

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**

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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and the educational fund of the State; ***but all acts, rules and regulations of said board may be altered, amended or repealed by the General Assembly, and when so altered, amended or repealed they shall not be re-enacted by the board.***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
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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.

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