

TENTH DISTRICT

~

V

From Wake County
No. 16CVS15607
No. COAP17-687

and

and

(Allowed 7 December 2017)

SUPREME COURT OF
NORTH CAROLINA

OCT 5 2017

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TENTH JUDICIAL DISTRICT

From Wake County
16-CVS-15607
COA P17-687

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 . . . [to] supervise and administer the free public school system[.]”</i>	“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 BACKGROUND¹

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,

¹ 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."²

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

² *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/ (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[.]” ³	“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.”

³ 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).⁴ 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

⁴ 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:
I certify that all of the attorneys listed
below have authorized me to list their
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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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This the 5th day of October, 2017.

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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: 7/18/2019

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:

Article IX, Section 5 of the North Carolina Constitution	House Bill 17, Section 4 (N.C. Sess. Law 2016-126 § 4)
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:

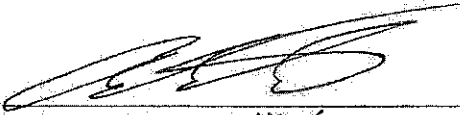
- (a) declare that the Transfer Legislation violates Article IX, Section 5 of the North Carolina Constitution and issue a permanent injunction enjoining its implementation or enforcement;
- (b) grant the Board's motion for preliminary injunction and enjoin the Transfer Legislation during the pendency 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:

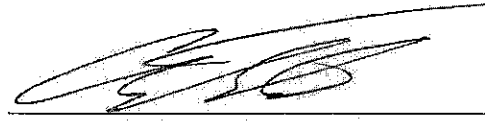

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BOARD OF EDUCATION**

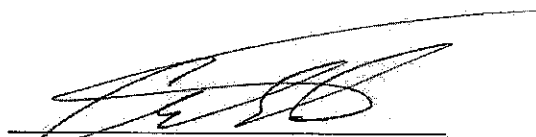
CERTIFICATE OF SERVICE

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
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Philip R. Isley
Philip R. Miller, III
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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 10th day of March, 2017.



Andrew H. Erteschik

STATE OF NORTH CAROLINA

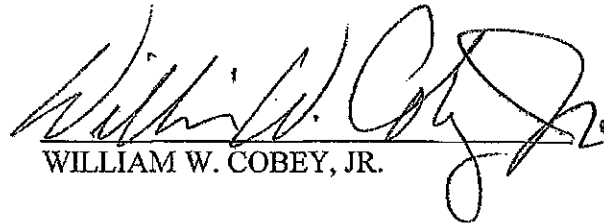
VERIFICATION

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]

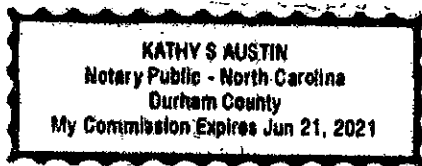


Exhibit B

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 ~~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 ~~1,500~~ 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-subdivisionsub-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 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 ~~it~~he or she 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.~~ 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 16th 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 19th day of December, 2016

Exhibit C

1 STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
2 COUNTY OF WAKE SUPERIOR COURT DIVISION
16-CVS-15607

3 NORTH CAROLINA STATE)
4 BOARD OF EDUCATION,)
5 Plaintiffs,)
6 vs.)
7 THE STATE OF NORTH)
8 CAROLINA,)
9 Defendant.)
10)
11)
12)
13)
14)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)

BEFORE: THE HONORABLE DONALD STEPHENS

TRANSCRIPT OF HEARING

TRANSCRIBED FROM A VIDEOTAPED PROCEEDING

DECEMBER 29, 2016

RALEIGH, NORTH CAROLINA

Reported in Stenotype by
Lauren M. McIntee, RPR
Transcript produced by computer-aided transcription

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 CA

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

Donald W. Stephens

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 M. Erteschik

Exhibit E

FILED

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE 16 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.)

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

Defendants.)

ORDER

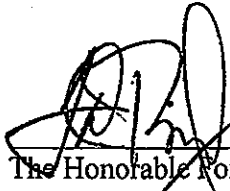
This cause came on for hearing before the undersigned three-judge panel presiding at the 29 June 2017 special setting of the Wake County Superior Court upon the motion for summary judgment filed by the North Carolina State Board of Education ("State Board"), the motion to dismiss filed by the State of 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.

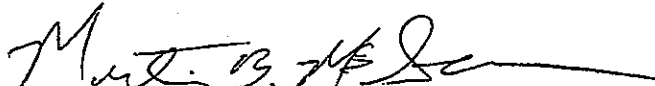
This the 30th day of June, 2017.



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.)	MEMORANDUM OF
)	OPINION
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 or 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 places 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.

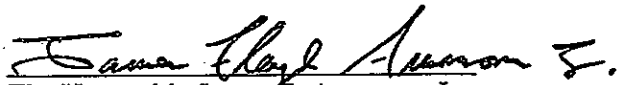
As noted previously, the State Board does not discuss in detail the additional provisions which it identifies in its complaint, and these provisions represent a permissible shift of day-to-day authority from the State Board to the Superintendent.

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.

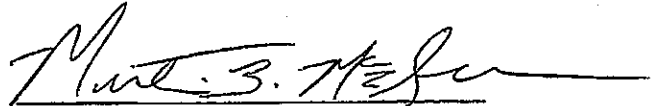
This the 6 day of July, 2017.



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:


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This the 14th day of July, 2017.



Kellie Z. Myers
Trial Court Administrator
PO Box 1916, Raleigh, NC 27602
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 RFE
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COUNSEL FOR PLAINTIFF
NORTH CAROLINA STATE
BOARD OF EDUCATION

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:

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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.⁴ 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

⁴ 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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*Counsel for The Honorable Mark Johnson,
Superintendent of Public Instruction*

This the 12th day of April, 2017.



Andrew H. Erteschik

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. SPT'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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CERTIFICATE OF SERVICE

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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Superintendent of Public Instruction*

This the 19th day of May, 2017.



Andrew H. Erteschik

Exhibit H

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

16-CVS-15607

NORTH CAROLINA STATE
BOARD OF EDUCATION,

2017-07-14 P 3:34
BY  S.C.
Plaintiff,

v.

**PLAINTIFF'S MOTION
FOR TEMPORARY STAY**

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

Defendants.

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.¹ 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.

¹ 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. § 1-500.²

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.”³ *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*

² 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.*

³ 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 SPT’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.”⁴ Prior to this Court’s decision, another Superior Court Judge expressed far greater concerns about the constitutionality of the challenged legislation.⁵ 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-

⁴ *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/ (last visited September 5, 2017).

⁵ 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.

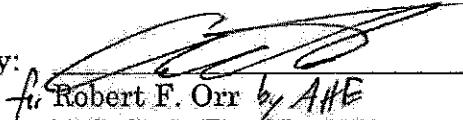
In the alternative, the Board respectfully requests that the Court temporarily stay its July 14, 2017 decision until the appellate courts have had an opportunity to rule on the Board’s motion for temporary stay and petition for writ of supersedeas.

Respectfully submitted the 5th day of September, 2017.

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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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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



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

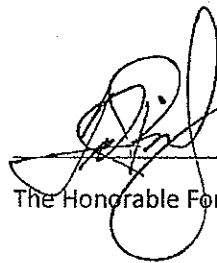
By its Motion, the Plaintiff seeks an extension of a stay of this Court's Order during the Plaintiff's appeal from the Order entered by this Court on July 14, 2017. In the alternative, the Plaintiff seeks "a brief extension of the temporary stay...to allow the appellate courts a sufficient opportunity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

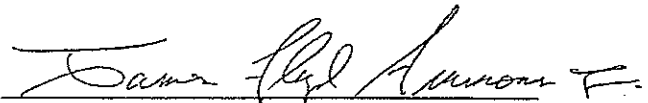
This Court has further determined in the exercise of its discretion, that given the magnitude of the issues involved in this case, the parties should have a reasonable opportunity to petition the appellate courts for a stay or writ of supersedeas pending the hearing and determination of the appeal.

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.

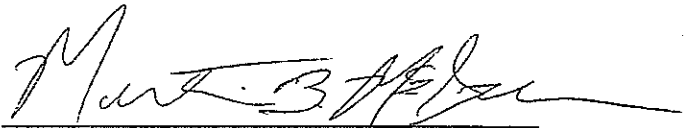
SO ORDERED, this the 14th day of September, 2017.

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

The Honorable Forest Donald Bridges

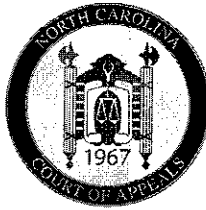
A handwritten signature in dark ink, appearing to read "James F. Ammons, Jr.", written over a horizontal line.

The Honorable James F. Ammons, Jr.

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

The Honorable Martin B. McGee

Exhibit K



North Carolina Court of Appeals

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

DANIEL M. HORNE JR., Clerk
Court of Appeals Building
One West Morgan Street
Raleigh, NC 27601
(919) 831-3600

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 Dumovich, 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 CONVENTION⁷⁹

Raleigh, January 14-March 17, 1868

President, Calvin J. Cowles, Wilkes

President *Pro Tem*, Richard W. King,⁸⁰ Lenoir

Secretary, T. A. Byrnes, Cumberland

Secretary *Pro Tem*, Joshua P. Andrews,⁸¹ WakeJames H. Harris,⁸² 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 ⁸³	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 ⁸⁴	7	Yadkin	John A. Hyman	32	Warren
John H. Marshall ⁸⁵	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 ⁸⁶	9	Rowan	Richmond T. Long, Sr.	38	Richmond
James S. McCubbins ⁸⁷	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.
William W. Cobey, Jr.

WAKE COUNTY, NORTH CAROLINA

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

Joan P. Champagne
Notary Public

My commission expires: Jan 9, 2018

[SEAL]

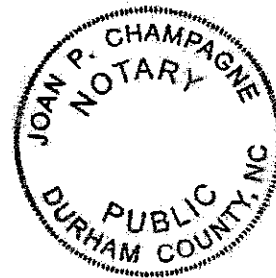


Exhibit O

NORTH CAROLINA
WAKE COUNTY

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

NORTH CAROLINA STATE
BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA,
Defendant.

**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.

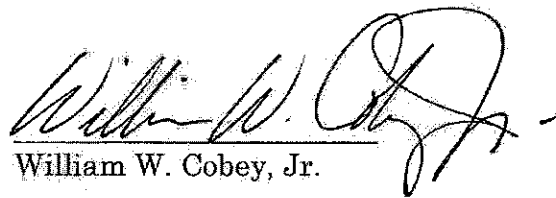
9. In addition, if the continued employment of these senior policymaking leaders were to depend entirely on whether the Superintendent is pleased with them, they will be unable to effectively implement the Board's policies—particularly

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.

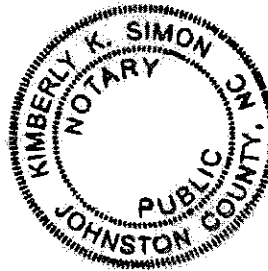
WAKE COUNTY, NORTH CAROLINA

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]



No. 333-P17

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA STATE BOARD
OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA, and
MARK JOHNSON, in his official capacity as
North Carolina Superintendent of
Public Instruction,

Defendants.

From Wake County
No. 16-CVS-15607
COA P17-687

SUPREME COURT OF
NORTH CAROLINA

OCT 06 2017

FILED

-3-

**DEFENDANT MARK JOHNSON'S RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR TEMPORARY STAY AND PETITION FOR
WRIT OF SUPERSEDEAS**

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SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA STATE BOARD
OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA, and
MARK JOHNSON, in his official capacity as
North Carolina Superintendent of
Public Instruction,

Defendants.

From Wake

**DEFENDANT MARK JOHNSON'S RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR TEMPORARY STAY AND PETITION FOR
WRIT OF *SUPERSEDEAS***

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant Mark Johnson, North Carolina Superintendent of Public
Instruction ("Superintendent"), respectfully submits this response in opposition to
the motion of plaintiff North Carolina State Board of Education ("State Board") for
temporary stay pending appeal and its petition for writ of *supersedeas*.

PRELIMINARY STATEMENT

Just over a week ago, in a case featuring the very same plaintiff as the current case, a panel of the North Carolina Court of Appeals observed:

[W]e must abide by the long established presumption that statutes . . . are constitutional both facially and as applied to any party. *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (“Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond a reasonable doubt.” (internal citations and quotation marks omitted)). “[T]he constitutional violation must be plain and clear.” *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016) (citation omitted). Any doubt as to the constitutionality of a statute must be resolved in favor of the legislature. *Baker*, 330 N.C. at 338, 410 S.E.2d at 891.

N.C. State Board of Education v. State of North Carolina, ___ N.C. ___, ___ S.E.2d ___ (No. COA 15-1229, filed 19 September 2017, slip op. pp. 17-18 (hereinafter “*Rules Review*”)).¹ Like the *Rules Review* case, this case involves a State Board constitutional challenge to legislation enacted by the North Carolina General Assembly. Although the legislation in the current case, House Bill 17 (“H.B. 17”), passed and received the Governor’s signature in December of 2016, it never has been allowed to take effect. The will of the Legislature expressed in H.B. 17 has been frustrated for nine months based on the inertia created by the trial court’s temporary restraining order from 29 December 2016, rendered in a hearing on the afternoon of the filing of the original complaint; a hearing in which

¹ A copy of the Court of Appeals slip opinion is attached to this response as Exhibit A.

defendant State of North Carolina's counsel told the court "we've only had the complaint a few hours." See Plaintiff's Motion for Temporary Stay and Petition for Writ of *Supersedeas* ("Appellate Motion to Stay"), Exhibit C (TRO Hearing Transcript) at 11. For his part, the Superintendent had not yet taken the oath of office and was neither named as a party nor present in the courtroom.

A great deal has happened in this case since that hearing. In keeping with the policy expressed in N.C. Gen. Stat. § 1-267.1 requiring heightened judicial scrutiny of facial constitutional challenges to acts of the General Assembly, the Chief Justice appointed a three judge panel to hear all further matters. The panel established a pleading and briefing schedule that generated nine briefs, totaling roughly 150 pages. For several hours on 29 June 2017, the three judge panel conducted a hearing on the parties' cross-motions for summary judgment. On 14 July 2017 the three judge panel filed an Order and a Memorandum of Opinion² unanimously upholding the constitutionality of H.B. 17 and entering summary judgment in favor of the State and the Superintendent and against the State Board.

The State Board appealed and sought a stay pending appeal from the Superior Court three judge panel. That panel issued an order unanimously denying the motion, stating: "In the exercise of [the Court's] discretion, this Court has

² Although filed on 14 July, the Order granting summary judgment had been signed by the panel on the day after the hearing – 30 June 2017. The Memorandum of Opinion was dated 6 July 2017.

determined that a stay of its Order throughout the pendency of the appeal should not be granted.” The State Board then turned to the Court of Appeals, filing nearly the same motion and argument it presented yesterday to this Court. That motion was largely denied in an order entered yesterday by the Court of Appeals. Last night the State Board turned to this Court seeking to block the will of the General Assembly yet again. At some point, the “long established presumption” that acts of the General Assembly are constitutional must mean something. At some point, the unanimous decision of a three judge panel, rendered after exhaustive briefing and hours of argument, should be given its proper weight compared to the outcome of a hastily convened, unbriefed hearing effectively featuring only one side of the argument. The Superintendent respectfully submits that point is now.

STATEMENT OF THE CASE

As discussed above, the plaintiff State Board filed a Verified Complaint for Declaratory Judgment and Injunctive Relief and Motion for Preliminary Injunctive Relief on 29 December 2016, naming the State of North Carolina as the sole defendant. In an emergency TRO hearing held the same day, the trial judge entered an order enjoining the implementation and enforcement of H.B. 17. By order of the Chief Justice of the North Carolina Supreme Court, a three judge panel of Superior Court judges obtained this case on 3 January 2017. The three judge panel issued a case management order on 16 February 2017. The parties agreed to leave the terms

suspending implementation and enforcement of H.B. 17 in place until the Superior Court entered judgment. On 10 March 2017, plaintiff filed an amended verified complaint naming the Superintendent as an additional defendant.

The Superior Court conducted a hearing on cross-motions for summary judgment on 29 June 2017. On 14 July 2017, the three judge panel filed an Order and Memorandum of Opinion declaring H.B. 17 constitutional, and granting summary judgment in favor of defendants State of North Carolina and the Superintendent. The State Board filed notice of appeal to the Court of Appeals on 20 July 2017. On 5 September 2017, the State Board filed a Motion for Temporary Stay pending appeal pursuant to N.C. Gen. Stat. § 1-500 in Superior Court. On 14 September 2017, after a hearing on the State Board's motion for stay, the three judge panel entered an order providing, in pertinent part:

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.

The three judge panel extended the existing stay an additional thirty days to allow the parties a reasonable opportunity to petition the appellate division to overturn the trial court's exercise of its discretion and to impose a stay of the three judge panel's judgment pending appeal. On 19 September 2017, the State Board filed a Motion for Temporary Stay and Petition for Writ of *Supersedeas*, to which the Superintendent responded on 29 September 2017. On 5 October 2017, the Court of

Appeals filed an order largely denying the State Board's motion (the State Board itself characterized the ruling as the grant of "a narrow, partial stay on a limited issue." (Plaintiff's Motion for Temporary Stay and Petition for Writ of *Supersedeas*, at 9)). Hours later, the State Board filed the motion that is before this Court.

ARGUMENT

I. The State Board has failed to demonstrate that it is entitled to a stay pending appeal.

State Board's principal argument, as expressed in its motion, is that "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[.]" Appellate Motion to Stay, p. 8. In other words, the State Board argues that if a stay pending appeal is not granted, it would be as if the three judge panel had ruled against it. Of course, the three judge panel *did* rule against it, holding that the Board's claims to a "constitutional power and duty to supervise and administer" are in fact "*subject to laws enacted by the General Assembly.*" N.C. CONST., Art. IX, § 5 (emphasis supplied).

The State Board's argument in its motion to stay, like all of its arguments in the case going back to the beginning, fails to account for those eight words at the end of Article IX, Section 5. Indeed, it is striking that the graphic table inserted in

the State Board's "Introduction"³ to its motion for stay in the Court of Appeals⁴ actually misquotes the constitutional provision at issue, first by placing quotation marks around the word "duty," which is not in the provision, but more importantly by placing a period in the quoted passage at the end of "free public school system." The only period in Article IX, Section 5 comes after the words "*subject to laws enacted by the General Assembly.*" As much as the State Board would have it otherwise, it is those words that drive the result in this case.

The three judge panel, having had the benefit of nine briefs and hours of argument, unanimously recognized this. Two months later the panel reinforced its confidence in the judgment by unanimously holding that in the exercise of its discretion it would deny the State Board's motion for stay pending appeal and allow the law to take effect. At this point, then, granting the State Board's motion to stay would amount to a conclusion that 1) the three judge panel likely was wrong in holding that H.B. 17 is constitutional; 2) the three judge panel abused its discretion in denying the State Board's motion to stay pending appeal; 3) the Court

³ See Appellate Motion to Stay, p. 2.

⁴ In a footnote in its motion before this Court, the State Board expressed pique at having been challenged for taking editorial liberties that, in the interest of creating a graphic point, omitted the most important constitutional passage in this case. As if to brush off the criticism, the State Board's motion in this Court has bracketed the period. While this indeed corrects the editorial miscue, it does nothing to cleanse the substantive failure of omitting the eight words that wholly qualify the passage in their box: "subject to laws enacted by the General Assembly." In fact, the State Board does not mention the phrase at all in its current motion until page 12 of a 20 page document.

of Appeals erroneously failed to find an abuse of discretion on the part of the three judge panel; and 4) the presumption that acts of the General Assembly are constitutional has no application in this context. The fact that North Carolina law provides for three judges instead of one at the trial level of a case such as this strongly suggests that trial court rulings should be entitled to more deference pending appellate review than rulings from a single judge. Otherwise, the three judge panel statute arguably would be pointless. The State Board's motion to stay fails to make a compelling case that either the three judge panel erred, or that the interests of justice otherwise require continued frustration of the will of the General Assembly. The State Board's motion/petition should be denied, and H.B. 17 should be allowed to take effect.

There is nothing new in the State Board's argument that it is right on the law and the trial court is wrong. The State Board fails in its motion to address the controlling eight words – “subject to laws enacted by the General Assembly” – discussed above. It also fails to distinguish, or even discuss, the Supreme Court's rulings in *Guthrie v. Taylor*, or *State v. Whittle Communications*,⁵ which are the most authoritative judicial examinations of the constitutional provision at issue in this case.

⁵ *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971); *State v. Whittle Communications*, 328 N.C. 456, 402 S.E.2d 556 (1991).

Although *Guthrie* and *Whittle Communications* are, by virtue of their rendering court, most authoritative on the application of “subject to laws enacted by the General Assembly” to the entirety of the provision, the decision of the Court of Appeals in the *Rules Review* case, filed on the same day as the State Board’s motion to stay in that Court, contains the most complete analysis of Article IX, Section 5 since it first appeared in the Constitution of 1868. Although the mandate has not yet issued, unless the opinion is withdrawn it will serve as solid support for the ruling of the three judge panel in this case. In *Rules Review* the State Board challenged the constitutionality of legislation that created a state agency – the Rules Review Commission – and authorized it to review and approve rules made by the State Board. *Rules Review*, slip op. at 1-2. The State Board, represented by counsel of record in this case, argued, as it has in this case, that the challenged statute unconstitutionally transfers the State Board’s constitutional powers and duties to a third party. In *Rules Review*, the “powers and duties” consisted of the authority to “make all needed rules and regulations” related to the school system, and the “third party” was the statutorily created Rules Review Commission. *Id.*, slip op. at 5. In the present case, the “powers and duties” are the authority to “supervise and administer” the school system, and the “third party” is the constitutional office of the Superintendent of Public Instruction.⁶

⁶ The Superintendent of Public Instruction is an office of constitutional moment, elected by the

The *Rules Review* opinion analyzes and relies upon *Whittle Communications* and *Guthrie* concerning the meaning of “subject to laws enacted by the General Assembly,” quoting the latter’s holding that the eight words are “designed to make, and did make, the powers so conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly.” *Rules Review*, slip op. at 29 (quoting *Guthrie*, 279 N.C. at 710, 185 S.E.2d at 198). The *Rules Review* opinion observed that the facts of *Guthrie*, in which the General Assembly had not acted to preempt the State Board’s authority, contrasted with the facts under consideration: “Here, the General Assembly has not been silent, but rather has exercised its authority to limit the Board’s rulemaking powers.” *Id.*, slip op. p. 30. Similarly, through H.B. 17 the General Assembly has acted to reallocate⁷ the powers and duties regarding the operation of the State’s public school system. The three judge panel’s ruling that H.B. 17 is constitutional is consistent with the holdings in *Guthrie*, *Whittle Communications*, and, now, *Rules Review*. There simply is no basis for the entry of a stay pending appeal.

People, and vested with duties as “shall be prescribed by law.” N.C. CONST., Art. III, §§ 7(1) & 7(2).

⁷ From the opening paragraphs of the complaint all the way to its latest filing, the State Board has hyperventilated about losing power “for the first time in the State Board’s 148 year history.” Amended Complaint, ¶ 3. This is simply false, and extensive briefing in the trial court has demonstrated that it is false. The great majority of H.B. 17 is directed at restoring the relative duties and powers among the constitutional entities responsible for public education to the *status quo* that existed prior to major legislation that effectively reduced the role of the Superintendent to that of a spokesperson. Session Laws 1995-72 and 1995-393. Again, this was discussed at length in the briefings of both defendants, as well as at the hearing before the three judge panel.

Although the State Board is correct in describing the *purpose* of a temporary stay and writ of *supersedeas* as being the maintenance of the *status quo*, it offers no convincing, or even persuasive, reason why the *status quo* in the current case *should* be maintained. The rule upon which the State Board relies in seeking this relief requires that the petition contain, among other things, “a statement of reasons why the writ should issue in justice to the applicant.” N.C. R. App. P. 23(c). The State Board spends the great majority of its energy in its motion arguing that the three judge panel erred in ruling unanimously that H.B. 17 is constitutional. It devoted none of its motion to arguing that the three judge panel abused its discretion in denying the very relief the State Board seeks here.

The final two and a half pages of the State Board’s motion appear to argue that a denial of the stay would trigger irreparable harm to the State’s public school system because certain powers currently exercised by an unelected board that meets one and a half days a month then would be exercised by a person elected statewide by the citizens of North Carolina who is on the job 365 days a year. The State Board, relying solely on the affidavit testimony of its Chairman,⁸ repeats its false claims to an unbroken 150 years of sole responsibility for administration of the public schools, when in fact there have been no fewer than seven substantial

⁸ The Superintendent filed an affidavit for the Superior Court’s consideration in considering – and eventually denying – the State Board’s motion for stay. In it, the Superintendent takes issue with several of the claims in the Chairman’s affidavits. The Superintendent’s affidavit is attached as Exhibit B.

revisions to the allocations of such powers since the enactment of the Constitution of 1971 (*see, e.g.*, Session Laws 1971-864 (An Act to Reorganize State Government); 1981-423 (An act to Recodify Chapter 115 of the General Statutes, Elementary and Secondary Education); 1987-1025 (An Act to Provide Governance Structure for the Department of Public Education); 1993-522 (An Act to Delete the References to the Department of Education); 1995-72 (An Act to Clarify the Statutes so as to Streamline the Operations of the State Education Agency); 1995-393 (An Act to Further Streamline the Statutes so as to Clarify the Constitutional Role of the State Board of Education); 2016-126 (An Act to Clarify the Superintendent of Public Instruction's Role as the Administrative Head of the Department of Public Instruction [and other unrelated purposes])).

In this brief section of its motion, the State Board also wildly exaggerates the "control" that H.B. 17 gives to the Superintendent, omitting that nearly all authority transferred to the Superintendent under the statute is tethered to State Board oversight through the oft-repeated phrase "in accordance with all needed rules and regulations adopted by the State Board of Education." For two of many examples of this in H.B. 17, see amendments to N.C. Gen. Stat. §§ 115C-408(a) and 115C-410. As a general matter, the addition of this phrase throughout the legislation was a restoration of language that had been added in 1989 legislation and later removed. See Session Law 1989-752. Thus, even if he had any intention

of triggering the “seismic shift” forecast by the State Board at the close of its petition, many of the Superintendent’s actions under the new law must comport with policy established by the State Board.

At its core, the State Board’s “irreparable harm” argument is one hundred percent speculation and zero percent evidence. This is clear from the State Board’s own words: “[T]he SPI would be immediately empowered to take drastic actions that could not be undone.” Appellate Motion to Stay, p. 16. The State Board offers no evidence that the Superintendent intends to take any “drastic actions.” Even the Chairman of the State Board does not allege in his affidavit that the Superintendent has expressed some intention or desire to take “drastic actions.” Instead of evidence, the State Board only suggests a caricature. The ideal that the writ should be granted “in justice” to the applicant is not served in any fashion by such an argument.

The bankruptcy of the State Board’s argument is further underscored by its reliance on an exchange between counsel for the State and the court that occurred at the TRO hearing on the day the case was filed. The State Board’s contention that counsel’s concession, made only hours after learning of the existence of this case, might in some way be persuasive nine months later, after all that has happened, is astonishing. As the Court of Appeals commented on one of the State Board’s

arguments in Rules Review, it “fails the test of common sense.” *Rules Review*, slip op. at 24.

In contrast to the persona implied by the State Board in its arguments, the Superintendent has approached this case with thoughtfulness and equanimity. Upon being recognized by the three judge panel as a stakeholder in January and, later as a named defendant, the Superintendent did not storm the barricades seeking a reconsideration of the original temporary restraining order. Rather, he agreed to wait until a ruling from the three judge panel before revisiting the issue. In the meantime, he performed his job and attempted to reach common ground with the State Board. The State Board recently went so far as to commend the Superintendent for negotiating in good faith in the ultimately unsuccessful attempt to craft a consent order that would have made the current exercise unnecessary.⁹ Had the three judge panel ruled for the State Board instead of unanimously in favor of the Superintendent, it is safe to surmise that he would not be arguing in opposition to a motion to stay on appeal. But that is not what happened.

Each day the original TRO is allowed to remain effective, there is irreparable harm, not only to the Superintendent and General Assembly, but to the citizens of North Carolina who elected them. The Superintendent has served nearly one quarter of his term. The General Assembly’s will expressed in H.B. 17 has

⁹ See Appellate Motion to Stay, Exhibit G, p. 2.

been subverted to a TRO for nine months. The statutory process for the appointment of and ruling by a three judge panel has produced a unanimous ruling based on exhaustive briefing and argument. The citizens of North Carolina have a right to expect that their exercise of the franchise will be respected, and their choices allowed to exercise their duties and rights as provided by law. The State Board's motion to stay pending appeal should be denied.

CONCLUSION

For the reasons stated and upon the authorities cited, the defendant, North Carolina Superintendent of Public Instruction Mark Johnson, respectfully prays that this Court deny the plaintiff's motion for stay, and dismiss plaintiff's petition for writ of *supersedeas*.

This the 6th day of October, 2017.

**BLANCHARD, MILLER, LEWIS
& ISLEY, P.A.**

/s/ E. Hardy Lewis

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*Attorneys for North Carolina Superintendent
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Defendant Mark Johnson's Response in Opposition to Plaintiff's Motion for Temporary Stay and Petition for Writ of *Supersedeas*** was served upon the following attorneys by U.S. Mail and e-mail to the following:

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This the 6th day of October, 2017.

/s/ E. Hardy Lewis
E. Hardy Lewis

Exhibit A

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1229

Filed: 19 September 2017

Wake County, No. 14 CVS 14791

NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff,

v.

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

Appeal by Defendants from order entered 2 July 2015 by Judge Paul G.
Gessner in Wake County Superior Court. Heard in the Court of Appeals 9 August
2016.

*Campbell Shatley, PLLC, by Robert F. Orr, and Poyner Spruill LLP, by Andrew
H. Erteschik, for Plaintiff-Appellee.*

*Troutman Sanders LLP, by Christopher G. Browning, Jr., for Defendant-
Appellant North Carolina Rules Review Commission.*

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Amar
Majmundar, and Special Deputy Attorney General Olga Vysotskaya de Brito,
for Defendant-Appellant The State of North Carolina.*

INMAN, Judge.

This appeal presents a question of first impression: Does the North Carolina
Rules Review Commission, an agency created by the General Assembly, have the
authority to review and approve rules made by the North Carolina State Board of

N.C. STATE BD. OF EDUC. V. THE STATE OF N.C.

Opinion of the Court

Education, whose authority is derived from the North Carolina Constitution? For the reasons explained in this opinion, we conclude the answer is yes.

The North Carolina Rules Review Commission (the "Commission") and the State of North Carolina (collectively, "Defendants") appeal from a trial court's order granting summary judgment in favor of the North Carolina State Board of Education (the "Board") and denying Defendants' motion to dismiss. Defendants argue the trial court erred because the state constitution provides that the Board's power is "subject to laws enacted by the General Assembly," and the General Assembly created the Commission and delegated its review power to the Commission by enacting laws. The Board, however, contends that review by the Commission encroaches on its constitutional authority and that the General Assembly's delegation to the Commission of authority to review and "veto" Board rules violates the separation of powers provision in the North Carolina Constitution.

We hold that rules made by the Board are subject to statutes enacted by the General Assembly requiring review and approval by the Commission. We also hold that the General Assembly has not violated the separation of powers requirement by enacting an administrative procedure for state agencies and delegating to the Commission the power to review and approve—or disapprove—rules made by the Board. Accordingly, we reverse the trial court's order and remand to the trial court for entry of judgment in favor of Defendants.

N.C. STATE BD. OF EDUC. V. THE STATE OF N.C.

Opinion of the Court

Procedural and Appellate History

On 7 November 2014, the Board commenced this action against Defendants based upon the North Carolina Constitution. The Board's complaint sought a declaratory judgment preventing the Commission from exercising any authority over the Board and, specifically, controlling the Board's enactment of rules. The complaint alleged two as-applied challenges to the Commission's interpretation and application of N.C. Gen. Stat. § 150B-2(1a), the Administrative Procedure Act ("the APA"), one joint as-applied and facial challenge,¹ and four facial challenges to the Commission's enabling legislation.²

The complaint did not identify any specific Board rule that had been thwarted by the Commission. The complaint alleged, however, the following:

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

¹ The joint as-applied and facial constitutional challenge, which is not at issue on appeal, alleged that the Commission's determination of whether a rule is within a rulemaking entity's authority is both facially unconstitutional and unconstitutional as applied to the Board because it violates Article I, Section 6 and Article IV, Section 1 of the state constitution.

² The facial challenges, which are not at issue on appeal, alleged: (1) the Commission improperly exercises legislative power by striking down agency rules without bicameral passage and presentment of a bill as required by Article I, Section 6 of the state constitution; (2) the General Assembly has not provided the Commission with adequate guiding standards in violation of Article I, Section 6 and Article II, Section I of the state constitution; (3) the Commission encroaches on the executive function of rulemaking in violation of Article I, Section 6 and Article III, Section 1 of the state constitution; and (4) the Board is a coequal of the executive and legislative branches of government and not an agency subject to the APA.

N.C. STATE BD. OF EDUC. V. THE STATE OF N.C.

Opinion of the Court

that the [Commission] would have objected to these rules or struck them down.

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

The complaint asserted that the Board would no longer voluntarily submit its rules to the Commission for approval and would nevertheless deem its rules to have the immediate full force and effect of law. The complaint acknowledged that the Board's position is in direct conflict with the Commission's interpretation and application of the APA and the Commission's enabling legislation.

On 12 January 2015, Defendants moved to dismiss the Board's complaint. The Board voluntarily dismissed without prejudice five of its seven claims, leaving only two as-applied challenges. The Board moved for affirmative summary judgment and the case was assigned to a single superior court judge. In a brief supporting their motion to dismiss and opposing the Board's motion for summary judgment, Defendants also argued that they were entitled to summary judgment in their favor.

On 29 June 2015, the trial court heard Defendants' motion to dismiss the Board's remaining two claims and the Board's motion for summary judgment on those

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claims. The first of these claims specifically asserts that the Commission's interpretation and application of N.C. Gen. Stat. § 150B-2(1a) to the Board violates Article IX, Section 5 of the North Carolina Constitution, the constitutional provision that grants the Board rulemaking authority. The second claim asserts that the Commission's interpretation and application of N.C. Gen. Stat. § 150B-2(1a) to the Board also violates Article I, Section 6, which requires the separation of powers, and Article II, Section 1, under which the General Assembly "may delegate a limited portion of its legislative power" *N.C. Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965).

On 2 July 2015, the trial court entered an order allowing the Board's motion for summary judgment,³ concluding:

Upon consideration of the plain language of the North Carolina Constitution, and the verified complaint, there is no genuine issue of material fact and Plaintiff is entitled to judgment as a matter of law pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

Defendants timely appealed to this Court.

³ Although the State references the motion to dismiss in a heading of its brief and cites the appropriate standard of review, the State fails to offer any substantive analysis in support of its argument that the trial court erred in denying Defendants' motion to dismiss. We therefore deem that issue abandoned. N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."); *N.C. Farm Bureau Mut. Ins. Co. v. Smith*, 227 N.C. App. 288, 292, 743 S.E.2d 647, 649 (2013) ("[Appellant] fail[s] to cite any controlling authority in support of this contention or otherwise explain why it has merit, and we accordingly deem the issue abandoned.").

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The Board moved to dismiss Defendants' appeal pursuant to N.C. Gen. Stat. § 7A-27(a1), which provides that "[a]ppel lies of right directly to the Supreme Court from any order or judgment of a court, either final or interlocutory, that holds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law." N.C. Gen. Stat. § 7A-27(a1) (2015). On 2 March 2016, this Court granted the Board's motion.

On 13 July 2016, the North Carolina Supreme Court entered a special order holding that the trial court's order did not facially invalidate an act of the General Assembly and remanded the appeal to this Court "for consideration of [D]efendants' challenges to the validity of the trial court's order on the merits."

We therefore address the trial court's ruling and the parties' arguments on the Board's two remaining claims.

Analysis

To better guide our determination of the issues raised on appeal, we consider the historical background surrounding the Board, its creation and evolution, the General Assembly's adoption of the APA and creation of the Commission, and the relation of the Board to the Commission.

I. Historical Context

A. Creation and Evolution of the Board

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Public education in North Carolina predates the Board. Our state's first constitution (the "1776 Constitution") provided that "a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public . . ." N.C. Const. of 1776, art. XLI.

In 1825, the General Assembly enacted a statute to "create a fund for the establishment of Common Schools." Act of Nov. 21, 1825, ch.1, 1825 N.C. Sess. Laws 3-4. The statute established "a body corporate and politic, under the name of the President and Directors of the Literary Fund[,] to administer and invest money controlled by the Fund. Act of Nov. 21, 1825, ch.1, 1825 N.C. Sess. Laws 3-4. The statute named the Governor as President of the Literary Fund's board—the first governing body for public education in North Carolina. Act of Nov. 21, 1825, ch.1, 1825 N.C. Sess. Laws 3-4.

The General Assembly allocated to the Literary Fund money from various revenue sources as well as all unoccupied swamp land in North Carolina, and vested the Literary Fund's board with the power to sell, invest, and otherwise exploit assets in the fund to generate revenue for public education and to build schools across the state. Act of Nov. 21, 1825, ch.1, 1825 N.C. Sess. Laws 3-4; Act of Feb. 10, 1855, ch. 27, 1854-55 N.C. Sess. Laws 50-62; *see also Bd. of Educ. Of Duplin Cnty. v. State Bd. of Educ.*, 114 N.C. 313, 317-19, 19 S.E. 277, 277-78 (1894).⁴ The Literary Fund was

⁴ This decision was reprinted in 1921 as 114 N.C. 202.

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all but depleted as a result of the Civil War. See Jonathan Worth, *Report of the President & Directors of the Literary Fund of North Carolina*, Exec. Doc. 18, General Assembly Session 1866-67 (1867).⁵

Following the Civil War, North Carolina adopted a new state constitution (the "1868 Constitution") which for the first time provided in its Declaration of Rights "a right to the privilege of education." N.C. Const. of 1868, art. I, § 27.⁶ Unlike other declarations of rights, this provision did not restrict state government, but rather committed it to an affirmative duty. Orth, *supra*, at 52.

The 1868 Constitution also devoted a separate Article to education, beginning with the premise that "[r]eligion, morality and knowledge being necessary to good government and happiness of mankind, schools and the means of education shall forever be encouraged[,]" and providing for tuition "free of charge to all children of the State between the ages of six and twenty-one years." N.C. Const. of 1868, art. IX, §§ 1-2. It also established the State Board of Education as follows:

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

⁵ The Report was submitted to the General Assembly on 10 December 1866 and printed with other executive and legislative documents maintained during the 1866-67 legislative session.

⁶ The 1868 Constitution, unlike the state's 1776 Constitution, was ratified by voters and incorporated individual rights which previously had been provided as constitutional amendments. See John V. Orth, *The North Carolina State Constitution*, 13 (1st ed. 1993).

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altered, amended or repealed by the General Assembly, and when so altered, amended or repealed they shall not be re-enacted by the Board.

N.C. Const. of 1868, art. IX, § 9. The Board was composed entirely of *ex-officio* members, specifically the Governor, Lieutenant Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction, and the Attorney General. N.C. Const. of 1868, art. IX, § 7.

In 1931, the General Assembly established the North Carolina Constitutional Commission, which recommended a constitutional amendment empowering the Board to "supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto[.]" eliminating the word "legislate" from the Board's powers, and providing that "[a]ll the powers enumerated in this Section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly." *The Report of the North Carolina Constitutional Commission*, 33 (1932) (hereinafter the "1932 Report"). The Constitutional Commission proposed this amendment as part of an entirely rewritten state constitution. *Id.* at 5. A preamble to the proposed constitution noted that "the chief need is to relax many of the existing restrictions on the powers of the General Assembly, so as to allow more elasticity in shaping government policies, not only in respect to present conditions, but also in regard to future needed adjustments" *Id.* at 5. The General Assembly proposed the new

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constitution in 1933, but because of a technicality, the issue did not come before the voters.⁷ John L. Sanders, *Our Constitutions: A Historical Perspective*, in *North Carolina Manual* 73, 77 (Liz Proctor ed., 2011).

In 1938, the Governor's Commission on Education issued a 63-page report recommending that the General Assembly propose to voters the 1932 draft amendment regarding the powers of the Board, and urging that if the amendment was submitted to voters in an election "not entangled with other amendments which might be less worthy, the people of the state will adopt the amendment." *Report and Recommendations of the Governor's Commission on Education*, 31 (Dec. 1, 1938) (hereinafter the "1938 Report").⁸

The Commission on Education reviewed the administrative challenge of a system governed by not only the Board but also by four other boards and commissions,

⁷ The enabling statute provided that the new state constitution could be ratified by voters in the "next general election." Act of May 8, 1933, ch. 383, sec. 2, 1933 N.C. Pub. Laws, 573. An election was held in November 1933 for voters to consider the proposed 21st amendment to the United States Constitution, which would repeal Prohibition as established by the 18th Amendment. Act of May 9, 1933, ch. 403, sec. 1, 1933 N.C. Pub. Laws, 600. The revised state constitution was not on this ballot. *Opinions of the Justices in the Matter of Whether the Election Held on Tuesday After the First Monday in November, 1933, Was the Next General Election Following the Adjournment of the 1933 Session of the General Assembly*, 207 N.C. 879, 181 S.E. 557 (1934). After that election and prior to the next general election in November 1934, the North Carolina Supreme Court held in an advisory opinion that the proposed new state constitution could not be considered by voters because the enabling statute provided for an election date that had already passed. *Id.* at 880, 181 S.E. at 557-58; Sanders, *supra*, at 77; Orth, *supra*, at 20.

⁸ The General Assembly in 1937 directed the governor to appoint a commission to examine North Carolina's public education system and to recommend reforms to lawmakers. Act of March 22, 1937, ch. 379, 1937 N.C. Pub. Laws, 709.

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and noted that "[t]here seems to be much duplication and some dual control in the workings of these various boards and unnecessary duplication in the work of school administrators." *1938 Report* at 30. The Commission recommended that "all these boards should be consolidated under [the Board] and that the direction of all activities of the teaching profession should come from this central board." *Id.* at 30. To provide the public school system "immediate relief from scattered administration rather than wait for the long time goal of the proposed constitutional amendment," the Commission also proposed that the General Assembly enact legislation to consolidate the work of the various boards and commissions and transfer their duties to the Board. *Id.* at 31.⁹

In 1942, voters adopted a constitutional amendment proposed by the General Assembly making several changes to the governance and power of the Board. Thad Eure, *North Carolina Manual*, 239-43 (1943). One section of the amendment reduced

⁹ Despite a provision in the 1868 Constitution for the state to be responsible for providing free public education, efforts by the General Assembly before 1942 to shift primary administrative and funding responsibilities from counties to the state were unsuccessful. See *1938 Report* at 34. For example, the School Machinery Act implemented a new statewide sales tax to support public schools with money for textbooks, supplies, and teacher salaries. Act of April 3, 1939, ch. 358, 1939 N.C. Pub. Laws, 771-91. Still, counties remained responsible for building schools. *Fletcher v. Comrs. of Buncombe*, 218 N.C. 1, 4, 9 S.E.2d 606, 608 (1940). "To call the resulting condition one of uniformity is to tax optimism. There are one hundred counties in the State, each with its own difficulties and problems, some of which seem to be almost unsolvable. There are one hundred governing boards, composed of men who have widely different ideas upon this subject and with a discretion which may be exercised and reflected in widely divergent standards throughout the State." *Id.* at 7, 9 S.E.2d at 610.

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the number of *ex-officio* members and provided for a majority of the Board to be appointed by the Governor. N.C. Const. of 1868 (amended 1942) art. IX, § 8; Act of March 13, 1941, ch. 151, sec. 1-3, 1941 N.C. Pub. Laws, 240-41. Another section of the amendment, central to the matter at hand, revised the Board's authority as follows:

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

N.C. Const. of 1868 (amended 1942), art. IX, § 9 (emphasis added).

The 1942 amendment eliminated the provision for the Board to have the "full power to legislate." *Id.* It also eliminated the provision that the Board's rules could be "altered, amended or repealed" by the General Assembly and instead provided that "[a]ll the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly." *Id.*

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In an article advocating that voters adopt the 1942 amendment, one educator explained that because most of the Board's members were elected to fill other offices unrelated to education, the Board "could not possibly do the job of administering a growing public school system." Ralph W. McDonald, Guy B. Phillips, Roy W. Morrison & Edgar W. Knight, *The Constitutional Amendment for a State Board of Education in North Carolina*, 25 *The High Sch. J.*, no. 6, 265, 266 (Oct. 1942). "From time to time, therefore, the Legislature has been forced to set up boards and commissions to carry out duties and responsibilities which, under the Constitution, the State Board of Education was supposed to exercise." *Id.* at 266-67. The other boards and commissions included the State School Commission, the Board of Vocational Education, the Board of Commercial Education, and the State Textbook Commission. *Id.* Even the Literary Fund, which the Board was created to replace after the Civil War, remained vested with education funds and provided loans for school construction and improvements. N.C. Code 1935 (Michie), § 5683.

In 1955, the General Assembly reorganized public education laws and established a statewide uniform system of public schools in a chapter of the General Statutes. Act of May 26, 1955, ch. 1372, sec. 1, 1955 N.C. Sess. Laws 1527. These statutes have been amended over time and are now codified in Chapter 115C of the General Statutes, titled "Elementary and Secondary Education." N.C. Gen. Stat. § 115C-1 (2015).

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Our state constitutional provisions for public education have not materially changed since 1942. Following the General Assembly's proposal in 1969 for a complete revision of the 1868 Constitution, Act of July 2, 1969, ch.1258, sec. 1, 1969 N.C. Sess. Laws 1461, and the voters' adoption of the revision in the general election of 1970, the Constitution was amended to its current form. N.C. Const. of 1970;¹⁰ *see also Sanders, supra*, at 80-87. The section delineating the Board's powers was renumbered and revised to provide:

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. of 1970, art. IX, § 5. A report by the North Carolina State Constitution Study Commission stated that Article IX, Section 5 "restates, in much abbreviated form, the duties of the State Board of Education, but without any intention that its authority be reduced." *Report of the State Constitutional Study Commission*, 87 (1968) (hereinafter the "1968 Report").

B. Enactment of the APA and Creation of the Commission

¹⁰ The latest version of the North Carolina Constitution is referred to by different authorities as "the 1970 Constitution" or "the 1971 Constitution." *Compare N.C. State Bar v. DuMont*, 304 N.C. 627, 633, 286 S.E.2d 89, 93 (1982), *with Orth, supra*, at 20. This opinion will refer to the document as the 1970 Constitution.

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In 1973, the General Assembly enacted the APA, initially adopted as Chapter 150A of the General Statutes. The original APA declared that its purpose "shall be to establish as nearly as possible a uniform system of administrative procedure for State agencies." N.C. Gen. Stat. § 150A-1(b) (Cum. Supp. 1977). The APA provides a comprehensive statutory scheme for procedures to allow and require, *inter alia*, notice to the public of proposed rules, public input regarding proposed rules, and due process for individuals affected by administrative rules and decisions.

The APA was rewritten and recodified as Chapter 150B effective 1 January 1986, and its purpose restated to "establish[] a uniform system of administrative rule making and adjudicatory procedures for agencies" and to ensure that rulemaking, advocacy, and adjudication "are not all performed by the same person in the administrative process." N.C. Gen. Stat. §§ 150B-1(a) and 150B-1(b) (Cum. Supp. 1985).

The APA does not explicitly list the Board as a state agency, but it defines "agency" as meaning "an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch." N.C. Gen. Stat. 150B-2(1a) (2015). The APA expressly and fully exempts from its application several state agencies listed in N.C. Gen. Stat. § 150B-1(c), exempts from its rulemaking provisions several other state

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agencies listed in N.C. Gen. Stat. § 150B-1(d), and exempts from its contested case provisions several other agencies or agency functions. The Board is not listed in any of the exemptions.

At the same time it recodified the APA, the General Assembly added a statute establishing the Rules Review Commission to review all rules promulgated by any state agency subject to the APA. Act of July 16, 1986, ch. 1028, sec. 32, 1985 N.C. Sess. Laws 1028 (originally codified at N.C. Gen. Stat. § 143B-30.1 (Interim Supp. 1986)). The statute as currently codified requires that temporary and permanent rules proposed by an agency be submitted and approved by the Commission before becoming effective. N.C. Gen. Stat. §§ 150B-21.8(b) and 150B-21.9 (2015).

C. Intersection of the Board's and the Commission's Authority

In 1981, following the General Assembly's enactment of the APA, the General Assembly added to Article 1 of Chapter 115C, governing the public education system, a statute making all action by all agencies governed by the Chapter subject to all provisions of the APA. Act of May 20, 1981, ch. 423, sec. 1, 1981 N.C. Sess. Laws 510; N.C. Gen. Stat. § 115C-2 (Cum. Supp. 1981); see N.C. Gen. Stat. § 115C-2 (2015).

For more than a quarter century, the Board proposed rules to the Commission for review and otherwise participated in the rules review process. However, as evidenced by this dispute, the Board now challenges the Commission's authority to limit the Board's rulemaking authority derived from the North Carolina Constitution.

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With this historical context in mind, we turn to the trial court's order and Defendants' appeal.

II. Standard of Review

We review a trial court's order denying or granting a motion for summary judgment *de novo*. *Rogerson v. Fitzpatrick*, 170 N.C. App. 387, 390, 612 S.E.2d 390, 392 (2005). A trial court's interpretation of the state constitution or a statute is also subject to *de novo* review. *See Hart v. State*, 368 N.C. 122, 130, 774 S.E.2d 281, 287 (2015); *see also Ennis v. Henderson*, 176 N.C. App. 762, 764, 627 S.E.2d 324, 325 (2006). *De novo* review allows this Court to substitute its judgment for that of the trial court. *Blow v. DSM Pharm., Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009).

Even when applying *de novo* review, however, we must abide by the long established presumption that statutes—including all statutes implicated by the Board's challenge to the Commission's authority—are constitutional both facially and as applied to any party. *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) ("Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond a reasonable doubt." (internal citations and quotation marks omitted)). "[T]he constitutional violation must be plain and clear." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016) (citation omitted). Any doubt as to the constitutionality of a

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statute must be resolved in favor of the legislature. *Baker*, 330 N.C. at 338, 410 S.E.2d at 891.

Neither the trial court nor this Court possesses the authority to decide whether governmental action required or allowed by a statute fosters good or bad policy. "If constitutional requirements are met, the wisdom of the legislation is a question for the General Assembly." *Hart*, 368 N.C. at 126, 774 S.E.2d at 284 (citation omitted).

III. Discussion

A. The Closest, But Not Controlling, Precedent

No North Carolina appellate court has previously decided the issue presented in this appeal. The North Carolina Supreme Court came the closest in *State v. Whittle Communications*, 328 N.C. 456, 402 S.E.2d 556 (1991), when it invalidated the Board's temporary rule prohibiting local school boards from contracting with a television content provider for short news segments that included commercial advertising. The Supreme Court held that because the General Assembly had enacted a statute delegating to local school boards the selection of supplemental educational materials, the Board had no authority to enact a rule on the subject. *Id.* at 466, 402 S.E.2d at 562.

The dispute in *Whittle* was prompted when the Commission disapproved of the rule on the ground that it exceeded the Board's statutory authority. *Id.* at 460, 402 S.E.2d at 558. A superior court judge reviewed the matter and held that the Board's

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rule was invalidly adopted in violation of the APA. The Board appealed, arguing, *inter alia*, that the APA rulemaking requirements did not apply to rules implementing the state constitution's grant of authority to the Board. *Id.* at 463-64, 402 S.E.2d at 560. The Supreme Court rejected the Board's argument on a narrower ground. *Id.* at 466-67, 402 S.E.2d at 562. It interpreted the statute authorizing local boards to select supplemental materials as leaving such selection "entirely to the discretion of local school boards[.]" and held that the Board's rule necessarily conflicted with the existing statute. *Id.* at 465, 402 S.E.2d at 561. In light of the existing statute, the Supreme Court reasoned, "deciding whether the State Board had the authority, absent legislative action, to enact this rule through direct constitutional authority and deciding whether the APA provisions concerning the adoption of temporary rules apply are not necessary to a resolution of this issue." *Id.* at 466-67, 402 S.E.2d at 562.

Two dissenting justices, both prominent state constitutional scholars, offered no constitutional analysis to protect the Board's rulemaking authority. *Id.* at 471-77, 402 S.E.2d at 565-68 (Martin, J., joined by Exum, C.J., dissenting). The dissenting opinion noted that the statute cited by the majority did not grant the local boards *exclusive* authority to select and procure supplemental materials. *Id.* at 472, 402 S.E.2d at 565. The dissent also interpreted the Board's rule to constrain only the purchase of materials in a format limiting or impairing the authority of local boards

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and administrators to determine the content and timing of materials presented to students. *Id.* at 473-74, 402 S.E.2d at 566.

Because this appeal concerns the Commission's authority to review and approve all Board rules, the issue before us exceeds the parameters of *Whittle*.

B. Constitutional Powers and Limits of the Board

The Commission argues that the trial court erred in entering summary judgment rendering all rules promulgated by the Board exempt from the Commission's rules review and approval process. The Board argues, as it did successfully before the trial court, that Article IX, Section 5 of the North Carolina Constitution endows it with broad rulemaking authority subject only to specific enactments of the General Assembly, and that review by the Commission is not a specific enactment of the General Assembly.

In reviewing this issue, we must consider the relationship between the Board's authority derived from the North Carolina Constitution, the General Assembly's authority to restrict the Board's authority, and the General Assembly's authority to delegate to the Commission the power to review, approve, and disapprove rules proposed by the Board.

Our analysis is guided by "the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents." *Berger*, 368 N.C. at 639, 781 S.E.2d at 252 (citation omitted);

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see also *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 505, 681 S.E.2d 278, 282 (2009) ("In interpreting our Constitution, we are bound to 'give effect to the intent of the framers of the organic law and of the people adopting it.'" (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953))); *DuMont* 304 N.C. at 634, 286 S.E.2d at 93-94 ("Reference may be had to unofficial contemporaneous discussions and expositions in arriving at a correct interpretation of the fundamental law.").

The 1868 Constitution vested in the Board the "full power to legislate and make all needful rules and regulations" for public schools, and provided that "all acts, rules and regulations of said Board may be altered, amended or repealed by the General Assembly" N.C. Const. of 1868, art. IX, §9. This language appears to limit the General Assembly to acting only once the Board has enacted some rule or regulation. Therefore, under the 1868 Constitution, the General Assembly would not, for example, be able to require the Board to gain legislators' approval of proposed rules before their enactment, because such action does not fall within the language of "alter," "amend," or "repeal." However, this aspect of the 1868 Constitution has not previously been examined by our appellate courts.

The only reported legal dispute about the 1868 constitutional provisions for education concerned how to pay for public schools. The North Carolina Supreme

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Court held in *Lane v. Stanly*, 65 N.C. 153, 157 (1871),¹¹ that "the Constitution establishes the public school system, and the General Assembly provides for it, by its own taxing power, and by the taxing power of the counties, and the State board of education, by the aid of School committees, manage[s] it." *Lane* held that county commissioners, but not town boards, could tax citizens for public schools concurrent with the General Assembly's authority to impose taxes for public education. *Id.* at 156-58. It did not address the parameters of the Board's authority to manage the public school system or the parameters of the General Assembly's authority to enact public education rules.

The 1942 amendment to Article IX, Section 9 divested the Board of legislative authority and made the Board's rulemaking authority subject to the General Assembly's legislative authority. The amendment, as discussed *supra*, eliminated language vesting in the Board the "full power to legislate," replacing it with enumerated specific duties and the authority "generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto." N.C. Const. of 1868 (amended 1942), art. IX, § 9. The 1942 amendment also eliminated the language restricting the General Assembly's authority over the Board to alter, amend, or repeal the Board's rules and instead provided, more broadly, that the Board's authority was "subject to such laws as may

¹¹ This decision was reprinted in 1964 as 65 N.C. 117.

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be enacted from time to time by the General Assembly." N.C. Const. of 1868 (amended 1942), art. IX, § 9. The question before us is whether this change in language, ratified by voters in 1942 and substantially retained in the 1970 Constitution, permits the General Assembly to limit the Board's rulemaking authority by requiring prior approval of the Board's proposed rules by the General Assembly or an executive branch agency other than the Board.

The Board argues that the first sentence of the 1942 amendment to Article IX, Section 9, which defined the governance of the Board, "clarified that the Board retained all the powers it held under the 1868 Constitution"—including the power to legislate all matters related to public education—subject only to being altered, amended, or repealed by the General Assembly. The first sentence of Section 9 provided that "[t]he State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted." N.C. Const. of 1868 (amended 1942), art. IX, § 9. The Board's interpretation conflicts with the amendment's deletion of the Board's power to legislate and its added grant to the General Assembly of broader oversight of the Board.

"[I]n case of ambiguity the whole Constitution is to be examined in order to determine the meaning of any part and the construction is to be such as to give effect

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to the entire instrument and not to raise any conflict between its parts which can be avoided." *State v. Baskerville*, 141 N.C. 811, 818, 53 S.E. 742, 744 (1906).¹²

Construing the first sentence of the 1942 amendment to revive and preserve the full scope of authority provided to the Board in the 1868 Constitution, as the Board argues, directly conflicts with the 1942 amendment's limitation on that authority by deleting the provision for "full power to legislate." The Board's argument also conflicts with the amendment's final full sentence providing that the Board's authority is wholly subject to laws enacted by the General Assembly. To interpret an amendment that reallocates powers between the Board and the General Assembly as preserving the Board's previous powers fails the test of common sense.

These competing provisions in the 1942 amendment can be harmonized by interpreting the first sentence to establish that the Board, and none of the other then-existing education boards and commissions created by the General Assembly since 1868, was authorized to regulate public schools. Reciting that the Board succeeded to all the powers of the Literary Fund's board nullified the authority of other boards and commissions to perform duties initially assigned to the Board. This interpretation is also consistent with the amendment's additional provisions listing specific powers vested in the Board which previously had been exercised by the other, "scattered" administrative agencies.

¹² This decision was reprinted in 1921 as 141 N.C. 617.

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In addition to the basic canon of constitutional construction to interpret separate provisions in harmony, history also favors our interpretation of the 1942 amendment. "A court should look to the history, general spirit of the times, and the prior and the then existing law in respect of the subject matter of the constitutional provision under consideration, to determine the extent and nature of the remedy sought to be provided." *Perry*, 237 N.C. at 444, 75 S.E.2d at 514. As discussed *supra*, at the time the 1942 amendment was ratified, there had been a decade-long push, evidenced by the 1931 Constitutional Commission's preamble to its proposed constitutional rewrite, to "relax many of the existing restrictions on the powers of the General Assembly," as a way "to allow more elasticity in shaping governmental policies . . . in regard to future needed adjustments . . ." *1932 Report* at 5. The intent of the General Assembly in proposing the 1932 Constitution can be extended to the 1942 amendment because the underlying reasoning for the amendment, as discussed in intervening years, had not changed.

The General Assembly's declared purpose of the APA upon its recodification was to "establish[] a uniform system of administrative rulemaking and adjudicatory procedures for agencies" and to ensure that rulemaking, advocacy, and adjudication "are not all performed by the same person in the administrative process." N.C. Gen. Stat. §§ 150B-1(a) and 150B-1(b) (Cum. Supp. 1985). The need for uniformity in

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agency rulemaking procedures is simply one such "future needed adjustment" fostered by the 1942 amendment.

Based on the plain language of the constitutional text, further bolstered by supplemental authorities, we hold that by the 1942 amendment to the North Carolina Constitution, the framers and voters consolidated in the Board all administrative authority governing a statewide public school system, limited the Board's authority to making rules and regulations subject to laws enacted by the General Assembly, eliminated the Board's authority to legislate, and thereby restored to the General Assembly all legislative authority regarding public education.

We are not persuaded by the Board's argument that the 1942 amendment could not divest the Board of authority derived from the 1868 Constitution. The Board has cited no judicial decision, no statute, and no other authority supporting its contention that the framers of the 1868 Constitution intended to preclude a later constitutional amendment modifying the Board's authority and the manner in which the General Assembly ultimately governs the Board. We are aware of no authority that prohibits a state constitution from diminishing the constitutionally derived authority of any agency by constitutional amendment so long as the amendment does not violate the United States Constitution.

"[U]nder our Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express

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constitutional provision or necessary implication therefrom.’” *Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970) (alteration in original) (quoting *Thomas v. Sanderlin*, 173 N.C. 329, 332, 91 S.E. 1028, 1029 (1917)). Although the General Assembly was restrained by the 1868 Constitution from making public education laws except by altering, amending, or repealing legislation by the Board, the 1942 amendment expanded the General Assembly’s legislative authority, and the prior restrictions no longer apply.

The 1970 Constitution did not in any meaningful way amend the Board’s authority to make rules and regulations, as it still provides that the Board “shall make all needed rules and regulations . . . subject to laws enacted by the General Assembly.” N.C. Const. of 1970, art. IX, § 5. The North Carolina Supreme Court declared that the intent of the 1970 Constitution was merely to “update, modernize and revise editorially the 1868 Constitution.” *DuMont*, 304 N.C. at 636, 286 S.E.2d at 95 (citing the *1968 Report*).¹³ Among the extraneous and obsolete provisions deleted in the 1970 Constitution was the first sentence in the 1942 amended section describing the powers and duties of the Board, which provided that the Board “shall

¹³ Constitutional scholars share the view that the 1970 Constitution primarily addressed editorial, and not substantive, concerns. Orth, *supra*, at 20-21 (describing the 1970 Constitution as “a good-government measure, long matured and carefully crafted by the state’s lawyers and politicians, designed to consolidate and conserve the best features of the past, not to break with it.”); Sanders, *supra*, at 81-82 (referring to the amendments as “extensive editorial changes” and “substantive changes that the commission judged would not be controversial or fundamental in nature[]”).

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succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted.” N.C. Const. of 1970, art. IX, § 5. That the deletion of this section in 1970 was viewed as merely editorial confirms our interpretation of the sentence as clarifying that the Board, and not any other administrative agency existing in 1942, would establish rules and regulations for the public schools.

The Board relies on *DuMont*’s holding that “the 1970 framers intended to preserve intact all rights under the 1868 Constitution” for the assertion that the Board maintains its powers under the 1868 Constitution. 304 N.C. at 636, 286 S.E.2d at 95. This argument is misplaced. Unlike the provision for the right to a jury trial, which was unchanged between 1868 and 1970 and was at issue in *DuMont*, our state constitution’s provision for the power and duties of the Board was substantively amended in 1942. *DuMont* did not address that pivotal amendment or the 1942 framers’ intent. And unlike *DuMont*, this case does not concern the scope of an individual right rooted in the state constitution. The North Carolina Constitution vests individual citizens with the right to free public education. N.C. Const. of 1970, art. I, § 15; see also *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 616-17, 599 S.E.2d 365, 377-78 (2004) (“*Leandro II*”) (holding that the constitutional right to public education is vested in children and not in state entities); *Leandro v. State*, 346 N.C.

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336, 345, 488 S.E.2d 249, 254 (1997) ("*Leandro I*"). It does not vest the Board with any rights, but rather with power and responsibilities.

Our interpretation of the 1942 amendment requires that we reject the Board's argument that it is vested with broad authority that cannot be limited except as through alteration, amendment, and repeal by the General Assembly.

The North Carolina Supreme Court considered the Board's rulemaking authority, as amended in 1942, in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971). In *Guthrie*, the plaintiff, a public school teacher, challenged a Board regulation requiring teachers to complete certain courses to qualify to renew their teaching certificates. *Id.* at 709, 185 S.E.2d at 198. The Supreme Court noted that the last sentence of Article IX, Section 9 "was designed to make, and did make, the powers so conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly." *Id.* at 710, 185 S.E.2d at 198. But because the General Assembly had not limited the Board's rulemaking powers regarding teacher certification, the Board's regulation was valid. The Supreme Court explained:

The Constitution, itself, . . . conferred upon the State Board of Education the powers so enumerated, including the powers to regulate the salaries and qualifications of teachers and to make needful rules and regulations in relation to this and other aspects of the administration of the public school system. Thus, *in the silence of the General Assembly*, the authority of the State Board to promulgate and administer regulations concerning the certification of

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teachers in the public schools was limited only by other provisions in the Constitution, itself.

Id. at 710, 135 S.E.2d at 198-99 (emphasis added).

Here, the General Assembly has not been silent, but rather has exercised its authority to limit the Board's rulemaking powers. The General Assembly, by enacting laws adopting a uniform statutory scheme governing administrative procedure, including the establishment of the Commission to review administrative rules, has imposed the requirement that the Board's rules be reviewed and approved prior to becoming effective. Our holding that the Board's rulemaking authority is subject to statutes providing for review and approval is therefore consistent with the holding in *Guthrie* and falls within the 1942 amendment's delineation of the General Assembly's authority over the Board.

C. Delegated Powers of the Commission

As discussed *supra*, the General Assembly has delegated to the Commission the procedural process through which the Board's rules are reviewed and approved before becoming effective. The Board contends that statutes making its rules subject to the Commission's review and approval result in an unconstitutional delegation of authority by the General Assembly in violation of Article I, Section 6 (separation of powers provision), Article II, Section 1 (vesting legislative power in the General Assembly), and Article IX, Section 5 (vesting rulemaking power in the Board). We disagree.

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Article II, Section 1 of the North Carolina Constitution vests the General Assembly with the broad power to legislate. N.C. Const. of 1970, art. II, § 1. It also permits the General Assembly to delegate “a *limited* portion of its legislative powers,” *N.C. Tpk. Auth.*, 265 N.C. at 114, 143 S.E.2d at 323 (emphasis in original), in contrast with its “supreme legislative power,” *id.*, to certain agencies “so long as adequate guiding standards are provided.” *Adams v. N.C. Dep’t of Nat. & Econ. Res.*, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978); *see also* N.C. Const. of 1970, art. II, § 1.

As explained by the North Carolina Supreme Court in *Adams*:

[W]e have repeatedly held that the constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers.

295 N.C. at 697, 249 S.E.2d at 410 (internal citations omitted).

The *Adams* Court explained why the General Assembly’s delegation of authority is necessary: “A modern legislature must be able to delegate—in proper instances—‘a limited portion of its legislative powers’ to administrative bodies which are equipped to adapt legislation ‘to complex conditions involving numerous details with which the Legislature cannot deal directly.’ ” *Id.* at 697, 249 S.E.2d at 410 (quoting *N.C. Tpk. Auth.*, 265 N.C. at 114, 143 S.E.2d at 323).

The General Assembly’s and the Board’s authority specific to education are both derived from the same Article IX, Section 5 of the North Carolina Constitution.

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But unlike the Board, the General Assembly possesses power that exceeds the scope of Section 5. Article II, Section 1 of the North Carolina Constitution provides that “[t]he legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.” This plenary provision vests in the legislative branch the power to enact all laws not prohibited by the constitution, including the APA and the enabling statute for the Commission. The General Assembly has not delegated to the Commission the overarching authority to enact legislation limiting the Board’s rulemaking. Rather, the General Assembly exercised its authority by enacting statutes requiring the Board to obtain approval of proposed rules before they take effect. The General Assembly has merely delegated the implementation of its legislation to the Commission.

The Board argues, and our dissenting colleague agrees, that this Court should adopt the reasoning of the Supreme Court of Appeals of West Virginia, which held that any statutory provision interfering with the rulemaking authority of that state’s board of education violated the separation of powers clause in that state’s constitution. *West Va. Bd. of Educ. v. Hechler*, 180 W. Va. 451, 455-56, 376 S.E.2d 839, 843 (1988). The West Virginia court in *Hechler* invalidated a statutory amendment making rules promulgated by the board of education, which historically had been exempt from administrative review, subject to review and approval by a new legislative oversight commission on educational accountability. *Id.* at 455-56,

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376 S.E.2d at 843. But West Virginia's constitutional provision for its board of education is not the same as ours, nor did it evolve in a manner similar to ours. Also, the Commission's structure differs materially from the review commission in West Virginia, which was composed solely of members of its legislature.¹⁴ For these reasons, we decline to follow *Hechler*.

The dissent also emphasizes that the North Carolina Constitution expressly vests in the Board the power to make "needed rules and regulations" relating to public education and asserts that by subjecting the Board's rules to review and approval by the Commission, the General Assembly has impermissibly transferred to the Commission an express power conferred upon it by our state constitution. But the General Assembly has by statute ensured that the Commission is unable to create and impose rules, and has made clear that the Commission does not have the authority to review the substantive efficacy of rules proposed by the Board. N.C. Gen. Stat. § 150B-21.9 (2015). The Commission's authority to implement the review and approval process is subordinate to the General Assembly's authority to create the

¹⁴ If the Commission here were solely composed of legislators, we would be presented with an entirely different issue concerning the separation of powers—namely, the legislature may not delegate powers to itself. See *State ex rel. Wallace v. Bone*, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982) (holding that "the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality").

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review and approval process. Therefore, we are unpersuaded that the Commission's power is in conflict with the Board's broad rulemaking authority.

The "complex conditions" and "numerous details" considered by the Commission with respect to rules proposed by the Board, consistent with our Supreme Court's holding in *Adams*, include the more than 100 local school districts across the state, more than 500 statutes in Chapter 115C of the General Statutes,¹⁵ and hundreds of administrative rules governing our public schools in Title 16 of the Administrative Code on topics ranging from teacher certification to curriculum to school buses. N.C. Admin. Code tit. 16, *et seq.* (April 2016).

The General Assembly is not always in session, and even when in session, legislators and their able staff have inadequate time and human resources to address the many specific needs and issues in the public school system by legislation. The General Assembly's interest in uniformity among administrative agencies is served by making one central agency responsible for reviewing the rulemaking by all of the others. For this reason, delegation of adjudicative authority to the Commission is necessary. "The goals and policies set forth by the legislature for the agency to apply in exercising its powers need be only as specific as the circumstances permit." *Matter of Broad and Gales Creek Cmty. Ass'n*, 300 N.C. 267, 273, 266 S.E.2d 645, 651 (1980)

¹⁵ The General Assembly also has provided by statute for the Board's authority by incorporating the provisions of the state constitution and adding dozens of specific powers and duties. N.C. Gen. Stat. § 115C-12 (Interim Supp. 2016).

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(internal citations omitted). "It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances." *Adams*, 295 N.C. at 698, 249 S.E.2d at 411.

In assessing whether the guiding standards provided by the General Assembly are adequate, "it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards." *Id.* at 698, 249 S.E.2d at 411. "[T]he existence of adequate procedural safeguards supports the constitutionality of the delegated power and tends to insure that the decision-making by the agency is not arbitrary and unreasoned." *In re Declaratory Ruling by N.C. Comm'r of Ins. Regarding 11 N.C.A.C. 12.0319*, 134 N.C. App. 22, 33, 517 S.E.2d 134, 142 (1999) (internal quotation marks and citation omitted).

The General Assembly has provided the Commission with criteria for reviewing the permanent rules submitted to it by state agencies, including the Board. These criteria include, *inter alia*, specific provisions in hundreds of statutes and administrative code sections previously enacted. The Commission's review is limited to determining whether a proposed rule: (1) is "within the authority delegated to the agency by the General Assembly[;]" (2) is clear and unambiguous; (3) is "reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency[;]" and (4) was adopted in accordance

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with the procedures prescribed by the APA for rulemaking. N.C. Gen. Stat. §§ 150B-21.9(a)(1)-(4).

The Board argues, and our dissenting colleague agrees, that the first of these criteria for review by the Commission, to determine whether a proposed rule is “within the authority delegated to the agency by the General Assembly,” cannot apply to the Board because its authority is delegated not merely by the General Assembly, but by the North Carolina Constitution. This point, considered in isolation, is persuasive. But when the plain language of a statute appears to create a constitutional conflict, we must look to other statutes, to our state constitution, and to precedent for guidance. Considering the genesis and evolution of the Board, the APA, and the Commission, and the Supreme Court’s reasoning in *Whittle*, which resolved a similar issue in favor of upholding the Commission’s authority, we are not persuaded that the Board’s authority to make rules in any subject area is beyond the reach of the APA.

The General Assembly has also expressly protected its legislative authority from encroachment by the Commission. N.C. Gen. Stat. § 150B-21.9 provides that “[t]he Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection[,]” which restricts the Commission from providing substantive review of proposed rules.

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Additionally, the General Assembly has provided adequate procedural safeguards by subjecting the Commission's decisions regarding whether the Board (or any agency) has properly followed the APA's procedures for promulgating rules to judicial review. See N.C. Gen. Stat. § 150B-21.8(d). Indeed, the Board has employed this procedural safeguard to obtain judicial review in the trial and appellate courts. See *Whittle*, 328 N.C. 456, 402 S.E.2d 556.

We hold that the review and approval authority delegated to the Commission is an appropriate delegable power and that the General Assembly has adequately directed the Commission's review of the Board's proposed rules and limited the role of the Commission to evaluating those proposed rules to ensure compliance with the APA.

By providing adequate guidelines for rules review, the General Assembly has ensured that the Commission's authority as it relates to the rules promulgated by the Board is not "arbitrary and unreasoned" and is sufficiently defined to maintain the separation of powers required by our state constitution. *In re Declaratory Ruling*, 134 N.C. App. at 33, 517 S.E.2d at 142. Accordingly, we reject the Board's challenge to the Commission's authority based on constitutional provisions for separations of power.

Conclusion

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For the reasons we have explained, we hold that: (1) the 1942 amendment to Article IX of the North Carolina Constitution rebalanced the division of power between the Board and the General Assembly by limiting the Board's authority to be subject more broadly to enactments by the General Assembly; (2) the General Assembly, by enacting the APA and creating the Commission, acted within the scope of its constitutional authority to limit the Board's rulemaking authority by requiring approval of rules prior to enactment; (3) the General Assembly's delegation to the Commission of the authority to review and approve Board rules does not contravene the Board's general rulemaking authority; and (4) the General Assembly has delegated review and approval authority to the Commission without violating the separation of powers clause by providing adequate guidance and limiting the Commission's review and approval power.

Because the undisputed facts compel these conclusions, and because no other factual allegations can change the constitutional relationship of the Board, the General Assembly, and the Commission, the trial court erred in entering summary judgment in favor of the Board and in denying Defendants' motion for summary judgment. The trial court's order is reversed and this matter is remanded for entry of judgment in favor of Defendants.

REVERSED AND REMANDED.

Chief Judge MCGEE concurs.

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Judge TYSON dissents with separate opinion.

No. COA15-1229 – *N.C. State Bd. of Educ. v. The State of N.C.*

TYSON, Judge, dissenting.

I respectfully dissent from the majority's opinion. Defendant has failed to show error in the superior court's ruling that the General Assembly has not constitutionally delegated its authority over rules and regulations adopted by the North Carolina State Board of Education ("State Board") to the Rules Review Commission ("RRC") by enacting the North Carolina Administrative Procedure Act ("NCAPA"). N.C. Gen. Stat. § 150B (2015).

I. Article IX, Section 5

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

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

N.C. Const. art. IX, § 5 (emphasis supplied).

Our Supreme Court has established the proper standard of review: "In interpreting our Constitution[,]. . . where the meaning is clear from the words used, we will not search for a meaning elsewhere." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989) (citation omitted). Under the plain language of this article, only "laws enacted by the General Assembly" may take precedent over "needed rules and regulations" promulgated by the constitutionally established State

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Board. N.C. Const. art. IX, § 5.

The RRC is not the General Assembly. See N.C. Const. art. II, § 1 (“The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.”). Review by and decisions of the RRC are not “laws enacted by the General Assembly.” N.C. Const. art. IX, § 5.

The RRC was created by statute in 1986, long subsequent to the ratification of the current version of Article IX, § 5, and consists of ten non-elected members appointed by the General Assembly. N.C. Gen. Stat. § 143B-30.1(a) (2015); 1985 N.C. Sess. Law 1028. The RRC members purported to act on their own accord in delaying and striking down “needed rules and regulations” established under constitutionally mandated policy of the State Board, without bicameral review and presentment of a bill.

The RRC’s purpose is to “review[] administrative rules in accordance with Chapter 150B of the General Statutes.” N.C. Gen. Stat. § 143B-30.2 (2015). The NCAPA defines “rule” as “*any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency.*” N.C. Gen. Stat. § 150B-2(8a) (2015) (emphasis supplied).

The majority’s opinion accepts Defendants’ usurpation of the plain language of

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Article IX and the framers' intent, and holds the various laws which establish the RRC and its review process are "laws enacted by the General Assembly," and that the policies and procedures of the State Board are "subject to" RRC review and authority. See N.C. Const. art. IX, § 5.

Under the plain language of Article IX, the People established the State Board and intended its educational policy and rulemaking authority to be limited only by "laws enacted by the General Assembly," which requires bicameral review and presentation of a bill. The People did not intend the constitutional rulemaking authority of the State Board to be "subject to" delays and veto by a commission of non-elected officials, who are statutorily tasked under the NCAPA to review proposed "agency rules." See N.C. Gen. Stat. § 143B-30.2; N.C. Gen. Stat. § 150B-2(8a). The General Assembly cannot either usurp nor delegate the specific constitutional authority vested in the State Board by the People.

II. *West Va. Bd. of Educ. v. Hechler*

This issue appears to be of first impression in our State. The sound analysis and holding of the Supreme Court of Appeals of West Virginia, which ruled upon this issue, is persuasive. See *West Va. Bd. of Educ. v. Hechler*, 180 W. Va. 451, 376 S.E.2d 839 (1988). The Constitution of West Virginia provides: "The general supervision of the free schools of the State shall be vested in the West Virginia board of education which shall perform such duties as may be prescribed by law." W. Va. Const. art. XII,

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§ 2. The West Virginia legislature created a “legislative oversight commission on education accountability.” *Hechler*, 180 W. Va. at 452, 376 S.E.2d at 840. As here, the Board of Education was purportedly required to submit its proposed rules to the oversight commission for review, and the commission would recommend that the legislature either promulgate the rule or the rule be withdrawn. *Id.* at 453, 376 S.E.2d at 840.

The West Virginia Supreme Court of Appeals held the state constitution granted the West Virginia Board of Education rulemaking powers, “and any statutory provision that interferes with such rule-making is unconstitutional,” and the legislature’s “attempt to undertake the Board’s general supervisory powers” violates the separation of powers clause of the West Virginia Constitution. *Id.* at 455-56, 376 S.E.2d at 843.

In support of its holding, the court explained:

Decisions that pertain to education must be faced by those who possess expertise in the educational area. These issues are critical to the progress of schools in this state, and, ultimately, the welfare of its citizens. . . . [T]he citizens of this state conferred general supervisory powers over education and one need not look further than art. XII, § 2 of the State *Constitution* to see that the “general supervision” of state schools is vested in the State Board of Education. *Unlike most other administrative agencies which are constituents of the executive branch, the Board enjoys a special standing because such a constitutional provision exists.*

Id. at 455, 376 S.E.2d at 842-43 (second emphasis supplied).

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Our Constitution *specifically* gives the State Board the power to promulgate “needed rules and regulations” to set policy and to “*supervise and administer* the free public school system.” See N.C. Const. art. IX, § 5 (emphasis supplied). The State Board is the only constitutionally created board, yet the RRC admitted during oral argument that it treats the Board and its proposed rules the same as any other “executive agency.”

As explained in *Hechler*, the General Assembly’s purported transfer of the State Board’s constitutional authority to promulgate its own rules and regulations to an agency rule review entity denies the State Board an express power, which has been constitutionally conferred upon the State Board by the People.

Under the plain language of Article IX, the rulemaking authority of the State Board is “subject to limitation and revision by acts of the General Assembly.” *Guthrie v. Taylor*, 279 N.C. 703, 710, 185 S.E.2d 193, 198 (1971), *cert. denied*, 406 U.S. 920, 32 L. Ed. 2d 119 (1972). While the General Assembly may “limit and revise,” the State Board’s exercise of its primary authority under Article IX, *see id.*, the State Board’s power to establish educational policy and to promulgate its own rules and regulations does not derive its authority from, nor depend upon the General Assembly. By enacting the NCAPA, the General Assembly could not and did not transfer the State Board’s constitutionally specified rulemaking power to an agency rule oversight commission under the NCAPA.

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The legislative, executive, and judicial branches of government "shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. In interpreting this clause, our courts have long recognized that "a modern legislature must be able to delegate – in proper instances – a limited portion of its legislative powers to administrative bodies which are equipped to adapt legislation to complex conditions involving numerous details with which the Legislature cannot deal directly." *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978) (citations and internal quotation marks omitted).

The rule in *Adams*, allowing the General Assembly to delegate a "limited portion of its legislative powers," does not apply here. "[S]uch powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law." Thomas M. Cooley, *Cooley's Constitutional Limitations* 215 (8th ed. 1927). The People of North Carolina granted and conveyed to the State Board powers, which are not intended to be, and cannot be, removed from the State Board and subordinated to or overruled by an executive agency review body. *Id.*

Furthermore, in reviewing an agency's rule, the RRC determines whether the rule meets the following NCAPA criteria:

- (1) It is within the authority *delegated to the agency by the General Assembly*.

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- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article [which governs the rulemaking procedure].

N.C. Gen. Stat. § 150B-21.9(a) (2015) (emphasis supplied).

The authority of the State Board to promulgate its own rules and regulations to establish educational policy are constitutionally established and cannot be “delegated by the General Assembly.” *See id.* Reviewing the plain language of the NCAPA, the RRC’s mandate and standard for reviewing agency rules does not include rules that are promulgated *by a constitutionally created and empowered Board* expressly acting under their *constitutionally mandated authority*. The General Assembly’s guiding standards to the RRC and definitions in the NCAPA support the State Board’s position and the correctness of the superior court’s ruling.

The Board of Education alleged and argues the RRC unreasonably delayed and has objected to or modified *every rule* adopted by the State Board and brought before the RRC since 1986. The State Board is tasked by the People with “constitutional obligations to provide the state’s school children with an opportunity for a sound basic education.” *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 614-15, 599 S.E.2d 365, 376

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(2004).

The members of the RRC are not required to have acquired or demonstrate any background or experience in public education, and need only be endorsed by the Speaker of the House or President of the Senate to serve on the RRC. N.C. Gen. Stat. § 143B-30.1(a) (2015). The asserted RRC delays, review, and rejection of State Board proposals unconstitutionally hinders the State Board's authority and mandate to "make all needed rules and regulations" to meet its constitutionally mandated obligations to "supervise and administer the free public school system and the educational funds provided for its support." N.C. Const. art. IX § 5.

Under the NCAPA, when the RRC strikes down a rule promulgated by the State Board, the only procedural safeguard and remedy is for the State Board to file suit to challenge the RRC in the Wake County Superior Court. *See* N.C. Gen. Stat. § 150B-21.8(d) (2015). This is a wholly untenable process for our school children, our citizens, and for establishing the constitutionally mandated "needed rules and regulations" that are required to implement the public educational policy of our State. N.C. Const. art. IX, § 5.

III. Conclusion

By establishing a Board of Education with the specific constitutional authority to promulgate its own rules and regulations, the framers of Article IX and the People, upon ratifying the Constitution, vested the authority to administer and supervise

N.C. STATE BD. OF EDUC. V. THE STATE OF N.C.

TYSON, J., dissenting

public education to the State Board, not the RRC. This intention is clearly set forth in the plain language of the Constitution in Article IX. The RRC review process has delayed and frustrated the State Board in accomplishing its constitutionally mandated mission.

The General Assembly cannot prohibit State Board from exercising its rulemaking powers under its constitutional grant of authority. The General Assembly also cannot accomplish the same result by delegating the State Board's constitutional rulemaking authority to a statutory entity the General Assembly has created for review of proposed executive agency rules under the NCAPA.

The State Board's constitutional authority and obligation to "make all needed rules and regulations" for the supervision and administration of the public school system does not function, and is not included, as a statutory or executive rulemaking agency under the NCAPA, with its rules subject to review by the RRC. The NCAPA cannot be applied to trump the constitutional rulemaking authority of the State Board of Education, and subject the State Board to the oversight authority the RRC applies to statutory State agencies.

Defendants have failed to show error in the superior court's judgment. The superior court's grant of summary judgment in favor of the State Board is properly affirmed. I respectfully dissent.

Exhibit B

NORTH CAROLINA
WAKE COUNTY

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

NORTH CAROLINA STATE
BOARD OF EDUCATION,

Plaintiff,

v.

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

Defendants.

FILED
2018-08-17
CLERK OF COURT
SECOND AFFIDAVIT OF NORTH
CAROLINA SUPERINTENDENT
OF PUBLIC INSTRUCTION MARK
JOHNSON

Mark Johnson, after being duly sworn, deposes and states the following:

1. I likewise compliment the State Board of Education's in-house and outside counsel for their professionalism throughout conversations to try and advance a joint motion for a temporary stay on agreed-upon terms. These conversations began in earnest on 10 August 2017 and had concluded by 29 August 2017. While I wish we could have reached an agreement, I strongly disagree with the need to extend the stay, as well as the unsupported and exaggerated representations made by Plaintiff in its motion.

2. Citing only Chairman Cobey's Affidavit filed on 5 September 2017, Plaintiff asserts that if Session Law 2016-126 is allowed to go into effect "the entire \$10 billion public school system" will be "under the control of a single individual for the first time in North Carolina history." (See Plaintiff's Motion for Temporary Stay, p. 5). This is false for several reasons. Most importantly, this statement in no way reflects the reality of how our public schools are run in North Carolina. While it is true that the State of North Carolina spends over \$9 billion on K-12 education annually, decision-making for our public schools is, and has been for

many years, divided among the General Assembly, the State Board of Education, Superintendent of Public Instruction, local school boards, charter school boards, local superintendents, and principals. Session Law 2016-126 does not fundamentally alter the day-to-day administration of our public schools in North Carolina, nor does it strip the State Board of Education of all or even most of its authority over the public school system. Pursuant to Session Law 2016-126, sec. 2, Plaintiff maintains the authority “to establish all needed rules and regulations for the system of free public schools, subject to laws enacted by the General Assembly,” among a multitude of other statutory powers and duties. Contrary to Plaintiff’s claim, there simply will not be a “seismic shift.”

3. Plaintiff also claims based on Chairman Cobey’s Affidavit that “the SPI takes the position that he would be immediately empowered to unilaterally fire over a *thousand* state employees.” (See Plaintiff’s Motion for Temporary Stay, p. 5). This falsehood could not be further from the truth. Such a hysterical claim unnecessarily strikes fear into the staff of the department. I have *never* taken such a position, nor does Session Law 2016-126 contemplate such a power. By default, Department of Public Instruction (“DPI”) employees are subject to Chapter 126 of the General Statutes and therefore cannot be fired without just cause. Only a fraction of DPI employees could be designated exempt and subject to removal at-will under Session Law 2016-126. Although some senior policymaking leaders at DPI could be designated exempt, this currently is a common practice in both Cabinet and Council of State agencies. Many of the senior policymaking leaders at DPI have already been designated exempt by the Plaintiff and could be removed at-will by the Plaintiff today.

4. Again citing only Chairman Cobey’s Affidavit filed on 5 September 2017, Plaintiff also warns against the Superintendent having authority to execute new statewide

contracts and to manage more than 150 existing contracts involving tens of millions of dollars. (See Plaintiff's Motion for Temporary Stay, p. 5). However, the State Board of Education's current delegation in CNTR-002 *already* largely grants the Superintendent the authority to sign and manage contracts on behalf of DPI, subject to certain reporting requirements to the Plaintiff. Therefore, granting the Superintendent the power "to enter into contracts for the operations of the Department" under Session Law 2016-126 does not even represent a radical departure from current practice at DPI.

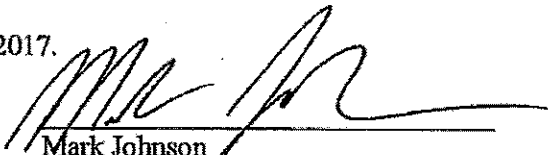
5. Despite the consistent representations by Plaintiff that it wishes to preserve the status quo, on 7 September 2017, the Plaintiff voted to fill an existing vacancy for Chief Academic Officer over my multiple objections. Even though the Chief Academic Officer position was vacant for over four (4) months, Plaintiff acted to fill the vacancy merely five (5) calendar days before the stay which maintains the authority of Plaintiff to hire for this position was set to expire. Session Law 2016-126 confers authority on the Superintendent to hire for this position.

6. Plaintiff argues that the temporary stay is prudent to preserve the North Carolina Constitution's nearly 150-year-old status quo during the appeal. However, any claim that the powers and duties of the State Board of Education and Superintendent of Public Instruction have not changed in 150-years is simply wrong and ignores the facts and legislative history that is well-known to Plaintiff. This issue was thoroughly briefed in prior submissions. The General Assembly has adjusted the powers and duties of both entities on many occasions – most notably in 1995. Many of the powers and duties granted to the Superintendent of Public Instruction by Session Law 2016-126 also belonged to the Superintendent prior to 1995.

7. Based upon the outrageous and exaggerated "facts" asserted in Plaintiff's Motion for Temporary Stay, Plaintiff has failed to meet its burden for the relief sought in its motion.

FURTHER, Affiant sayeth not.

This the 8 day of September, 2017.

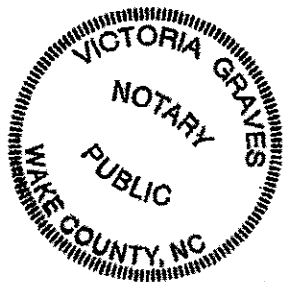

Mark Johnson
North Carolina Superintendent of
Public Instruction

Sworn to and subscribed before me,
this the 8 day of September, 2017.


NOTARY PUBLIC

My Commission Expires: Nov. 23, 2018

[Notary Seal]



CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Affidavit of North Carolina Superintendent of Public Instruction Mark Johnson** was served upon the following attorneys by U.S. Mail and e-mail to the following:

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

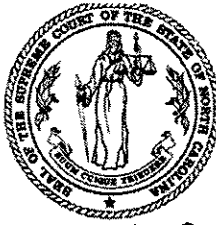
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*Counsel for North Carolina State Board
Of Education*

This the 8th day of September, 2017.



Philip R. Isley



Supreme Court of North Carolina

CHRISTIE SPEIR CAMERON ROEDER, Clerk

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From N.C. Court of Appeals
(P17-687)
From Wake
(16CVS15607)

16 October 2017

Mr. Robert F. Orr
Attorney at Law
LAW OFFICE OF ROBERT F. ORR
3434 Edwards Mill Road
Suite 112-254
Raleigh, NC 27612

RE: NC State Board of Education v State of NC, et al - 333P17-1

Dear Mr. Orr:

The following order has been entered on the motion filed on the 5th of October 2017 by Plaintiff for Temporary Stay:

"Motion Allowed by order of the Court in conference, this the 16th of October 2017."

Martin, C. J. recused

**s/ Morgan, J.
For the Court**

Christie Speir Cameron Roeder
Clerk, Supreme Court of North Carolina


M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:

North Carolina Court of Appeals

Mr. Andrew H. Erteschik, Attorney at Law, For North Carolina State Board of Education - (By Email)

Mr. Robert F. Orr, Attorney at Law, For North Carolina State Board of Education - (By Email)

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Mr. John Michael Dumovich, Attorney at Law, For North Carolina State Board of Education - (By Email)

Mr. Amar Majmundar, Special Deputy Attorney General, For State of North Carolina - (By Email)

Ms. Olga E. Vysotskaya, Special Deputy Attorney General, For State of North Carolina - (By Email)

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Lexis-Nexis - (By Email)

No. 333PA17

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA STATE)
BOARD OF EDUCATION,)

Plaintiff,)

v.)

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

Defendants.)

From Wake County
16-CVS-15607

**PLAINTIFF'S PETITION FOR DISCRETIONARY REVIEW
PRIOR TO DETERMINATION BY THE COURT OF APPEALS**

SUPREME COURT OF
NORTH CAROLINA

NOV 15 2017

FILED

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No. 333P17

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA STATE)
BOARD OF EDUCATION,)
Plaintiff,)

v.)

From Wake County
16-CVS-15607

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

**PLAINTIFF'S PETITION FOR DISCRETIONARY REVIEW
PRIOR TO DETERMINATION BY THE COURT OF APPEALS**

Pursuant to Rule 15(a) of the North Carolina Rules of Appellate Procedure and N.C. Gen. Stat. § 7A-31(b), the North Carolina State Board of Education respectfully petitions the Court for discretionary review prior to determination by the Court of Appeals.

INTRODUCTION

This bypass petition seeks the Court's review of a closely watched, high-stakes constitutional challenge of historic importance to all North Carolina families. In this case, the Court will be asked to determine who is in charge of the State's \$10 billion public school system: the bipartisan State

Board of Education, which has ably “supervised and administered” the public school system pursuant to Article IX, Section 5 of the North Carolina Constitution for nearly 150 years, or the Superintendent of Public Instruction (“SPT”), a single individual preferred by the current General Assembly.

After a nearly 150-year constitutional status quo, the General Assembly in December 2016 introduced and passed a law in less than 48 hours declaring that the SPI, and not the Board, would supervise and administer the public schools. This law used essentially the same text from the North Carolina Constitution stating that the Board is empowered to 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 filed a declaratory judgment action challenging 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 shared his view that the text of the law was “very troubling.” Nevertheless, the three-judge panel declined to invalidate the law. In doing so, the three-judge panel also failed to address the constitutional principle at the heart of the case: that when a state 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 it sought a stay of the trial court’s decision during the pendency of its appeal. On 16 October 2017, this Court issued a temporary stay of the three-judge panel’s decision.

Given the unique features of this appeal, it is not a matter of whether this Court will hear it, but when. As described below, even if the Court were to deny this bypass petition, the Court would ultimately hear this case a year or two from now in a direct appeal as a matter of right based on a substantial constitutional question. For at least three distinct reasons, however, the Court should grant this bypass petition and hear this case now.

First, the subject matter of this appeal has immense public interest and importance. This Court has consistently granted bypass petitions in high-profile constitutional challenges, and the result here should be no different. This is especially true given that this case not only involves a critically important issue, but also involves important stakeholders: the General Assembly, the State Board of Education, the SPI, and, most importantly, North Carolina's 1.5 million school children. Indeed, it is difficult to imagine an appeal that is more deserving of this Court's immediate attention.

Second, this case presents an important constitutional issue of first impression: whether the Board's duty is to "supervise and administer the free public school system," as the people so declared in Article IX, Section 5 of their Constitution, or whether, as the SPI contends, the Board's duty is "whatever the General Assembly says it is." T. p. 100 (emphasis added). A resolution of that issue turns on one of the most significant legal principles in our state's jurisprudence: the bedrock principle of constitutional law that when a state 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. The trial court disregarded that principle. That erroneous and dangerous precedent warrants immediate review by the State's highest court.

Third, under the unique circumstances of this case, bypassing the Court of Appeals will promote judicial economy and conserve judicial resources. As described more fully below, a separate constitutional challenge with overlapping issues—also involving the Board against the State—is currently before this Court in a direct appeal from a dissent in the Court of Appeals. The Board’s opening brief in that case is currently due on 22 November 2017. Thus, granting this bypass petition would bring these companion cases before the Court at the same time, where they could be set on parallel tracks and scheduled for oral argument on the same day, thereby streamlining two critically important, related appeals.

For each of these reasons, the Court should grant this bypass petition and review the case prior to determination by the Court of Appeals.

STATEMENT OF FACTS¹

Background

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

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

¹ For brevity, the Board has provided only the most relevant facts, but incorporates by reference the verified factual allegations of the amended complaint. Ex. A, Amended Complaint (without exhibits) ¶¶ 11-26.

N.C. Const. art. IX, § 5.

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 Board has fulfilled that duty since its creation in 1868. It has done so ably and without disruption, regardless of shifting political winds.

Today, the Board’s composition continues to promote this stability. 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.” N.C. Const. art. IX, § 4. Article IX, Section 4 requires that these Board members serve “overlapping terms of eight years.” *Id.* 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.

The genius of the framer’s design—a politically and geographically diverse Board comprised of education experts who serve lengthy terms

insulated from political pressure—enables the Board to place public education above politics.

In December 2016, however, for the first time in North Carolina history, the General Assembly passed legislation that attempted to transfer the Board's constitutional powers and duties to the newly elected SPI—a single individual whose experience consists of a few years of teaching and service on a local school board.²

Without any opportunity for input from the education community, the Board, 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.

The Board's Constitutional Challenge

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.*

² Speaking about his experience, the SPI stated, “This is my first job in my life where I have to really wear a suit every day.” *Fighting the status quo: Inside the combative world of NC's new public schools chief*, WRAL (Sept. 27 2017), available at <http://www.wral.com/-fighting-the-status-quo-inside-the-combative-world-of-nc-s-new-public-schools-chief/16918014/> (last visited 14 November 2017).

As described in the Board's complaint, 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. The Transfer Legislation attempts to accomplish this unconstitutional objective 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)).

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 . . . [t]o 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)).

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.

The Three-Judge Panel's Decision

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.”³

Nevertheless, the three-judge panel issued a decision on 24 July 2017 upholding the Transfer Legislation. Ex. E, Three-Judge Panel's Decision.

³ *Three judge panel hears arguments on education governance authority*, EdNC (Jun. 29, 2017), available at www.ednc.org/2017/06/29/three-judge-panel-hears-arguments-education-governance-authority/ (last visited 14 November 2017).

The decision did not engage with 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. The Board then sought a stay of the trial court's decision during the pendency of its appeal. On 16 October 2017, this Court issued a temporary stay of the three-judge panel's decision.

On 14 November 2017, the Board filed the record on appeal with the Court of Appeals, and the appeal was docketed the same day. Ex. G, Court of Appeals' Docket. The Board now seeks discretionary review prior to determination by the Court of Appeals.

REASONS SUPPORTING IMMEDIATE REVIEW

The statutory criteria for bypass petitions is set forth in N.C. Gen. Stat. § 7A-31(b). Under that section, review by this Court prior to the Court of Appeals is warranted if the appeal meets either of the following criteria: (1) "[t]he subject matter of the appeal has significant public interest"; or (2) the appeal "involves legal principles of major significance to the jurisprudence of the State." N.C. Gen. Stat. § 7A-31(b)(1)-(2).

This appeal satisfies both criteria. In addition, under the unique circumstances of this case, allowing this appeal to bypass the Court of Appeals will promote judicial economy.

For each of these reasons, both independently and collectively, the Court should grant immediate review.

I. The subject matter of this appeal has immense public interest and importance.

The first statutory criteria for a bypass petition asks whether “[t]he subject matter of the appeal has significant public interest.” N.C. Gen. Stat. § 7A-31(b)(1).

This Court has consistently granted bypass petitions in closely watched constitutional challenges, like this one. *See, e.g., Cooper v. Berger*, No. 52P17-2, 2017 N.C. LEXIS 643, (N.C. Jul. 19, 2017) (granting bypass petition to decide constitutionality of election law legislation), *Hart v. State*, No. 372A14-1, 773 S.E.2d 885, 2014 N.C. LEXIS 1246 (N.C. Oct. 10, 2014) (granting bypass petition to decide constitutionality of private school voucher program); *Richardson v. State*, No. 384A14-1, 773 S.E.2d 885, 2014 N.C. LEXIS 1247 (N.C. Oct. 10, 2014) (same); *Cubbage v. Bd. of Trs. of the Endowment Fund*, No. 380A14-1, 773 S.E.2d 884, 2014 N.C. LEXIS 1245 (N.C. Oct. 10, 2014) (granting bypass petition to decide constitutionality of proposed sale of Hoffman Forest); *State v. Young*, No. 80A14-1, 773 S.E.2d. 2d

882, 2014 N.C. LEXIS 1243 (N.C. Mar. 12, 2014) (granting bypass petition to decide constitutionality of sentence of life without parole for juvenile); *State v. Seam*, No. 82A14-1, 773 S.E.2d 882, 2014 N.C. LEXIS 1241 (N.C. Mar. 12, 2014) (same); *State v. Perry*, No. 81A14-1, 773 S.E.2d 882, 2014 N.C. LEXIS 1242 (N.C. Mar. 12, 2014) (same); *Hoke Cty. Bd. of Educ. v. State*, No. 830PA02, 579 S.E.2d 275, 2003 N.C. LEXIS 408 (N.C. Mar. 18, 2003) (granting bypass petition to decide claim that State failed in its constitutional duty to provide sound basic education); *Pope v. Easley*, No. 206PA01, 548 S.E.2d 527, 2001 N.C. LEXIS 466 (N.C. May 3, 2001) (granting bypass petition to decide constitutionality of legislative change to size of Court of Appeals); *Williams v. Blue Cross Blue Shield*, No. 277PA01, 552 S.E.2d 637, 2001 N.C. LEXIS 703 (N.C. July 19, 2001) (granting bypass petition to decide constitutionality of employment provisions of county ordinance and enabling act for ordinance); *Bailey v. State*, No. 53PA96-2, 541 S.E.2d 141, 1999 N.C. LEXIS 1233 (N.C. Nov. 4, 1999) (granting bypass petition to decide constitutional challenge to tax on retirement benefits).

Here, the Board seeks review of a high-stakes constitutional challenge that has attracted enormous public interest across the state and even

nationally.⁴ This public interest is justified, as this case will determine who supervises and administers the State's \$10 billion public school system for the benefit of our 1.5 million school children.⁵

Moreover, not only does this case involve a critically important issue, but it also involves important litigants. The parties involved in this case include: (1) the State Board of Education, which is comprised of "the Lieutenant Governor, the Treasurer, and eleven members appointed by the

⁴ See, e.g., *The GOP coup in North Carolina previews what we're going to see everywhere*, THE WASHINGTON POST, Opinion (Dec. 16, 2016), available at www.washingtonpost.com/blogs/plum-line/wp/2016/12/16/the-gop-coup-in-north-carolina-previews-what-were-going-to-see-everywhere/?utm_term=.83cfb5deac68 (last visited 14 November 2017); *Dispute Over NC Public Schools Control, Money Lands in Court*, U.S. NEWS & WORLD REPORT (June 27, 2017), available at www.usnews.com/news/best-states/north-carolina/articles/2017-06-27/dispute-over-nc-public-schools-control-money-lands-in-court (last visited 14 November 2017); *NC school board to sue over law giving superintendent power*, ASHEVILLE CITIZEN-TIMES (Dec. 29, 2016), available at www.citizen-times.com/story/news/2016/12/29/nc-school-board-sue-law-giving-superintendent-power/95951240/ (last visited 14 November 2017); *NC school board to sue over law giving superintendent power*, GREENSBORO NEWS & RECORD (Dec. 28, 2016), available at <http://www.greensboro.com/ap/north-carolina/nc-school-board-to-sue-over-law-giving-superintendent-power/article-4f0ecc06-7d4b-5d9f-ace2-0d0ab568898b.html> (last visited 14 November 2017); *A new threat to N.C. public schools*, CHARLOTTE OBSERVER, Opinion (Jan. 5, 2017), available at www.charlotteobserver.com/opinion/editorials/article124716439.html ("We think the N.C. Constitution offers a clear answer . . . [and] expect the courts to strike most, if not all, of HB17.") (last visited 14 November 2017).

⁵ The SPI apparently agrees, having argued to the three-judge panel that this case "presents matters of great importance to the children and taxpayers of this State." R. Supp. 320, SPI Opp. Br. at 10.

Governor,” N.C. Const. art. IX, § 4; (2) the General Assembly, which enacted the Transfer Legislation; and (3) the SPI. These constitutional entities and officers would benefit immeasurably from having this State’s highest court provide immediate guidance on the scope of their constitutional roles in public education.

In sum, the subject matter of this appeal has immense public interest and importance. For this reason alone, this appeal warrants immediate review.

II. This case involves legal principles of the highest significance to the State’s jurisprudence.

The second statutory criteria for a bypass petition asks whether the appeal “involves legal principles of major significance to the jurisprudence of the State.” N.C. Gen. Stat. § 7A-31(b)(2).

Here, this case presents an important constitutional issue of first impression: whether the Board’s duty is to “supervise and administer the free public school system,” as the people so declared in Article IX, Section 5 of

their Constitution, or whether, as the SPI contends, the Board's duty is "whatever the General Assembly says it is."⁶

A resolution of that issue turns on one of the most significant legal principles in our state's jurisprudence: the 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. This Court has safeguarded that legal principle since Reconstruction. *See 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).

The three-judge panel, however, disregarded this principle. Despite the observation at oral argument that the Transfer Legislation is "very troubling," the three-judge panel nevertheless declined to invalidate the law.

⁶ T. p. 100 ([SPI's counsel]: "The people have said [the Board and the SPI] exist and that they have powers. And then the question is: What are their powers relative to each other? And it might – might sound flippant, but it's whatever the General Assembly says it is. I mean, that's what the Constitution says."

Absent this Court's immediate review, the three-judge panel's decision stands for a dangerous precedent: that the legislature can copy and paste constitutional text into a statute, remove constitutional entities or officers, replace them with individuals who better suit its political agenda, and effectively rearrange state government in its image.

This Court warned against such a precedent nearly 150 years ago, cautioning that if constitutional powers could be transferred without an amendment, then "[w]ith as much propriety every other office in the State may be cut up, and those who have been put into the office by the people may be starved out, and irresponsible persons put in." *King*, 65 N.C. at 612.

Virtually every other state supreme court in the nation has issued similar warnings. *See, e.g., Ex Parte Corliss*, 114 N.W. 962, 965 (N.D. 1907) (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); *Love v. Baehr*, 47 Cal. 364, 366 (Cal. 1874) (observing that legislature's discretion to define constitutional officers' duties was obviously not unlimited, or else 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).

In sum, the legal principles involved in this case are of the highest significance to our state's jurisprudence. For that reason, this appeal warrants the Court's immediate review.

III. Under the unique circumstances of this case, bypassing the Court of Appeals will promote judicial economy.

In addition to the reasons above, granting this bypass petition would significantly promote judicial economy. This is true for at least two reasons:

First and foremost, a case with overlapping issues is already before this Court on a direct appeal from a dissent in the Court of Appeals. In *State Board of Education v. North Carolina*, No. 110PA16, this Court will consider for the first time whether the Rules Review Commission, a legislatively created state agency, can nullify the Board's constitutionally promulgated rules. In answering that question, the Court will be asked to decide the meaning, intent, and scope of Article IX, Section 5's delegation of constitutional power and duty to the Board to "supervise and administer the free public school system . . . subject to laws enacted by the General Assembly." N.C. Const. art. IX, § 5. The Superior Court ruled in favor of the Board in that case, but a panel of the Court of Appeals reversed in a 2-to-1 split decision. The Board appealed to this Court as a matter of right on 23 October 2017.

Briefing in that case is already underway. The Board's opening brief to this Court is currently due 22 November 2017. Thus, if the Court grants this bypass petition, both cases involving the same or similar issues would be before the Court at almost exactly the same time. Indeed, these cases would make ideal companion cases, and they could be set on parallel tracks and scheduled for oral argument on the same day. Thus, granting this bypass petition would allow the Court to take advantage of this unique timing to streamline two critically important, related appeals.

Second, it is not a matter of whether this Court will hear this case, but when. Even if the Court were to deny this bypass petition and this appeal proceeded to the Court of Appeals as if it were an ordinary civil case, the parties would ultimately have an appeal as of right to this Court based on the constitutional question described above—a constitutional question that every party to this litigation would be forced to concede is, quite obviously, “substantial.” N.C. Gen. Stat. § 7A-30(1).

By certifying this case for immediate review now, however, the Court will truncate this litigation by a year or more, thereby providing the constitutional stakeholders and the public school system with an expeditious resolution of this important dispute. Likewise, immediate review would allow this Court to consolidate these cases as described above, thereby avoiding two rounds of Supreme Court litigation on the same or similar

issues within a couple years of each other—a pointless exercise that would unnecessarily consume this Court's resources.

For these reasons, immediate review by this Court would strongly promote judicial economy.

ISSUES FOR WHICH REVIEW IS SOUGHT

The Board respectfully requests that the Court allow discretionary review on the following issue:

Does the Transfer Legislation's attempt to transfer the Board's constitutional powers and duties to the SPI violate Article IX, Section 5 of the North Carolina Constitution?

CONCLUSION

The Board respectfully requests that the Court allow discretionary review of this appeal prior to determination by the Court of Appeals.

Respectfully submitted the 15th day of November, 2017.

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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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This the 15th day of November, 2017.

s/ Andrew H. Erteschik
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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:

Article IX, Section 5 of the North Carolina Constitution	House Bill 17, Section 4 (N.C. Sess. Law 2016-126 § 4)
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:

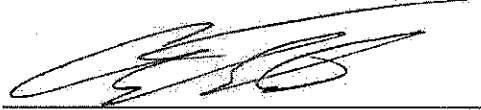


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BOARD OF EDUCATION**

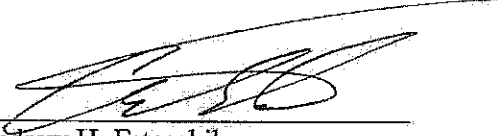
CERTIFICATE OF SERVICE

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
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 10th day of March, 2017.



Andrew H. Erteschik

STATE OF NORTH CAROLINA

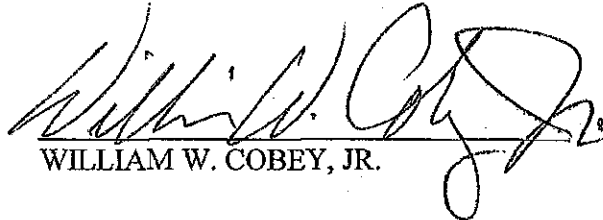
VERIFICATION

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]

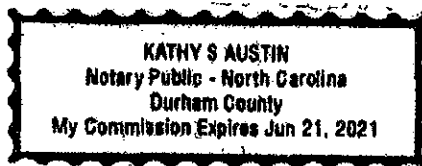


Exhibit B

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~~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~~system.
 - (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 ~~1,500~~ 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~~ 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~~ 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 ~~it~~he or she 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.

(c) ~~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 16th 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 19th day of December, 2016

Exhibit C

1 STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
2 COUNTY OF WAKE SUPERIOR COURT DIVISION
16-CVS-15607

3 NORTH CAROLINA STATE)
4 BOARD OF EDUCATION,)
5 Plaintiffs,)
6 vs.)
7 THE STATE OF NORTH)
8 CAROLINA,)
9 Defendant.)
10)
11)
12)
13)
14)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)

BEFORE: THE HONORABLE DONALD STEPHENS

TRANSCRIPT OF HEARING

TRANSCRIBED FROM A VIDEOTAPED PROCEEDING

DECEMBER 29, 2016

RALEIGH, NORTH CAROLINA

Reported in Stenotype by
Lauren M. McIntee, RPR
Transcript produced by computer-aided transcription

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 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.

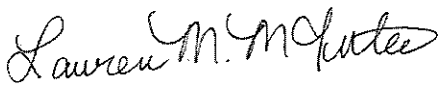
19 
20 LAUREN MCINTEE, RPR, Notary Public
21 Notary Number: 201616600044
22
23
24
25

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.

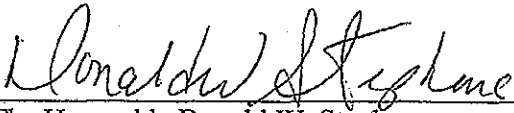
Unless the State consents to an extension of this temporary restraining order, the Board's motion for preliminary injunction shall be heard before the undersigned Superior Court Judge

~~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. Brieschik

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.)

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

ORDER

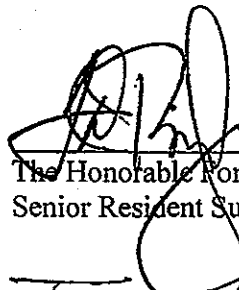
This cause came on for hearing before the undersigned three-judge panel presiding at the 29 June 2017 special setting of the Wake County Superior Court upon the motion for summary judgment filed by the North Carolina State Board of Education ("State Board"), the motion to dismiss filed by the State of 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

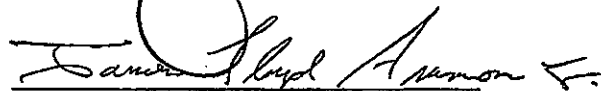
North Carolina and the Superintendent, and the State Board's motion for summary judgment is denied.

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 30th 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.)	MEMORANDUM OF
)	OPINION
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 or 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 places 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.

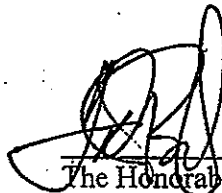
Third, the State Board challenges the removal of “policy,” and its replacement with “all needed rules and regulations” in G.S. 115C-12. This Court concludes that deletion of the word “policy” does not change the constitutional role of the State Board of

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.

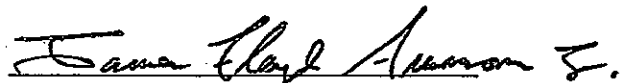
As noted previously, the State Board does not discuss in detail the additional provisions which it identifies in its complaint, and these provisions represent a permissible shift of day-to-day authority from the State Board to the Superintendent.

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.

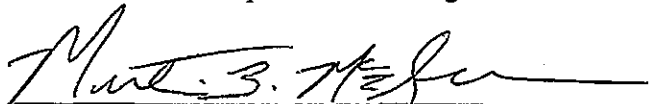
This the 6 day of July, 2017.



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:

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Raleigh, NC 27603
Plsley@bmlilaw.com
HLewis@bmlilaw.com

This the 14th day of July, 2017.



Kellie Z. Myers
Trial Court Administrator
PO Box 1916, Raleigh, NC 27602
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.

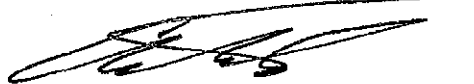
ROBERT F. ORR, PLLC

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

By:


Andrew H. Erteschik
N.C. State Bar No. 35269
aerteschik@poynerspruill.com
P.O. Box 1801
Raleigh, NC 27602-1801
Telephone: (919) 783-2895
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COUNSEL FOR PLAINTIFF
NORTH CAROLINA STATE
BOARD OF EDUCATION

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:

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This the 20th day of July, 2017.



Andrew H. Erteschik

Exhibit G

North Carolina Court of Appeals

Docket Sheet

NC State Bd. of Educ. v. The State of NC

Case Number: 17-1259

As of: 11/15/2017

Case Closed: No

Close Date:

Case Type: Civil (3 Judge Const'l)

Mediation: No

NORTH CAROLINA STATE BOARD
OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA
and MARK JOHNSON, in his Official
Capacity,

Defendants.

Docket Date: 11-14-2017

File Date: 11-14-2017

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To SC:

From SC:

Lower Court Number(s)

Location: Wake (10)

Judge: Forrest Donald Bridges

Case #: 16CVS15607

Tracking/Argue

Opinion

Documents

Document	Date Recvd	Cert of Service	Rec/Brf Due	Resp. Due	Resp. Recvd	Mailed Out	Ruling	Ruling Date
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FOR: Plaintiff-Appellant NC State Board of Education

BY : Mr. Andrew H. Erteschik

POYNER SPRUILL LLP

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Exhibits

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Party Name	Role
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The State of North Carolina	Defendant-Appellee
Johnson, Mark	Defendant-Appellee

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TENTH DISTRICT

From Wake County
No. 16-CVS-15607

SUPREME COURT OF
NORTH CAROLINA

NOV 29 2017

FD-36

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SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA STATE)	
BOARD OF EDUCATION,)	
)	
Plaintiff,)	
)	
v.)	<u>From Wake County</u>
)	No. 16-CVS-15607
THE STATE OF NORTH CAROLINA,)	
MARK JOHNSON, North Carolina)	
Superintendent of Public Instruction,)	
in his official capacity,)	
)	
Defendants.)	

**DEFENDANT’S RESPONSE IN OPPOSITION TO PLAINTIFF’S
PETITION FOR DISCRETIONARY REVIEW PRIOR TO
DETERMINATION BY THE COURT OF APPEALS**

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant Mark Johnson, North Carolina Superintendent of Public Instruction (“Superintendent”), respectfully submits this response in opposition to the petition of plaintiff North Carolina State Board of Education (“State Board”) for discretionary review by the Supreme Court prior to determination by the North Carolina Court of Appeals.

PRELIMINARY STATEMENT

In December of 2016, the North Carolina Legislature passed House Bill 17 (“HB 17”), entitled, in pertinent part, “An Act to Clarify the Superintendent of Public Instruction’s Role as the Administrative Head of the Department of Public Instruction[.]” Three days later, the Governor signed HB 17 into law as Session Law 2016-126. In effectuating the policy decisions contained in HB 17, the North Carolina General Assembly was exercising the plenary authority over the State’s public school system originally granted to it when the People of North Carolina enacted the Constitution of 1868. The Constitution of 1868 also created the office of Superintendent of Public Instruction (“Superintendent”) and the State Board of Education (“State Board”). In the provision creating the State Board, however, the 1868 Constitution was unambiguous in establishing the supremacy of the General Assembly over the State Board in matters concerning public education in North Carolina:

The Board of Education shall succeed to all the powers and trusts of the president and directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to free public schools and the educational fund of the State; *but all acts, rules and regulations of said board may be altered, amended or repealed by the General Assembly, and when so altered, amended or repealed they shall not be re-enacted by the board.*

N.C. CONST. of 1868, Art. IX, § 10. (Emphasis supplied).

This principle of the supremacy of the General Assembly in all matters relating to public schools has been reaffirmed, and, indeed, strengthened, in subsequent iterations of the Constitution. The most recent change to the constitutional text, enacted by the Citizens of North Carolina in 1971, is even clearer than the original:

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 (Emphasis supplied).¹

This constitutional principle has been the foundation of multiple, significant legislative actions clarifying and reallocating duties and responsibilities among and between the State Board, the Superintendent, local school boards, and the General Assembly. *See, e.g.*, N.C. Session Laws 1971-864, 1981-423, 1987-1025, 1993-522, 1995-72, 1995-393. Although a detailed analysis of these actions is beyond the scope of this response, it should be noted that the two 1995 session laws reallocated significant duties and authority away from the Superintendent and to

¹ The constitutional provision establishing the elected office of Superintendent of Public Instruction provides that the duties of the office “shall be prescribed by law,” thus likewise establishing the supremacy of the General Assembly in allocating responsibilities among the constitutionally provided entities charged with overseeing public schools. *See* N.C. CONST., Art. III, § 7(2).

the State Board, and the legislation at issue in the current case largely restored those duties to the Superintendent.

The principle of legislative supremacy over the State Board also has been recognized numerous times by our appellate courts, most importantly by this Court in *Guthrie v. Taylor*, 279 N.C. 703, 710, 185 S.E.2d 193, 185 (1971) (“subject to laws” language of Constitution “was designed to make, and did make, the powers so conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly”); and *State v. Whittle Communications*, 328 N.C. 456, 464, 402 S.E.2d 556, 560-61 (1991) (“Article IX, § 5 of the North Carolina Constitution, which grants the State Board the authority to ‘make all needed rules,’ also limits this authority by making it ‘subject to the laws enacted by the General Assembly.’”); and most recently by the Court of Appeals in *State Board v. State of North Carolina and N.C. Rules Review Commission* (hereinafter the “*Rules Review*” decision), 2017 N.C. App. LEXIS 757, ___, 805 S.E.2d 518, ___ (19 September 2017) (“The [State] Board’s argument also conflicts with the amendment’s final full sentence providing that the [State] Board’s authority is wholly subject to laws enacted by the General Assembly. To interpret an amendment that reallocates powers between the Board and the General Assembly as preserving the Board’s previous powers fails the test of common sense.” (*Id.*, slip op. p. 24)).

In spite of this well-established legal history recognizing both the General Assembly's primacy in matters relating to public education and the constantly shifting landscape of powers and duties among entities in the field, the State Board has persisted in claiming that HB 17 has shattered some claimed "150-year status quo."² The State Board's latest appeal to this imagined "tradition" ignores more than just the unanimous ruling of the three-judge trial court panel appointed by the Chief Justice in this case. It also ignores the extensive and definitive repudiation of that argument by the North Carolina Court of Appeals in the *Rules Review* case – a case decided less than 60 days prior to the filing of the current petition in this action, and involving the same plaintiff and plaintiff's counsel. Clearly, the State Board seeks to avoid application of *Rules Review* as precedent should this case follow a normal path through the Appellate Division.³ The Superintendent respectfully suggests that it would be most appropriate for this case to proceed and develop – as *Rules Review* did – through the Court of Appeals.

STATEMENT OF THE CASE

After enactment of HB 17 as discussed above, the plaintiff State Board filed a Verified Complaint for Declaratory Judgment and Injunctive Relief and Motion for Preliminary Injunctive Relief on 29 December 2016, naming the State of North

² See Plaintiff's Petition for Discretionary Review Prior to Determination by the Court of Appeals, at 2. Plaintiff has repeated this claim in all or nearly all of its pleadings in this case.

³ Because of a dissent by Judge Tyson, the *Rules Review* case is now on appeal in the Supreme Court. The file number is 110PA16-2.

Carolina as the sole defendant. In an emergency TRO hearing held the same day, the trial judge entered an order enjoining the implementation and enforcement of HB 17. By order of the Chief Justice of the North Carolina Supreme Court, a three judge panel of Superior Court judges obtained this case on 3 January 2017. The three judge panel issued a case management order on 16 February 2017. The parties agreed to leave the terms suspending implementation and enforcement of HB 17 in place until the Superior Court entered judgment. On 10 March 2017, plaintiff filed an amended verified complaint naming the Superintendent as an additional defendant.

The Superior Court conducted a hearing on cross-motions for summary judgment on 29 June 2017. The parties filed a total of nine briefs for consideration by the three-judge panel, and on 29 June 2017 participated in several hours of oral argument on the motions. On 14 July 2017, the three judge panel filed an Order and Memorandum of Opinion declaring HB 17 constitutional, and granting summary judgment in favor of defendants State of North Carolina and the Superintendent.

The State Board filed notice of appeal on 20 July 2017. On 5 September 2017, the State Board filed a Motion for Temporary Stay pending appeal pursuant to N.C. Gen. Stat. § 1-500 in Superior Court. On 14 September 2017, after a

hearing on the State Board's motion for stay, the three judge panel entered an order providing, in pertinent part:

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.

The three judge panel extended the existing stay an additional thirty days to allow the parties a reasonable opportunity to petition the appellate division to overturn the trial court's exercise of its discretion and to impose a stay of the three judge panel's judgment pending appeal. On 19 September 2017, the State Board filed a Motion for Temporary Stay and Petition for Writ of *Supersedeas* in the Court of Appeals, to which the Superintendent responded on 29 September 2017. On 5 October 2017, the Court of Appeals filed an order largely denying the State Board's motion. Hours later, the State Board filed a nearly identical motion in this Court, to which the Superintendent responded the next day, 6 October 2017. On 16 October 2017, this Court filed an order allowing the motion and staying the effective date of House Bill 17.

ARGUMENT

I. The Court of Appeals, Having Recently Ruled on Similar Issues in the *Rules Review* Decision, Is the Appropriate Forum for the First Appellate Review in this Case.

This case, in which the three-judge Superior Court panel unanimously determined that the General Assembly's enactment of HB 17 was constitutional,

will depend on the appellate court's interpretation and application of the eight words at the end of Article IX, Section 5 of the North Carolina Constitution: "subject to laws enacted by the General Assembly." Although, as mentioned above, this Court's holdings in *Guthrie* and *Whittle Communications* are most authoritative, the decision by the North Carolina Court of Appeals less than three months ago in *Rules Review* contains the most complete and detailed analysis of the "subject to laws" language since it first appeared in the Constitution of 1868. This is largely because the *Rules Review* opinion provides the most thoughtful interpretations of this Court's controlling precedent, but also because it contains new conclusions concerning the evolution of the General Assembly's constitutional relationship with the State Board that are highly relevant to the current case.

Specifically, the Court of Appeals responded to the State Board's "150 year status quo" argument described above by noting that an amendment made to the Constitution in 1942 actually was intended to shift power away from the State Board and to the General Assembly "as a way 'to allow more elasticity in shaping governmental policies . . . in regard to future needed adjustments. . . .'" *Rules Review*, at slip op. p. 25 (ellipses in original; internal citation omitted). That is, the Court of Appeals rejected the "150 year status quo" argument in much the same

fashion as the three-judge panel rejected it in this case. The *Rules Review* opinion concluded:

Based on the plain language of the constitutional text, further bolstered by supplemental authorities, we hold that by the 1942 amendment to the North Carolina Constitution, the framers and voters consolidated in the Board all administrative authority governing a statewide public school system, limited the Board's authority to making rules and regulations subject to laws enacted by the General Assembly, eliminated the Board's authority to legislate, and thereby restored to the General Assembly all legislative authority regarding public education.

Id. at slip op. p. 26.⁴

The State Board seeks to avoid the Court of Appeals in the present case because it is unhappy with the court's decision in *Rules Review* – a decision that reversed the trial court's holding in its favor. The State Board did not seek to bypass the Court of Appeals in *Rules Review*, despite that the issues presented are of similar constitutional scope and moment. The current case should be allowed to proceed along a traditional appellate course. The State Board's petition to bypass the Court of Appeals is nothing more than forum shopping, and it should be denied.

⁴ In his principal summary judgment brief filed four months before the Court of Appeals announced its decision in *Rules Review*, the Superintendent argued, regarding the 1942 constitutional amendment: "The effect of this change in the final sentence of the provision, if anything, is to increase the power of the General Assembly to control the actions of the State Board." Superintendent's Brief in Support of Motion for Summary Judgment, at 14.

CONCLUSION

For the reasons stated and upon the authorities cited, the Superintendent respectfully requests that the Court deny the State Board's petition to bypass the Court of Appeals.

Respectfully submitted this 27th day of November, 2017.

**BLANCHARD, MILLER, LEWIS
& ISLEY, P.A.**

/s/ E. Hardy Lewis

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Defendant's Response in Opposition to Plaintiff's Petition for Discretionary Review Prior to Determination by the Court of Appeals** was served upon the following attorneys by U.S. Mail and e-mail to the following:

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This the 27th day of November, 2017.

/s/ E. Hardy Lewis

E. Hardy Lewis

Supreme Court of North Carolina

NORTH CAROLINA STATE BOARD OF EDUCATION

v

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

From N.C. Court of Appeals
(P17-687)
From Wake
(16CVS15607)

ORDER

Upon consideration of the petition filed by Plaintiff on the 5th of October 2017 for Writ of Supersedeas of the judgment of the Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Allowed by order of the Court in conference, this the 7th of December 2017."

Martin, C.J. recused

s/ Morgan, J.
For the Court

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of December 2017.



Christie Speir Cameron Roeder
Clerk, Supreme Court of North Carolina

M. C. Hackney
M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

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Supreme Court of North Carolina

NORTH CAROLINA STATE BOARD OF EDUCATION

v

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

From N.C. Court of Appeals
(P17-687)
From Wake
(16CVS15607)

ORDER

Upon consideration of the petition filed by Plaintiff on the 15th of November 2017 in this matter for discretionary review under G.S. 7A-31 prior to a determination by the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Allowed by order of the Court in conference, this the 7th of December 2017."

Martin, C.J. recused

**s/ Morgan, J.
For the Court**

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of December 2017.



Christie Speir Cameron Roeder
Clerk, Supreme Court of North Carolina

M. C. Hackney
M. C. Hackney
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