolina’s public school system should be supervised and administered by any one of these individuals.

For precisely that reason, state supreme courts that have considered similar state constitutional language—for example, “subject to laws” or “as prescribed by law”—have “uniformly denounced” the argument that the State makes here. *Hudson v. Kelly*, 263 P.2d 362, 368 (Ariz. 1953) (holding that legislature could not reduce constitutional office to an empty shell, and noting further that similar efforts had “uniformly been denounced by courts of last resort”); *see also, e.g., State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 782 (Minn. 1986) (holding that legislature’s power to modify duties of executive officials was inherently limited and could not deprive an office of all of its basic functions); *Am. Legion Post No. 279 v. Barrett*, 20

N.E.2d 45, 51 (Ill. 1939) (holding that constitutional provision requiring State Treasurer to perform “such duties as may be required by law” implied that the office had certain duties which could not be allocated elsewhere); *Ex parte Corliss*, 114 N.W. 962, 965 (N.D. 1907) (holding that the legislature’s power to prescribe duties for officers did not mean that it had the power to transfer their inherent duties to other officers); *Fant v. Gibbs*, 54 Miss. 396, 409 (Miss. 1877) (holding that legislature’s constitutional right to prescribe the duties and functions of district attorneys incorporated “implied prohibition of the power to deprive them of all duties”); *Love v. Baehr*, 47 Cal. 364, 367 (Cal. 1874) (observing that there are inherent limits on the legislature’s ability to delineate the “necessarily implied” duties and powers of a constitutional officer).

There is a good reason why courts across the country have all safeguarded their state constitutions against the kind of statutory circumvention the State is attempting here: “If . . . constitutional offices can be stripped of a *portion* of the inherent functions thereof, they can be stripped of *all* such functions . . . and the will of the framers of the constitution thereby thwarted.” *State ex rel. Banks v. Drummond*, 385 P.3d 769, 781-82 (Wash. 2016) (en banc) (emphasis added); *see also, e.g., Love*, 47 Cal. at 366 (observing that legislature’s discretion to define constitutional officers’ duties was obviously not unlimited, or it could compel the Treasurer to become a prison warden, the Controller to become a librarian, the Attorney General to become the head of mental health facilities, and the Secretary of State to become the manager of state hospitals); *Corliss*, 114 N.W. at 965

(observing that if legislature could assign duties from County Sheriff and State's Attorney to another entity, nothing could stop it from creating its own Governor or Attorney General).

For this reason alone, the State's argument fails.

The State's requested interpretation of Article IX, Section 5 is also flawed for another reason: It would violate the first and most basic rule of constitutional construction, which requires giving effect to each and every word of the text. *See Town of Boone v. State*, No. 93A15-2, 794 S.E.2d 710, 715 (N.C. Dec. 21, 2016) ("Each word informs a proper understanding of the whole."). This rule requires the Court to "lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory." *Bd. of Educ. v. Bd. of Comm'rs*, 137 N.C. 310, 312, 49 S.E. 353, 354 (1904) (quoting Thomas M. Cooley, *Cooley's Constitutional Limitations* 92 (7th ed. 1903)); *see also, e.g., Lacy v. Fid. Bank of Durham*, 183 N.C. 373, 380, 111 S.E. 612, 615 (1922) (stating that the constitution should be "construed so as to allow significance to each and every part of it if this can be done by any fair and reasonable intendment").

Here, if "subject to laws enacted by the General Assembly" means that the General Assembly can strip the Board of its constitutional powers and duties, it

would reduce 28 words in the constitutional text to mere surplusage.<sup>4</sup> Under the State’s requested interpretation, the Transfer Legislation would rewrite Article IX, Section 5 to read as follows:

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 (striketthrough added).

The 28 words stricken above were carefully chosen by the framers and ratified by the people of North Carolina. Their obvious intent was to confer specific powers and duties on the Board. Thus, to render those 28 words meaningless would violate the first and most basic rule of constitutional construction.

In sum, the phrase “subject to laws enacted by the General Assembly” does not permit the General Assembly to rewrite the North Carolina Constitution by stripping the Board of its constitutional powers and duties and transferring those

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<sup>4</sup> Notably, the State admitted that the Transfer Legislation seeks to reduce the Board to a shell entity that merely makes rules and regulations, instead of one that supervises and administers the public schools, as Article IX, Section 5 requires:

[THE COURT]: So that’s what it means when the Constitution says, “It shall be the duty of the State Board of Education to supervise and administer the free public school system?” Is that what that means? The Board will now make rules and regulations?

[THE STATE’S COUNSEL]: That’s [what] the [Transfer Legislation] says. Its plain meaning is that they make the rules and regulations.

Ex. D at 29.

powers and duties to anyone it desires. For that reason, the State's only defense is without merit.

## **II. THE BOARD IS ENTITLED TO A PRELIMINARY INJUNCTION WHILE THE COURT CONSIDERS THE BOARD'S MOTION FOR SUMMARY JUDGMENT.**

### **A. The Board is likely to succeed on the merits.**

As described above, the Board is entitled to summary judgment. *See supra* at 5-16. For the same reasons, the Board has satisfied the first requirement for a preliminary injunction: a likelihood of success on the merits. *McClure*, 308 N.C. at 401, 302 S.E.2d at 759.

Therefore, for purposes of the Board's motion for preliminary injunction, the only remaining questions before the Court are: (1) whether the Board has shown irreparable harm; and (2) whether the balancing of equities favors the Board. *Id.*

### **B. The Board has shown irreparable harm as a matter of law.**

As the Court correctly noted in its temporary restraining order, constitutional violations amount to *per se* irreparable harm as a matter of law. Exhibit E, Temporary Restraining Order at 2; *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 653, 142 S.E.2d 697, 700 (1965); *Kaplan v. Prolife Action League*, 111 N.C. App. 1, 15, 431 S.E.2d 828, 834 (1993). Thus, in a constitutional challenge like this one, the irreparable-harm analysis simply collapses into a merits analysis. *See, e.g., Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520-21 (4th Cir. 2002); *Dean v. Leake*, 550 F. Supp. 2d 594, 602 (E.D.N.C. 2008).

Respectfully submitted the 12th day of April, 2017.

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The undersigned hereby certifies that a copy of the foregoing document was served by e-mail and hand delivery prior to 5:00 p.m. to the following:

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This the 12th day of April, 2017.

  
\_\_\_\_\_  
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STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16-CVS-15607

NORTH CAROLINA STATE  
BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA, and  
MARK JOHNSON, in his official capacity,

Defendants.

**PLAINTIFF’S RESPONSE  
TO DEFENDANTS’ MOTION TO  
DISMISS AND MOTION FOR  
SUMMARY JUDGMENT**

Pursuant to the Court’s March 1, 2017 case management order, the North Carolina State Board of Education respectfully submits the following response to the motion to dismiss filed by the State and the motion for summary judgment filed by the Superintendent of Public Instruction (“SPI”).

**INTRODUCTION**

Defendants’ dispositive motions concede that Article IX, Section 5 confers a “broad, nearly unlimited grant of power to the State Board . . . to supervise and administer the public schools,” and that “[t]hese words—‘supervise’ and ‘administer’—cover essentially everything.” SPI’s Br. at 7-8.

Nevertheless, Defendants claim that the General Assembly can disregard this direct delegation of constitutional powers and duties from the people of North Carolina to the Board, because the General Assembly is the supreme authority and can do whatever it wants. Defendants are mistaken.

For the reasons that follow, the Board is entitled to summary judgment.



sovereign-immunity argument disregards controlling authority and should be rejected.

Similarly, the State's pleading-sufficiency argument, which is premised on its view of sovereign immunity, is inappropriate. The State contends that the complaint should be dismissed because it did not "allege that the State has waived its immunity." State's Br. at 7. Again, however, the State has no immunity from the claims in this lawsuit to begin with, because sovereign immunity does not apply to Article IX claims. *See supra* at 2-3. Thus, as our courts have recognized, it was unnecessary for the Board to plead that sovereign immunity is inapplicable. *See, e.g., Bolick v. Cty. of Caldwell*, 182 N.C. App. 95, 98, 641 S.E.2d 386, 389 (2007) (holding that when sovereign immunity does not apply, a "plaintiff is under no requirement to plead a waiver of sovereign immunity," because a "defendant could not waive an immunity that it did not possess").

For these reasons, the State's jurisdictional arguments should be rejected.

## **II. DEFENDANTS' SUBSTANTIVE ARGUMENTS ARE MISPLACED.**

### **A. The phrase "subject to laws" does not allow the General Assembly to transfer the Board's constitutional powers and duties to someone else.**

Defendants' primary defense to this lawsuit is their claim that the phrase "subject to laws enacted by the General Assembly" in Article IX, Section 5 gives the General Assembly unlimited authority to rearrange or "reallocate" (in Defendants' words) the constitutional responsibilities for managing our public schools. SPI's Br. at 23-24.

As support for their view, Defendants point to several North Carolina decisions that have addressed circumstances arising under Article IX, Section 5. None of these decisions, however, either address or support Defendants' argument.

There is a simple reason for this: In the Board's nearly 150-year existence, North Carolina's courts have never had to confront whether the legislature can transfer the Board's express constitutional powers and duties to someone else. Until December 2016, the constitutionally defined roles of the General Assembly the Board were understood.

Those constitutionally defined roles have also been embraced by the North Carolina cases interpreting the phrase "subject to laws" under Article IX, Section 5. Those cases fall into one of two categories:

First, the courts have held that Article IX, Section 5 permits the General Assembly to enacting legislation *repealing* the Board's decisions. *See Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971) (recognizing legislative repeal of Board's teacher-certification regulation).

Second, the courts have held that Article IX, Section 5 permits the General Assembly to enact legislation *repealing* the Board's decisions—in other words, by "occupying the field," as that term is used in preemption cases. *See State v. Whittle Commc'ns*, 328 N.C. 456, 402 S.E.2d 556 (1991) (recognizing legislature's preemption of Board's decisions on supplementary teaching materials); *N.C. Bd. of Exam'rs for Speech & Language Pathologists and Audiologists v. N.C. State Bd. of Educ.*, 122 N.C. App. 15, 468 S.E.2d 826 (1996), *aff'd*, 345 N.C. 493, 480 S.E.2d 50

(1997) (recognizing legislature’s preemption of Board’s regulations directed at speech pathologists); *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 673 S.E.2d 667 (2009) (recognizing legislature’s preemption of Board’s role in charter school funding disputes).

These two lines of cases reflect how Article IX, Section 5 was intended to function—and has, in fact, functioned—for nearly 150 years. Under these two lines of cases, the Board has the express power and duty to manage the public schools, and the phrase “subject to laws” allows the General Assembly to “alter, amend, or repeal” the Board’s decisions—a built-in, constitutional checks-and-balances mechanism for our public schools. *See* 1868 N.C. Const. art. IX, § 9; 1942 N.C. Const. art. IX, § 9; 1971 N.C. Const. art. IX, § 5; *see also Guthrie*, 279 N.C. at 710, 185 S.E.2d at 199 (observing that there is no substantive difference between the 1868 Constitution and the current 1971 Constitution).

Here, however, the legislature did not merely “check” the Board on one of its decisions, as in the cases above. Instead, the legislature tried to *eliminate* the Board’s role in public education altogether by transferring away its constitutional powers and duties to someone else. North Carolina’s courts have never had occasion to consider a situation like this. This case is the first.

Fortunately, the Court is not addressing this first-impression issue on a blank slate. Long before the Attorney General’s Office was engaged to represent the Defendants in this case, it issued an opinion on this precise issue. A 1994 Attorney General’s Opinion confirmed that while the legislature could “limit” or “revise” the

Board's decisions under the checks-and-balances mechanism in Article IX, Section 5, the legislature could *not* transfer the Board's constitutional powers and duties to another entity. 1994 Op. N.C. Att'y Gen. 41. As the Opinion explained, "a legislative act *transferring* the State Board's constitutional power . . . would amount to more than a limitation or revision" under Article IX, Section 5, and instead, "would amount to the *denial* to the State Board of a power conferred on the State Board by the people." *Id.* (emphasis added).

The following year, the Attorney General again recognized this same principle, noting that this principle is followed uniformly in other states. *See* 1995 Op. N.C. Att'y Gen. 32 ("If 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.'") (quoting Thomas M. Cooley, *Constitutional Limitations* 213-15 (1927)).

The Attorney General was correct that this principle is followed uniformly in other states. Courts in other states that have considered this issue have held that the phrase "subject to laws" (or similar language) does not permit the legislature to eliminate or transfer constitutional powers and duties that a state constitution expressly confers on a particular entity. Bd. Br. at 12-13 (collecting cases); *see also*, e.g., *Hudson v. Kelly*, 263 P.2d 362, 368 (Ariz. 1953)) (noting that state courts have "uniformly denounce[d]" the same arguments that Defendants make here).

As one recent example, the Wyoming state legislature in *Powers v. State*, 318 P.3d 300, 313 (Wyo. 2014), attempted to strip the Superintendent of Education of

various state-constitutional powers, relying on language in the state constitution providing that the Superintendent’s powers “shall be prescribed by law.” Like the Transfer Legislation here, the transfer legislation in *Powers* replaced the word “Superintendent” with the word “Director” (the new position) in virtually every applicable statute. *Id.*

The Wyoming Supreme Court rejected the attempted power transfer. The Court explained that “[w]hile the legislature can prescribe powers and duties of the Superintendent, it cannot eliminate or transfer powers and duties to such an extent that the Superintendent no longer maintains the power of ‘general supervision of the public schools’”—in other words, the powers expressly conferred by the state constitution. *Id.* The Court determined that the Superintendent’s remaining “limited and piecemeal” powers did not comport with the constitutional mandate that the Superintendent be responsible for “general supervision” of the public schools. *Id.* at 321. In other words, the Wyoming Constitution’s “prescribed by law” provision did not provide the legislature with “unlimited authority” to delineate the powers and duties of the Superintendent. *Id.* at 323.

The same analysis applies here. Indeed, Defendants apparently concede—as they must—that the Transfer Legislation does not merely repeal or preempt a decision by the Board; instead, it attempts to *eliminate* the Board’s express constitutional powers and duties by transferring them to the SPI.

The nature of this transfer is especially egregious given the “directly delegated” nature of the Board’s constitutional powers and duties, which the

Supreme Court in *Guthrie* specifically recognized. *Guthrie*, 279 N.C. at 710, 712, 185 S.E.2d at 198-99. By “directly delegating” this broad, sweeping power to the Board in the Constitution itself, the people elevated the Board to a unique status. *Id.* They made it *mandatory* for the Board—and not some other officer—to hold those “directly delegated” powers and duties. N.C. Const. art. IX, § 5 (stating that “[t]he State Board of Education *shall* supervise and administer the free public school system and the educational funds provided for its support”) (emphasis added). Thus, by attempting to “reallocate” (in Defendants’ words) to the SPI the framer’s “direct delegation” of powers and duties to the Board, the General Assembly is attempting to do by statute what only the people can do by constitutional amendment. State’s Br. at 12, 16; SPI’s Br. at 16, 23-24.

In sum, while North Carolina’s Article IX, Section 5 case law has never addressed a legislative maneuver this extreme, bedrock principles of constitutional law—including those relied on by the Attorney General and other state supreme courts—condemn Defendant’s position.

**B. The Transfer Legislation is not a “codification” of the SPI’s limited constitutional role.**

Next, Defendants contend that the Transfer Legislation merely “codifies” the SPI’s constitutional role. As support for this contention, Defendants exaggerate the SPI’s role in ways that lack support in the constitutional text.

For instance, the State refers to the SPI as a constitutional “executive,” a “chief operating officer,” and even the Board’s “chief executive,” who enjoys “executive discretion.” State’s Br. at 14, 15, 16, 17, 19. None of these new, made-up

Respectfully submitted the 19th day of May, 2017.

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This the 19th day of May, 2017.

  
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# Exhibit H

STATE OF NORTH CAROLINA

COUNTY OF WAKE

NORTH CAROLINA STATE  
BOARD OF EDUCATION,

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

16-CVS-15607

2017 JUL 15 P 3:34

BY  J. S. C.

Plaintiff,

v.

THE STATE OF NORTH CAROLINA, and  
MARK JOHNSON, in his official capacity,

Defendants.

**PLAINTIFF'S MOTION  
FOR TEMPORARY STAY**

Pursuant to Section 1-500 of the North Carolina General Statutes and Rules 8(a) and 23(c) of the North Carolina Rules of Appellate Procedure, the North Carolina State Board of Education respectfully moves this Court for a temporary stay of its July 14, 2017 decision pending the Board's appeal.

**BACKGROUND**

On July 14, 2017, this Court issued a decision denying the Board's motion for summary judgment and granting summary judgment to the State of North Carolina and the Superintendent of Public Instruction ("SPI"). The Court temporarily stayed its decision, however, "for a period of 60 days pending further orders of this court or any appellate court having jurisdiction over this matter so as to allow any motions by any of the parties herein requesting additional stays or dissolution of this stay pending appeal of this matter." July 14, 2017 Order at 2.

On July 20, 2017, the Board gave notice of appeal. The Board did not immediately seek a temporary stay pending the appeal, however, because within

hours of the Court's July 14, 2017 decision, counsel for both the Board and the SPI began a series of discussions about whether they could join in a motion to this Court for a temporary stay on agreed-upon terms that both parties could accept. In other words, before the Board brought the instant motion, it sought to resolve the issue without Court involvement.

The discussions between the Board's counsel and the SPI's counsel continued for over six weeks, from July 14, 2017 until August 29, 2017. These discussions involved dozens of lengthy telephone conferences, multiple face-to-face meetings, and virtually constant communication between both in-house counsel and outside litigation counsel for the Board and the SPI.<sup>1</sup> The parties could not have tried any harder to reach an agreement, and the Board commends the SPI, the SPI's in-house counsel, and the SPI's outside counsel for their diligence and professionalism throughout the course of these lengthy discussions.

Unfortunately, however, the parties were ultimately unable to come to an agreement on the terms of a temporary stay pending the Board's appeal. As a result, unless this Court extends the 60-day stay of its decision, Session Law 2016-126 will go into effect on September 12, 2017.

In advance of that September 12, 2017 deadline, the Board now seeks a temporary stay.

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<sup>1</sup> The substance of those discussions, of course, is protected by Rule 408 of the North Carolina Rules of Evidence, and will not be disclosed here.

## ARGUMENT

### **I. An extension of the July 14, 2017 temporary stay during the Board’s appeal is necessary to preserve the North Carolina Constitution’s nearly 150-year-old status quo.**

A trial court has the discretion to temporarily stay its denial of an injunction on the merits when the “injunction is the principal relief sought by the plaintiff” and it appears that “denying said injunction will enable the defendant to consummate the threatened act, sought to be enjoined, before such appeal can be heard, so that the plaintiff will thereby be deprived of the benefits of any judgment of the appellate division, reversing the judgment of the lower court . . . .” N.C. Gen. Stat. § 1-500.<sup>2</sup>

Section 1-500 is essentially the trial-court version of the writ of supersedeas, the appellate writ aimed at “preserv[ing] the status quo pending the exercise of the appellate court’s jurisdiction.”<sup>3</sup> *City of New Bern v. Walker*, 255 N.C. 355, 356, 121 S.E.2d 544, 545-46 (1961). The focus of the Section 1-500 inquiry is not the *merits*; after all, in every Section 1-500 situation, the trial court has already ruled *against*

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<sup>2</sup> As a matter of logistics, the statute provides that “the original restraining order granted in the case shall in the discretion of the trial judge be and remain in full force and effect until said appeal shall be finally disposed of.” N.C. Gen. Stat. § 1-500. Here, the Court issued a temporary restraining order on December 29, 2016 that blocked the challenged provisions of Session Law 2016-126 from taking effect. *See* Exhibit A. Thus, as a logistical matter, the relief the Board seeks here (a temporary stay of the Court’s July 14, 2017 decision) would simply involve keeping “the original restraining order granted in the case . . . in full force and effect until [the] appeal [is] finally disposed of.” *Id.*

<sup>3</sup> Even beyond N.C. Gen. Stat. § 1-500, this Court has broad authority to enter a stay to protect the rights of the litigants during the pendency of the appeal. *See, e.g.*, N.C. R. App. P. 8(a); N.C. R. App. P. 23(c).

the plaintiff on the merits. *See* N.C. Gen. Stat. § 1-500. Instead, the focus of the Section 1-500 inquiry is on preserving the *status quo* during the pendency of an appeal. *See id.* (ensuring that the plaintiff will not “be deprived of the benefits of any judgment of the appellate division reversing the judgment of the lower court”)

Section 1-500 is designed for precisely the situation here, as the North Carolina Supreme Court’s decision in *GI Surplus Store, Inc. v. Hunter* illustrates. 257 N.C. 206, 125 S.E.2d 764 (1962). In *Hunter*, the trial court ruled against the plaintiff on the merits of its constitutional challenge, but the trial court temporarily stayed its decision and enjoined the challenged law under Section 1-500. The Supreme Court upheld the trial court’s temporary stay as proper. *Id.* at 214, 125 S.E.2d at 770. In hindsight, the trial court’s temporary stay was also prudent: the Supreme Court ultimately reversed the trial court on the merits and struck down the law as unconstitutional. *Id.*

Here, Section 1-500 applies in full force because a temporary stay of this Court’s decision pending the Board’s appeal is necessary to preserve the North Carolina Constitution’s nearly 150-year-old status quo during the appeal.

Since the 1868 Constitution, the Board has supervised and administered the state’s public schools. *See* Bd. Sum. J. Br. at 6-9 (detailing nearly 150-year history of managing the state’s public school system). Throughout its history, the Board has exercised these powers and carried out these duties without disruption, regardless of the Board’s or SPI’s political affiliations at the time.

Without a temporary stay pending appeal, however, Session Law 2016-126 will move the entire \$10 billion public school system under the control of a single individual for the first time in North Carolina history. *See* Exhibit B, 1/4/17 Cobey Affidavit ¶ 9. This seismic shift will generate enormous disruption for our State’s public schools. *Id.* Worse, this seismic shift would occur overnight, without any transition period whatsoever. *Id.*

As part of this disruption, the SPI would be immediately empowered to take drastic actions that could not be undone. For example, the SPI takes the position that he would be immediately empowered to unilaterally fire over a *thousand* state employees, including key senior policymaking leaders. *See* Exhibit C, 9/1/17 Cobey Affidavit ¶¶ 5-11. These employees could not realistically be “unfired,” of course, if this Court’s decision is later reversed on appeal. *Id.*

The SPI would also be immediately empowered to unilaterally take other drastic actions. For example, the SPI could immediately decide whether certain state public school system positions should be exempt from state personnel laws, execute new statewide contracts for the public school system, and jeopardize the Board’s ability to manage more than 150 existing contracts involving tens of millions of dollars. *See* Exhibit B, 1/4/17 Cobey Affidavit ¶ 10. These actions would be impossible to undo after the fact. *Id.*

As these examples illustrate, a temporary stay pending appeal is necessary to preserve the North Carolina Constitution’s nearly one-and-a-half-century status quo.

These concerns are intensified, moreover, by the fact that the appellate courts may very well reach a different conclusion than this Court on the merits—especially given that the standard of review is *de novo*.

Indeed, notwithstanding this Court’s ultimate decision, at the hearing on the parties’ dispositive motions, Judge Bridges acknowledged that the General Assembly’s cutting and pasting of the text of the North Carolina Constitution into Session Law 2016-126 and replacing the words “State Board of Education” with “Superintendent” was “very troubling.”<sup>4</sup> Prior to this Court’s decision, another Superior Court Judge expressed far greater concerns about the constitutionality of the challenged legislation.<sup>5</sup> As these comments show, it is certainly possible that the appellate courts could reach a different conclusion than this Court on *de novo* review.

Yet if the appellate courts reach a different conclusion and this Court’s decision is not temporarily stayed during the pendency of the appeal, the appellate courts will be left with the challenges of having to “unring the bell.” Sparing the litigants (and the appellate courts) from this situation is precisely why Section 1-

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<sup>4</sup> *Three judge panel hears arguments on education governance authority*, available at [www.ednc.org/2017/06/29/three-judge-panel-hears-arguments-education-governance-authority/](http://www.ednc.org/2017/06/29/three-judge-panel-hears-arguments-education-governance-authority/) (last visited September 5, 2017).

<sup>5</sup> In addition to the conclusions Judge Donald W. Stephens reached in his temporary restraining order, he remarked at the TRO hearing that the Board’s entitlement to relief was “straightforward,” that he “[did not] see any ambiguity,” and that the law is “significantly likely to be unconstitutional on its face.” Exhibit D, TRO Hearing Transcript pp. 6, 13, 24.

500 provides for a temporary stay pending appeal in cases, like this one, that are aimed at injunctive relief. *See* N.C. Gen. Stat. § 1-500.

Lastly, a balancing of the equities weighs heavily in favor of a stay pending appeal. The State even conceded as much at the TRO hearing:

[THE COURT]: And that [would be] a fairly easy balancing test, wouldn't it? A theoretical harm to the State and a real, practical harm to an agency that's constitutionally mandated to care for the public school children of the state.

[THE STATE'S COUNSEL]: Yes, sir.

Bd. Sum. J. Br., Ex. D at 34.

This concession makes sense, because a temporary stay pending the Board's appeal would not harm Defendants at all. The Board has exercised its constitutional powers and fulfilled its constitutional duties for nearly a century and a half. Surely Defendants would not be harmed by maintaining this longstanding status quo during the comparatively brief period of months that it will take for the appellate courts to resolve this dispute.

For all of these reasons, the Court should temporarily stay its July 14, 2017 decision pending the Board's appeal.

**II. At a minimum, a brief extension of the temporary stay is necessary to allow the appellate courts a sufficient opportunity to issue a temporary stay or writ of supersedeas.**

If the Court is inclined to deny the Board's request above, then the Board will seek the same relief from the appellate courts in the form of a motion for temporary stay and petition for writ of supersedeas. *See* N.C. R. App. P. 8(a) ("After a stay order or entry has been denied or vacated by a trial court, an appellant may apply



to the appropriate appellate court for a temporary stay and a writ of supersedeas in accordance with Rule 23.”); *see also* N.C. R. App. P. 23 (stating procedure for petitions for writs of supersedeas). Thus, at a minimum, the Court should extend the temporary stay to afford the appellate courts the opportunity to rule on the Board’s request.

As described above, 46 days of the 60-day stay elapsed during the course of the Board’s and the SPI’s attempt to reach an agreement that would have obviated the need for this Court to resolve the instant motion. To deny even a brief extension of the original 60-day temporary stay under these circumstances would be to punish the Board for its efforts to promote judicial economy by obtaining a resolution of these issues by consent. Under these circumstances, allowing the clock to simply run out would be unjust, particularly given the speed with which the Board is filing this motion—a mere four business days after the discussions between the Board and the SPI resulted in an impasse.

For these reasons, the Court should, at a minimum, extend its temporary stay until the appellate courts have had an opportunity to rule on the Board’s motion for temporary stay and petition for writ of supersedeas.

### **CONCLUSION**

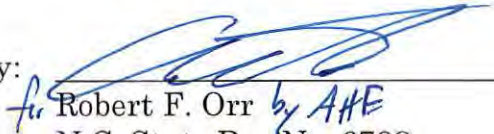
The Board respectfully requests that the Court temporarily stay its July 14, 2017 decision during the pendency of the Board’s appeal.

In the alternative, the Board respectfully requests that the Court temporarily stay its July 14, 2017 decision until the appellate courts have had an opportunity to rule on the Board’s motion for temporary stay and petition for writ of supersedeas.

Respectfully submitted the 5th day of September, 2017.

**ROBERT F. ORR, PLLC**

By:



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NORTH CAROLINA STATE  
BOARD OF EDUCATION**

**POYNER SPRUILL LLP**

By:



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Telephone: (919) 783-2895  
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**COUNSEL FOR PLAINTIFF  
NORTH CAROLINA STATE  
BOARD OF EDUCATION**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was served by e-mail and U.S. Mail to the following:

Amar Majmundar  
Olga E. Vysotskaya de Brito  
N.C. Department of Justice  
114 W. Edenton Street  
Raleigh, NC 27603  
*Counsel for the State of North Carolina*

Philip R. Isley  
Philip R. Miller, III  
E. Hardy Lewis  
Blanchard, Miller, Lewis & Isley P.A.  
1117 Hillsborough Street  
Raleigh, NC 27603  
*Counsel for The Honorable Mark Johnson,  
Superintendent of Public Instruction*

This the 5th day of September, 2017.

  
\_\_\_\_\_  
Andrew H. Erteschik

# Exhibit I

**From:** Vysotskaya, Olga <OVysotskaya@ncdoj.gov>  
**Sent:** Friday, September 08, 2017 11:23 AM  
**To:** Myers, Kellie Z.  
**Cc:** Erteschik, Drew; Robert F Orr; Majmundar, Amar; Hardy Lewis; Philip Isley; Victoria Graves  
**Subject:** RE: Our filing today - NC State Board of Education v. NC and Mark Johnson - 16 CVS 15607

Thank you for all your help with this case, Kellie. The Attorney General's Office joins all the parties in appreciating your amazing promptness and attention to the logistics and details, which helps us and the Court to litigate this matter efficiently.

The State does not intend to submit any written material to the Court regarding the pending Motion to Stay. We anticipate that we will neither object, nor consent to the motion.

I hope this helps,

Olga



**Olga E. Vysotskaya de Brito**  
Special Deputy Attorney General  
Composite Litigation Group  
Phone: 919.716.0185  
Email: [ovysotskaya@ncdoj.gov](mailto:ovysotskaya@ncdoj.gov)  
114 W. Edenton St., Raleigh, NC 27603  
[ncdoj.gov](http://ncdoj.gov)

Please note messages to or from this address may be public records.

**From:** Myers, Kellie Z. [mailto:Kellie.Z.Myers@nccourts.org]  
**Sent:** Friday, September 08, 2017 10:46 AM  
**To:** Victoria Graves  
**Cc:** Erteschik, Drew; Robert F Orr; Majmundar, Amar; Vysotskaya, Olga; Hardy Lewis; Philip Isley  
**Subject:** RE: Our filing today - NC State Board of Education v. NC and Mark Johnson - 16 CVS 15607

Thank you, Victoria. I forwarded the attachments to the panel and also informed them that I will mail hard copies to them, if they so require, but that I suggested you not do so due to the timing.

Best,  
Kellie

**Kellie Z. Myers**  
Trial Court Administrator  
**North Carolina Judicial Branch**  
PO Box 1916, Raleigh, NC 27602

**From:** Victoria Graves [<mailto:vgraves@bmlilaw.com>]

**Sent:** Friday, September 08, 2017 10:38 AM

**To:** Myers, Kellie Z. <[Kellie.Z.Myers@nccourts.org](mailto:Kellie.Z.Myers@nccourts.org)>

**Cc:** Erteschik, Drew <[DErteschik@poynerspruill.com](mailto:DErteschik@poynerspruill.com)>; Robert F Orr <[orr@rforrlaw.com](mailto:orr@rforrlaw.com)>; Majmundar, Amar <[amajmundar@ncdoj.gov](mailto:amajmundar@ncdoj.gov)>; Vysotskaya, Olga <[OVysotskaya@ncdoj.gov](mailto:OVysotskaya@ncdoj.gov)>; Hardy Lewis <[HLewis@bmlilaw.com](mailto:HLewis@bmlilaw.com)>; Philip Isley <[PIsley@bmlilaw.com](mailto:PIsley@bmlilaw.com)>

**Subject:** Our filing today - NC State Board of Education v. NC and Mark Johnson - 16 CVS 15607

Good Morning Kellie,

I hope you are well. Attached please find a filed copy of the Superintendent's Response in Opposition to Plaintiff's Motion for Temporary Stay and Notice of Filing as well as a filed copy of the Second Affidavit of North Carolina Superintendent of Public Instruction Mark Johnson. We will also be serving hard copies upon all of the parties' attorneys via U.S. Mail. Let me know if you have any questions regarding the attached. Thank you for all your help and I hope you have a great weekend!

Take Care,

V

Victoria N. Graves  
NC Certified Paralegal  
Blanchard, Miller, Lewis & Isley, P.A.  
1117 Hillsborough Street  
Raleigh, NC 27603  
Direct Dial: (919) 747-8111  
Main Office Line: (919) 755-3993  
Fax: (919) 755-3994  
[vgraves@bmlilaw.com](mailto:vgraves@bmlilaw.com)  
[www.bmlilaw.com](http://www.bmlilaw.com)

E-mail correspondence to and from this address may be subject to the North Carolina public records laws and if so, may be disclosed.

# Exhibit J

NORTH CAROLINA

WAKE COUNTY

NORTH CAROLINA STATE BOARD  
OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA and  
MARK JOHNSON, in his official capacity,

Defendants.

FILED

2017 SEP 14 P 12:47

GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16 CVS 15607

ORDER ON PLAINTIFF'S  
MOTION FOR TEMPORARY STAY

This matter came on for hearing before the undersigned panel on Thursday, September 14, 2017 on Plaintiff's Motion for Temporary Stay. After review of written submissions by the parties and consideration of arguments presented in open court, this Court enters the following Order.

By its Motion, the Plaintiff seeks an extension of a stay of this Court's Order during the Plaintiff's appeal from the Order entered by this Court on July 14, 2017. In the alternative, the Plaintiff seeks "a brief extension of the temporary stay...to allow the appellate courts a sufficient opportunity to issue a temporary stay or writ of supersedeas."

Pursuant to G.S. § 1-500, requests for stay pending appeal are addressed to the discretion of the trial judge. In the exercise of that discretion, this Court has determined that a stay of its Order throughout the pendency of the appeal should not be granted.

This Court has further determined in the exercise of its discretion, that given the magnitude of the issues involved in this case, the parties should have a reasonable opportunity to petition the appellate courts for a stay or writ of supersedeas pending the hearing and determination of the appeal.

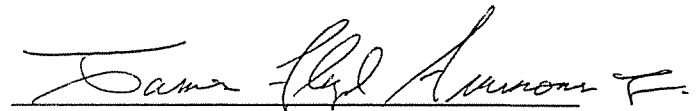


IT IS HEREBY ORDERED that the temporary stay of the Order of this Court entered on July 14, 2017, as extended by the subsequent September 11, 2017 Order of this Court up to and through the conclusion of any hearing conducted by this Court, shall be and hereby is further extended for a period of 30 days from today, specifically up to and including 5:00 p.m. on Monday, October 16, 2017, in order to afford a reasonable opportunity for the parties to petition and present such arguments as may be required to any appellate court upon the issue of further extension or dissolution of the said stay.

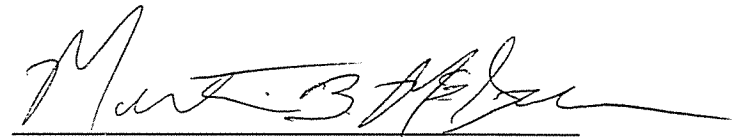
SO ORDERED, this the 14<sup>th</sup> day of September, 2017.

A handwritten signature in black ink, appearing to read "Forest Donald Bridges", written over a horizontal line.

The Honorable Forest Donald Bridges

A handwritten signature in black ink, appearing to read "James F. Ammons, Jr.", written over a horizontal line.

The Honorable James F. Ammons, Jr.

A handwritten signature in black ink, appearing to read "Martin B. McGee", written over a horizontal line.

The Honorable Martin B. McGee

# Exhibit K



## North Carolina Court of Appeals

DANIEL M. HORNE JR., Clerk

Court of Appeals Building  
One West Morgan Street  
Raleigh, NC 27601  
(919) 831-3600

Fax: (919) 831-3615  
Web: <http://www.nccourts.org>

Mailing Address:  
P. O. Box 2779  
Raleigh, NC 27602

No. P17-687

**NORTH CAROLINA STATE BOARD  
OF EDUCATION,  
PLAINTIFF,**

**V.**

**THE STATE OF NORTH CAROLINA, AND  
MARK JOHNSON, IN HIS OFFICIAL CAPACITY,  
DEFENDANTS.**

From Wake  
( 16-CVS-15607 )

### **ORDER**

The following order was entered:

The petition filed in this cause by petitioner on 20 September 2017 and designated 'Petition for Writ of Supersedeas' is allowed, in part, to the extent that the challenged provisions of S.L. 2016-126 empower the Superintendent of Public Instruction to enter into statewide contracts for the public school system which could not be terminated by the Board immediately upon any decision by our Court in this matter which determines that the Board has the authority under our State Constitution to enter into such contracts. The petition is otherwise denied.

By order of the Court this the 5th of October 2017.

The above order is therefore certified to the Clerk of the Superior Court, Wake County.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 5th day of October 2017.

Daniel M. Horne Jr.  
Clerk, North Carolina Court of Appeals

Copy to:

Mr. Andrew H. Erteschik, Attorney at Law, For North Carolina State Board of Education  
Mr. Robert F. Orr, Attorney at Law  
Mr. Saad Gul, Attorney at Law  
Mr. John Michael Durnovich, Attorney at Law  
Mr. Amar Majmundar, Special Deputy Attorney General, For State of North Carolina  
Ms. Olga E. Vysotskaya, Special Deputy Attorney General

Mr. Hardy Lewis, Attorney at Law  
Mr. Philip R. Isley, Attorney at Law  
Hon. Jennifer Knox, Clerk of Superior Court

# Exhibit L

## CONSTITUTION OF NORTH CAROLINA OF 1868

DELEGATES TO THE CONSTITUTIONAL CONVENTION<sup>79</sup>

Raleigh, January 14-March 17, 1868

President, Calvin J. Cowles, Wilkes

President *Pro Tem*, Richard W. King,<sup>80</sup> Lenoir

Secretary, T. A. Byrnes, Cumberland

Secretary *Pro Tem*, Joshua P. Andrews,<sup>81</sup> WakeJames H. Harris,<sup>82</sup> Wake

Assistant Secretary, John H. Bonner, [Wake]

Name	District	County	Name	District	County
W. A. B. Murphey	1		Wilson Carey	25	Caswell
John S. Parks	1		Phillip Hodnett	25	Caswell
William H. Logan	2	Rutherford	Henry M. Ray	26	Alamance
Jesse Rhodes	2	Henderson	William Merritt	27	Person
Julius S. Garland	3	[Mitchell]	John W. Graham	28	Orange
Thomas J. Candler	4	Buncombe	Edwin M. Holt	28	Orange
James H. Duckworth	4	Transylvania	William T. Gunter	29	Chatham
George W. Gahagan	4	Madison	John A. McDonald	29	Chatham
W. G. B. Garrett	5	Haywood	Joshua P. Andrews	30	Wake
George W. Dickey	6	Cherokee	Stokes D. Franklin	30	Wake
Mark May	6	Macon	James H. Harris	30	Wake
Edwin C. Bartlett <sup>83</sup>	7	Alleghany	B. S. D. Williams	30	Wake
Evan Benbow	7	Yadkin	Cuffey Mayo	31	Granville
George W. Bradley	7	Watauga	James J. Moore	31	Granville
Samuel Forkner	7	Surry	John W. Ragland	31	Granville
John G. Marler <sup>84</sup>	7	Yadkin	John A. Hyman	32	Warren
John H. Marshall <sup>85</sup>	7	Surry	John Read	32	Warren
John Q. A. Bryan	8	Wilkes	James T. Harris	33	Franklin
Calvin J. Cowles	8	Wilkes	John H. Williamson	33	Franklin
Wesley H. George	8	Iredell	James H. Hood	34	Cumberland
Calvin C. Jones	8	Caldwell	William A. Mann	34	Cumberland
Jerry Smith	8	Alexander	James M. Turner	35	Harnett
Milton Hobbs	9	Davie	Swain S. McDonald	36	Moore
Allen Rose	9	Rowan	George A. Graham	37	Montgomery
Isaac M. Shaver <sup>86</sup>	9	Rowan	Richmond T. Long, Sr.	38	Richmond
James S. McCubbins <sup>87</sup>	9	Rowan	Hiram L. Grant	39	Wayne
Plato Durham	10	Cleveland	Jesse Hollowell	39	Wayne
James R. Ellis	11	Catawba	Nathan Gulley	40	Johnston
Joseph H. King	12	Lincoln	John M. Patrick	41	Greene
Milot J. Aydlott	13	Gaston	Willie Daniel	42	Wilson
Edward Fullings	14	Mecklenburg	Jacob Ing	43	Nash
Silas N. Stilwell	14	Mecklenburg	Henry Eppes	44	Halifax
William Newson	15	Union	J. J. Hayes	44	Halifax
William T. Blume	16	Cabarrus	John H. Renfrow	44	Halifax
Levi C. Morton	17	Stanly	Henry T. Grant	45	Northampton
Henry Chillson	18	Anson	Roswell C. Parker	45	Northampton
George Tucker	18	Anson	Joseph H. Baker	46	Edgecombe
Riley F. Petree	19	Stokes	Henry C. Cherry	46	Edgecombe
Elijah B. Teague	20	Forsyth	Henry A. Dowd	46	Edgecombe
Isaac Kinney	21	Davidson	Richard W. King	47	Lenoir
Spencer Mullican	21	Davidson	Edwin Legg	48	Brunswick
Talton L. L. Cox	22	Randolph	Hayes Lennon	49	Colombus
Reuben F. Trogon	22	Randolph	O. S. Hayes	50	Robeson
Albion W. Tourgee	23	Guilford	Joshua L. Nance	50	Robeson
G. William Welker	23	Guilford	Abiel W. Fisher	51	Bladen
Henry Barnes	24	Rockingham	Frederick F. French	51	Bladen
John French	24	Rockingham	Joseph C. Abbott	52	New Hanover

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, assessment, 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.*

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.

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.

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 requirement of this section, they shall be liable to indictment.

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 monies, 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 exemptions 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.

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.

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.

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.

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

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 by the General Assembly, and when so altered, amended or repealed they shall not be reenacted by the 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 meetings may be determined by the Board.

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

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

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 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.

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.

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.

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.

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.



# Exhibit M

# NORTH CAROLINA STATE CONSTITUTION

## PREAMBLE

We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign Ruler of Nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do, for the more certain security thereof and for the better government of this State, ordain and establish this Constitution.

## ARTICLE I DECLARATION OF RIGHTS

That the great, general, and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and government of the United States and those of the people of this State to the rest of the American people may be defined and affirmed, we do declare that:

### **Section 1. The equality and rights of persons.**

We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

### **Sec. 2. Sovereignty of the people.**

All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

### **Sec. 3. Internal government of the State.**

The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States.

### **Sec. 4. Secession prohibited.**

This State shall ever remain a member of the American Union; the people thereof are part of the American nation; there is no right on the part of this State to secede; and all attempts, from whatever source or upon whatever pretext, to dissolve this Union or to sever this Nation, shall be resisted with the whole power of the State.

### **Sec. 5. Allegiance to the United States.**

Every citizen of this State owes paramount allegiance to the Constitution and government of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force.

### **Sec. 6. Separation of powers.**

The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

### **Sec. 7. Suspending laws.**

## **ARTICLE IX EDUCATION**

### **Section 1. Education encouraged.**

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

### **Sec. 2. Uniform system of schools.**

(1) General and uniform system: term. The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

(2) Local responsibility. The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

### **Sec. 3. School attendance.**

The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means.

### **Sec. 4. State Board of Education.**

(1) Board. The State Board of Education shall consist of the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session. The General Assembly shall divide the State into eight educational districts. Of the appointive members of the Board, one shall be appointed from each of the eight educational districts and three shall be appointed from the State at large. Appointments shall be for overlapping terms of eight years. Appointments to fill vacancies shall be made by the Governor for the unexpired terms and shall not be subject to confirmation.

(2) Superintendent of Public Instruction. The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education.

### **Sec. 5. Powers and duties of Board.**

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.

### **Sec. 6. State school fund.**

The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or by the terms of the grant, gift, or devise, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

**Sec. 7. County school fund; State fund for certain moneys.**

(a) Except as provided in subsection (b) of this section, all moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

(b) The General Assembly may place in a State fund the clear proceeds of all civil penalties, forfeitures, and fines which are collected by State agencies and which belong to the public schools pursuant to subsection (a) of this section. Moneys in such State fund shall be faithfully appropriated by the General Assembly, on a per pupil basis, to the counties, to be used exclusively for maintaining free public schools. (2003-423, s.1.)

**Sec. 8. Higher education.**

The General Assembly shall maintain a public system of higher education, comprising The University of North Carolina and such other institutions of higher education as the General Assembly may deem wise. The General Assembly shall provide for the selection of trustees of The University of North Carolina and of the other institutions of higher education, in whom shall be vested all the privileges, rights, franchises, and endowments heretofore granted to or conferred upon the trustees of these institutions. The General Assembly may enact laws necessary and expedient for the maintenance and management of The University of North Carolina and the other public institutions of higher education.

**Sec. 9. Benefits of public institutions of higher education.**

The General Assembly shall provide that the benefits of The University of North Carolina and other public institutions of higher education, as far as practicable, be extended to the people of the State free of expense.

**Sec. 10. Escheats.**

(1) Escheats prior to July 1, 1971. All property that prior to July 1, 1971, accrued to the State from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons shall be appropriated to the use of The University of North Carolina.

(2) Escheats after June 30, 1971. All property that, after June 30, 1971, shall accrue to the State from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons shall be used to aid worthy and needy students who are residents of this State and are enrolled in public institutions of higher education in this State. The method, amount, and type of distribution shall be prescribed by law.

# Exhibit N

NORTH CAROLINA

WAKE COUNTY

NORTH CAROLINA STATE  
BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA,

Defendant.

GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16-CVS-15607

**AFFIDAVIT OF  
WILLIAM W. COBEY, JR.**

I, William W. Cobey, Jr., declare under penalty of perjury as follows:

1. I have personal knowledge of the matters set forth in this affidavit.
2. I currently serve as the Chairman of the North Carolina State Board of Education.

I have served in this capacity since 2013, when Governor Pat McCrory appointed me to the Board and I was confirmed by the General Assembly.

3. Prior to serving as Chairman, I served as a member of the U.S. House of Representatives, as the Deputy Secretary of the North Carolina Department of Transportation, as the Secretary of the North Carolina Department of Environment, Health and Natural Resources, and for two terms as the Chairman of the North Carolina Republican Party.

4. I hold a bachelor of arts in chemistry from Emory University, a masters in business administration from the University of Pennsylvania's Wharton School of Business, and a masters in education from the University of Pittsburgh.

5. Under Article IX, Section 4 of the North Carolina Constitution, the Board is composed of "the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session." Article IX,

Section 4 requires that these Board members serve “overlapping terms of eight years.” These lengthy, overlapping terms ensures that, at all times, Board has at least a half century of combined experience supervising and administering North Carolina’s public school system and the funds provided for its support. This constitutional structure also maintains the Board’s institutional knowledge and expertise in education, enables smooth transitions between Board memberships, provides ample training opportunities for incoming members by experienced members, and insulates the Board from political cycles.

6. In addition, Article IX, Section 4 requires that eight of the Governor’s eleven appointments must be made from each of the eight educational districts. This geographic diversity ensures that the Board is representative of the people.

7. On December 14, 2016, the General Assembly introduced House Bill 17. Within 48 hours, it passed both the House of Representatives and the Senate. Three days later, on December 19, 2016, House Bill 17 was signed into law as Session Law 2016-126.

8. Session Law 2016-126 contains provisions that attempt to transfer the Board’s constitutional powers and duties to the Superintendent of Public Instruction (“SPI”). Those provisions appear in Part I, Sections 1-12, 14-16, 24-15, and 28-30 (“the Transfer Legislation”).

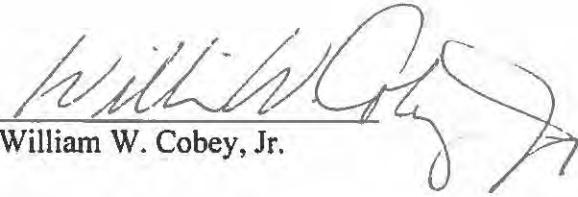
9. For the past 148 years, the Board has been in charge of the public school system. The Transfer Legislation attempts to strip the Board of its constitutional powers and duties, however, and makes the SPI in charge of the public school system instead. Thus, without a preliminary injunction to preserve the status quo, the Transfer Legislation would reduce a 148-year-old constitutional entity to an empty shell, and would put the entire \$10 billion public

school system under the control of a single individual. Without a preliminary injunction to preserve the status quo, the Transfer Legislation would accomplish this seismic shift overnight.

10. Furthermore, without a preliminary injunction to preserve the status quo, the SPI would be immediately empowered to take drastic actions that could not be undone. For example, the SPI would immediately be empowered to unilaterally hire and fire public school system employees, fire members of the Board's staff, determine whether certain public school system positions should be exempt from state personnel laws, execute new contracts for the public school system, and jeopardize the Board's ability to manage more than 150 existing contracts for tens of millions of dollars. These actions would be impossible to undo after the fact, even if this declaratory judgment action were ultimately resolved in favor of the Board.

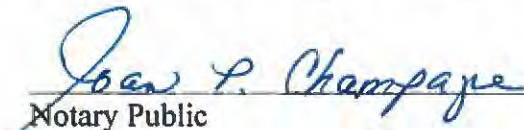
11. I am unaware of any non-political justifications for dismantling North Carolina's 148-year-old constitutional structure for managing public education. Under Article I, Section 15 of the North Carolina Constitution, "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." I personally believe that guarding and maintaining that right should always be above politics.



  
William W. Cobey, Jr.

WAKE COUNTY, NORTH CAROLINA

Sworn to and subscribed before me this the 4 day of January, 2017.

  
Notary Public

My commission expires: Jan 9, 2018

[SEAL]



# Exhibit O

NORTH CAROLINA

WAKE COUNTY

NORTH CAROLINA STATE  
BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA,

Defendant.

GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16-CVS-15607

**AFFIDAVIT OF  
WILLIAM W. COBEY, JR.**

I, William W. Cobey, Jr., being first duly sworn, testify as follows:

1. I have personal knowledge of the matters set forth in this affidavit.
2. I currently serve as the Chairman of the North Carolina State Board of Education. I have served in this capacity since 2013, when I was appointed by Governor Pat McCrory and confirmed by the General Assembly.
3. Prior to serving as Chairman of the Board, I served as a member of the U.S. House of Representatives, as the Deputy Secretary of the North Carolina Department of Transportation, as the Secretary of the North Carolina Department of Environment, Health and Natural Resources, and for two terms as the Chairman of the North Carolina Republican Party. I hold a bachelor of arts in chemistry from Emory University, a masters in business administration from the University of Pennsylvania's Wharton School of Business, and a masters in education from the University of Pittsburgh.

4. In its July 14, 2017 decision, this Court concluded that it is “the clear intent of the Constitution that the State Board shall have the primary authority to supervise and administer the free public school system.” July 14, 2017 Order at 4. The Court further concluded that Session Law 2016-126 “places a limit on the Superintendent’s power, leaving the ultimate authority to supervise and administer the public school system with the State Board.” *Id.* at 6.

5. Unless the Court’s July 14, 2017 decision is stayed, Session Law 2016-126 will go into effect on September 12, 2017. The Superintendent has taken the position that, if Session Law 2016-126 is allowed to take effect, he will immediately possess the sole hiring, firing, and supervisory authority over more than a *thousand* state employees.

6. These affected employees include senior employees who, before Session Law 2016-126, were known as “dual reports”—that is, they were accountable to both the Board and the Superintendent. Under Session Law 2016-126, however, these and other critical education policymaking leaders for the agency would report exclusively to the Superintendent. The Superintendent has also taken the position that these employees would serve at his pleasure. The affected senior employees include senior policymaking leaders such as the Deputy State Superintendent, the Chief Financial Officer, the Chief Academic Officer, the Director of Communications, the Director of Human Resources, the Chief Information

Technology Officer, the Internal Auditor, the Executive Director of the Office of Charter Schools, and the Superintendent of Innovative School Districts.

7. These senior policymaking leaders form the core team that enables the Board to effectively set policy for the public school system. Thus, without hiring authority, firing authority, or at least supervisory authority over the senior policymaking leaders noted above, the Board would be unable to exercise (in this Court's words) "the ultimate authority to supervise and administer the public school system."

8. For example, the Board needs specialized expertise from its Chief Information Technology Officer to develop information technology policies for the state's public schools. Similarly, the Board relies on the Internal Auditor's subject matter knowledge and experience to evaluate Board policies on investments and expenditures. The Board likewise relies on the Human Resources Director's expertise to advise the Board on personnel procedures. As these examples illustrate, the Board will be unable to exercise (in this Court's words) "the ultimate authority to supervise and administer the public school system" if it has no authority whatsoever over the hiring, firing, and supervisions of these senior policymaking positions.

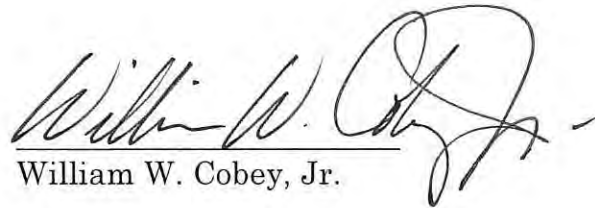
9. In addition, if the continued employment of these senior policymaking leaders were to depend entirely on whether the Superintendent is pleased with them, they will be unable to effectively implement the Board's policies—particularly

when there is a conflict between what the Superintendent believes is effective education policy and what the Board has decided is effective education policy. Indeed, the Superintendent has already communicated his disapproval of one or more of these senior policymaking leaders. *See, e.g.*, April 12, 2017 Mark Johnson Affidavit ¶ 12-14 (describing disapproval with Chief Financial Officer).

10. Moreover, if fired by the Superintendent, the key senior policymaking employees described above cannot be “unfired”—at least not without serious consequences to both the Board and the employees themselves. In addition, if these employees are fired and replaced by the Superintendent, the Board will have no means to discipline the new, replacement senior policymaking employees who fail to adhere to the Board’s policy directives.

11. Above and beyond the harm described above, the Superintendent’s dismissal of long-term, senior policymaking employees would also result in the loss of significant cumulative institutional expertise. Between them, the long-term senior policymaking employees offer a pool of accumulated experience and specialized knowledge that is an invaluable asset to the Board. This experience and knowledge, built up over years of service, will be lost in short order with their removal. This loss, by itself, will inflict irreparable harm on the Board and the public school system.

[signature on next page]

  
William W. Cobey, Jr.

WAKE COUNTY, NORTH CAROLINA

Sworn to and subscribed before me this the 1st day of September, 2017.

  
Notary Public KIMBERLY K. SIMON

My commission expires: 2/6/22

[SEAL]

