

SUPREME COURT OF NORTH CAROLINA

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|---------------------------------------|---|-------------------------|
| NORTH CAROLINA STATE |) | |
| BOARD OF EDUCATION, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | <u>From Wake County</u> |
| |) | |
| THE STATE OF NORTH CAROLINA, |) | |
| and MARK JOHNSON, North Carolina |) | |
| Superintendent of Public Instruction, |) | |
| in his official capacity, |) | |
| |) | |
| Defendants. |) | |
| |) | |

**NEW BRIEF OF NORTH CAROLINA SUPERINTENDENT
OF PUBLIC INSTRUCTION MARK JOHNSON**

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| 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. |) | |

**NEW BRIEF OF NORTH CAROLINA SUPERINTENDENT
PUBLIC INSTRUCTION MARK JOHNSON**

ISSUE PRESENTED

- I. Was the North Carolina General Assembly’s enactment of House Bill 17, which included a reallocation of powers and duties among the Superintendent of Public Instruction and the State Board of Education – two entities established by the Constitution of North Carolina – a constitutional exercise of the General Assembly’s supreme power over matters involving the public schools of North Carolina?**

STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

This case is on direct appeal from a unanimous decision of a three-judge panel of the North Carolina Superior Court granting summary judgment in favor of the State of North Carolina and elected Superintendent of Public Instruction Mark Johnson. The ruling of the three-judge panel upholds the constitutionality of 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[.]” The Superior Court decision recognizes the supremacy of the role of the North Carolina General Assembly in setting policy for the State’s free public schools, and, more specifically, as the definitive promulgator of powers and duties of the appellant State Board of Education (“State Board”).

The State Board in its New Brief claims that the three-judge panel erred by grounding its decision in the plain language of Article IX, Section 5 of the North Carolina Constitution, which 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). It complains that the Superior Court also erred by following binding precedent in the form of this Court’s opinions interpreting the meaning of the last eight words of Article IX, § 5, quoted in italics

above – cases *involving the State Board* but which were only discussed in a footnote in its brief. It also argues that the trial court was wrong because it was unpersuaded by the State Board’s overwrought fulminations about being disenfranchised by HB 17.

In fact, the State Board’s brief seeks to make the issue to be decided by this Court much more complicated than it actually is.¹ In enacting HB 17, the General Assembly allocated responsibilities concerning North Carolina’s public school system among two entities of constitutional moment. Each entity exists by virtue of a constitutional provision that confers upon the General Assembly the authority to assign rights and duties to the entity. Every North Carolina appellate case that has considered this issue has concluded that even the express constitutional powers

¹ Indeed, in the “Introduction” to its brief, the State Board is at pains to subvert the legitimacy of both the Superintendent and the legislation itself by arguing matters that are both wholly irrelevant and outside the record. For example, the State Board makes unsupported statements regarding the Superintendent’s “political priorities” and his experience. This unfortunate effort to obfuscate the issues properly presented in this case fails to make the more salient observation that the Superintendent, whatever his politics or his experience, was elected by the People of North Carolina. Furthermore, the State Board’s “Introduction” also claims that the General Assembly drafted HB 17 “[f]ollowing the new SPI’s election” and “in secret.” Plaintiff-Appellant North Carolina State Board of Education’s New Brief (“Appellant’s New Brief”) at 3. Not only did the State Board fail to assert any claim or assign any error on the basis of the legislative process involved in the enactment of HB 17, the claims quoted above are simply false. Again, the claims are irrelevant even if true, but if this Court desires supplemental record material regarding the claims, it will be provided.

granted to the State Board may be “limited and defined” by “laws enacted by the General Assembly.”

The three-judge Superior Court panel sensibly saw the controversy for what it is, an effort by the General Assembly to confer more day-to-day executive authority to the Superintendent, who is on the job 365 days a year, while re-establishing the big-picture policy-setting role of the State Board, which meets for one and a half days per month. As will be detailed in this brief, the challenged legislation is but the latest in a series of efforts by the General Assembly over at least the past 50 years to attain an optimal allocation of authority and duties among the entities charged with overseeing the State’s public school system. HB 17 does not disenfranchise the State Board, indeed nearly all of the changes to the Superintendent’s duties contain language requiring that officer’s actions to be performed “in accordance with all needed rules and regulations adopted by the State Board of Education.” The three-judge panel, in the penultimate sentence of its order granting summary judgment against the State Board, recognized this:

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.

(R p 93).

The three-judge Superior Court panel was correct in concluding that HB 17 is constitutional, and in entering final judgment against the State Board on all claims. The appellee, North Carolina Superintendent of Public Instruction Mark Johnson, respectfully requests that this Court affirm the judgment of the Superior Court.

STANDARD OF REVIEW

This Court, in a recent case involving the review of an order of a three-judge Superior Court panel, held:

The analytical framework for reviewing a facial constitutional challenge is well-established. Our “State Constitution is in no matter a grant of power,” *Lassiter v. Northampton Cty. Bd. of Education*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), *aff’d*, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072 (1959), and as such, “[a]ll power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it,” *id.* at 112, 102 S.E.2d at 861 (citation omitted). *See also State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 878, 787 (1895) (“[P]ower resides with the people and is exercised by their representatives in the General Assembly.”). “We seldom uphold facial challenges because it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them.” *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm’rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009) (citation omitted). An act of the General Assembly will be declared 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)), and its unconstitutionality must be demonstrated beyond reasonable doubt. *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887, 889 (1991) (citations omitted).

Town of Boone v. State, No. 93A15-2, 794 S.E.2d 710, 714 (N.C. 21 December 2016).

ARGUMENT

I. THE CONSTITUTIONAL GRANT OF POWERS TO THE NORTH CAROLINA STATE BOARD OF EDUCATION MAY BE LIMITED AND DEFINED BY “LAWS ENACTED BY THE GENERAL ASSEMBLY.”

In its amended complaint and its New Brief, the State Board stakes an aggressive claim to inviolable authority over essentially every aspect of the operation of North Carolina’s public schools. This claim, however, is based upon a misinterpretation of Article IX, § 5 of the Constitution of North Carolina, because it ignores that the People, in creating the State Board, made it wholly subservient and auxiliary to the General Assembly. North Carolina courts have recognized the primacy of the General Assembly time and again in cases involving questions about the powers and duties of the State Board. In the current case, the challenged legislation is to a great degree directed toward restoring the balance of powers that existed between the parties in 1995 prior to substantial revisions to Chapters 115C, 126, and 143. A ruling that such legislation amounts to an unconstitutional intrusion upon the powers of the State Board, aside from reversing decades-old Supreme Court precedent, would invert the hierarchy of authority established by the citizens of this State, enshrining the State Board above the elected General Assembly as the supreme policy-setting entity for the public schools. Such a ruling

also would bar the Legislature from prescribing duties for the elected Superintendent, in violation of Article III, § 7 of the Constitution of North Carolina.

A. North Carolina Courts Uniformly Have Recognized the Supremacy of the General Assembly in Regulating the Authority of the State Board and the Superintendent.

The outcome of the present case will turn on this Court's analysis of a simple eight word phrase: "subject to laws enacted by the General Assembly." These words are at the end of, and qualify the entirety of, the constitutional provision conferring powers and duties to the State Board of Education:

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).

A few months after the effective date of the 1971 revisions to Article IX (Education) of the Constitution, this Court considered a challenge to the State Board's constitutional authority and rendered what remains today the most important interpretation of the "*subject to*" phrase, holding:

Where, as here, power to make rules and regulations has been delegated to an administrative board or agency by the Constitution, itself, the delegation is absolute, except insofar as it is limited by the Constitution of the State, by the Constitution of the United States or

by the Legislature . . . pursuant to power expressly conferred upon it by the Constitution.

Guthrie v. Taylor, 279 N.C. 703, 712 185 S.E.2d 193, 200 (1971).² *Guthrie* involved a legal challenge by a North Carolina schoolteacher to a teacher certification regulation promulgated by the State Board, claiming, among other things, that the State Board exceeded its constitutional and statutory authority in enacting such a regulation. The Court began its analysis by reviewing the constitutional grant of power to the State Board, specifically, the power “generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto.” *Id.* at 709-10, 185 S.E.2d at 198 (quoting 1868 N.C. CONST., art. IX, § 9). After quoting the “subject to such laws as may be enacted from time to time by the General Assembly” phrase at the end of Article IX, § 9, the *Guthrie* Court acknowledged the principle that should guide the outcome of this case: “The last sentence of Art. IX, § 9 above quoted, was designed to make, and did make, the powers so conferred upon the State Board of

² The Court in *Guthrie* actually considered the predecessor to art. IX, § 5 of the Constitution of 1971 - art. IX, § 9 of the Constitution of 1868 – the last sentence of which read: “All 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.” 1868 N.C. CONST., art. IX, § 9 (1868). The *Guthrie* Court made note of the revisions to the Constitution and even quoted the new provision, observing that “there is no difference in substance between the powers of the State Board of Education with reference to this matter under the old and the new Constitutions.” *Id.* at 710, 185 S.E.2d at 199.

Education subject to *limitation and revision* by acts of the General Assembly.” *Id.* at 710, 185 S.E.2d at 198 (emphasis supplied).

It is important to note that the Court in *Guthrie* made clear that the General Assembly has plenary power to limit and revise even the *express* authority conferred upon the State Board in the Constitution. The genius of this constitutionally provided legislative check on the exercise of power by the State Board is that it allows for a broad, nearly unlimited grant of power to the State Board itself in Article IX. That is, the State Board has the constitutional authority to supervise and administer the public schools. These words – “supervise” and “administer” – cover essentially everything. There is no need to weigh down the Constitution with a laundry list of the different tasks the State Board is allowed to do. The State Board can do anything in furtherance of its authority to supervise and administer the public schools. Anything that is, except those things limited by the General Assembly.

Again, *Guthrie* makes this clear. The plaintiff teacher complained that the State Board lacked authority to enact regulations pertaining to the certification of teachers. Nowhere in the Constitution does (or did) any provision specifically address certification of teachers. Nonetheless, these broad, general grants of authority to “supervise” and “administer” the public schools “conferred upon the [State Board] 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.”

Id. “Thus,” the Court continued, “in the silence of the General Assembly, the authority of the State Board to promulgate and administer regulations concerning the certification of teachers in the public schools was limited only by other provisions in the Constitution itself.” *Id.* at 710, 195 S.E.2d at 198-99.

In a more recent case, this Court provided further illustration of the plenary nature of the General Assembly’s oversight powers with regard to public education. *State v. Whittle Communications* presented the question of whether the State Board of Education’s broad constitutional authority to supervise and administer the public schools of North Carolina could be curtailed by a legislative enactment transferring certain supervisory authority instead to local school districts. 328 N.C. 456, 402 S.E.2d 556 (1991). The controversy arose out of the development and promotion by defendant Whittle Communications (“Whittle”) of an in-school video news program called Channel One, which was designed to keep students informed on current affairs. *Id.* at 458, 402 S.E.2d at 557. The daily program was twelve minutes long, with two of the twelve minutes consisting of commercial advertising. *Id.* at 459, 402 S.E.2d at 557.

Whittle made a presentation concerning Channel One to the State Department of Public Instruction in July, 1989, and began marketing to local

school boards in the fall of 1989. *Id.* at 459, 402 S.E.2d at 558. The State Board of Education considered Channel One at its regular January meeting and decided it needed additional time to study the matter before its February meeting. *Id.* On 1 February 1990, the State Board adopted a temporary rule prohibiting local school boards from entering into contracts that limited teacher discretion regarding presentation of subject matter and required students to watch commercials – the very type of contract school boards were contemplating signing with Whittle. *Id.* at 459-60, 402 S.E.2d at 558. The Thomasville City Board of Education entered into a contract with Whittle to provide the Channel One programming one week after the State Board of Education promulgated the temporary rule prohibiting such contracts. *Id.* at 459, 402 S.E.2d at 558. Eleven days after execution of the contract by the Thomasville Board, the State Board filed a lawsuit against Whittle and the Thomasville Board seeking a declaration that the contract between the defendants was void and unenforceable. *Id.* at 461, 402 S.E.2d at 558. As in the present case, the State Board also sought and obtained a temporary restraining order enjoining the defendants from implementing the 8 February 1990 contract. *Id.* at 461, 402 S.E.2d at 559.

The Superior Court dismissed the State Board's complaint and declared that the Thomasville Board's contract with Whittle was valid and enforceable under North Carolina law, but its order did not squarely address the issue that became the

basis of the Supreme Court’s decision affirming the outcome. *Id.* at 461-62, 402 S.E.2d at 559. This Court, instead of focusing on less substantive issues such as exhaustion of administrative remedies or whether the State Board followed proper procedure in enacting the temporary rule, looked directly to the question of *the source of authority* that might support the State Board’s attempt to prohibit contracts like the one between the Thomasville Board and Whittle. Channel One, the Court observed, constituted “supplementary instructional materials,” as opposed to “textbooks.” *Id.* at 463, 402 S.E.2d at 560. The Court noted that although choosing textbooks is the job of the State Board, the General Assembly had enacted a statute providing that choosing supplemental materials is the responsibility of local school boards. *Id.* Justice Frye, writing for six members of the Court,³ held:

We conclude that the State Board of Education did not have the authority to promulgate a temporary rule governing this contract because the contract involves supplementary materials, an area which the General Assembly has delegated to the local school boards to oversee. *See* N.C. Gen. Stat. § 115C-98(b).

Id. at 462-63, 402 S.E.2d at 559-60.

³ Justice Harry C. Martin, in dissent, did not raise any question regarding the authority of the General Assembly to allocate sole responsibility for such contracts to the local school boards despite that such authority clearly falls within the scope of “supervising” and “administering” the public schools of North Carolina. *See generally, id.* at 472-73, 404 S.E.2d at 566.

Just as in *Guthrie*, the *Whittle Communications* opinion explicitly acknowledges the supremacy of the Legislature in setting educational policy and allocating responsibilities among the various entities of the public school system in North Carolina:

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.” Thus, we must examine our statutes to ascertain whether the General Assembly has enacted laws which would limit the power of the State Board in the area of selection of materials such as Channel One which we conclude is a supplementary instructional material.

Id. at 464, 402 S.E.2d at 560-61. It is noteworthy that whereas in this case the State Board of Education is complaining about a legislative allocation of responsibilities as between two constitutional entities, the *Whittle Communications* Court held that the State Board’s authority to “supervise” and “administer” public schools could be legislatively reassigned to *local school systems*, which are creations of statute. *See generally*, N.C. Gen. Stat. Chapter 115C, Article 5.

Indeed, *Whittle Communications* makes clear that these constitutional powers cannot be exercised in a manner that interferes with the authority that the General Assembly has granted to local school boards. The opinion does this by juxtaposing the statute that prescribes procedures for local school boards to follow in adopting textbooks against the statute prescribing procedures relating to supplementary materials. *Id.* at 465-66, 402 S.E.2d at 561. Regarding textbooks,

the guiding statute (N.C. Gen. Stat. § 115C-98(a)) “directed the local school boards to adopt rules and regulations concerning the local operation of the textbook program, but these rules and regulations were not to be ‘inconsistent with the policies of the State Board of Education concerning the local operation of the textbook program.’” *Id.* at 466, 402 S.E.2d at 561. The Court continued:

The General Statutes do not contain a similar direction to the State Board of Education for the adoption of supplementary instructional materials. The only statute which speaks to this issue is N.C.G.S. § 115C-98(b) which directs each local school board to adopt “written policies concerning the procedures” used in the adoption of supplementary instructional materials in its own unit. Furthermore, this statute contains no limitation on the local school boards’ directive to adopt these written policies on supplementary instructional materials similar to the limitation concerning the local adoption of rules dealing with the local operation of the textbook program found in § 115C-98(a). . . . Thus, the General Assembly, by adopting chapter 519 in 1969, placed the decision-making process for the selection and procurement of these supplementary instructional materials in the *exclusive domain of the local school boards* while clearly making the rules adopted by the local boards concerning textbooks subject to the policies of the State Board.

Id. at 466, 402 S.E.2d at 561-62 (emphasis supplied). Although the details of *Whittle Communications* can be somewhat cumbersome, the principle on which the outcome is based is simple – in the North Carolina public schools, the General Assembly is the ultimate arbiter and delegator of powers and duties.

Despite the clear applicability of this Court’s interpretations of Article IX, § 9 in *Guthrie* and *Whittle Communications* to this case, the State Board attempts to hide from their binding effect by quietly exiling them to a footnote. *See Appellee’s*

New Brief at 33 n.10. The *Guthrie* decision, contrary to the State Board's one-sentence argument, stands for far more than the notion that the General Assembly can reject rules promulgated by the State Board. In fact, in *Guthrie* this Court announced the rule that controls this case in its simplest terms, to wit: "The last sentence of Art. IX, § 9 above quoted, 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." *Guthrie*, 279 N.C. at 710, 185 S.E.2d at 198 (emphasis supplied). This plain language is far more than the mere authority to veto rules. The General Assembly's power extends to limiting and revising even the express powers conferred in the constitution, that is, even the reallocation of powers contemplated by the General Assembly in HB 17.

This power was further illustrated and further explained by this Court in *Whittle Communications*, as discussed at length above. The State Board completely misses the point of the *Whittle Communications* opinion in its attempt to distill the holding into oblivion, claiming that it only means that "if the legislature preempts the Board by enacting a law on a 'specific' public education matter, the Board cannot overrule the law by enacting a contrary rule."⁴ Appellee's New Brief at 33

⁴ Despite the use of quotation marks around the word "specific" (without citation to the opinion), the word "specific" only appears once in *Whittle Communications*, in a context having nothing to do with the contention advanced by the State Board. See *Whittle Communications*, 328 N.C. at 463, 402 S.E.2d at 560.

n.10. The State Board's principle grievance in the present case is based on the (incorrect) notion that because Article IX, § 9 uses the words "supervise" and "administer" in reference to the State Board, the General Assembly (notwithstanding the final phrase of the constitutional provision) may not assign matters involving the supervision or administration of the public schools to anyone or anything else. In *Whittle Communications*, this Court, citing the "subject to laws enacted by the General Assembly" constitutional language on which the current case turns, approved of a legislative reallocation of administrative power away from the State Board in favor of local educational authorities. This is exactly what HB 17 does, except HB 17 reallocates duties to an entity created by the Constitution to oversee matters involving public schools, as opposed to local school systems, which, much like the Rules Review Commission in the companion case, are created by statute.

In fact, every grant of power to local school boards by the General Assembly would be unconstitutional if the outcome advocated in this case by the State Board actually were the law of North Carolina. Yet the courts of this State, without exception, have recognized that the General Assembly has the discretion and authority to delegate matters of supervision and administration of public schools to local boards. In a recent case, the Court of Appeals held:

The General Assembly "may delegate to local administrative units the power to make such rules and regulations as may be deemed

necessary and expedient, and when so delegated it is peculiarly within the province of the administrative officers of the local unit to determine what things are detrimental to the successful management, good order, and discipline of the schools in their charge and the rules required to produce those conditions.”

Wake Cares, Inc. v. Wake County Board of Education, 190 N.C. App. 1, 17, 660 S.E.2d 217, 227 (2008) (quoting *Coggins v. Board of Education of Durham*, 223 N.C. 763, 767, 28 S.E.2d 527, 530 (1944)), *see also Hughey v. Cloninger*, 297 N.C. 86, 93, 253 S.E.2d 898, 903 (1979) (“In its discretion the General Assembly may delegate to local administrative units the general supervision and control of schools within their boundaries.” (citing *Coggins, supra*)).

This principle of legislative supremacy in matters of public education has become so well-settled since *Guthrie* that it does not provoke much discussion in the more recent cases. In a 2009 opinion, the Court of Appeals quoted Article IX, § 5 of the North Carolina Constitution in its entirety and observed: “Therefore, this constitutional grant of powers to the BOE may be limited and defined by ‘laws enacted by the General Assembly.’” *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Board of Education*, 195 N.C. App. 348, 351, 673 S.E.2d 667, 670 (2009) (quoting last sentence of N.C. CONST., art. IX, § 5). In fact, the State Board itself has been admonished previously in the Appellate Division when making overly ambitious claims to “plenary authority”:

Finally, defendants (including the State Board of Education) claim “exclusive authority to regulate the professional qualifications of

persons employed in North Carolina schools” as “the Constitution itself grants the State Board [this] plenary authority.” This power is unfettered, the Board of Education asserts, as its “authority regarding certification of school professionals does not derive from the General Assembly *at all*.” [emphasis by the Court.] Defendants have misapprehended their power under the N.C. Constitution and the Act. Certainly, they are subject to both. Article IX, § 5 of the North Carolina Constitution is unambiguous on this point, as it states: “The State Board of Education shall supervise and administer the free public school system . . . and shall make all needed rules and regulations in relation thereto, *subject to laws enacted by the General Assembly*.” [emphasis by the Court.] Moreover, this Constitutional provision was interpreted by our Supreme Court in *Guthrie v. Taylor* [citation omitted]. There, the Court held that Article IX, § 5 “was designed to make, and did make, the powers so conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly.”

N.C. Bd. of Examiners for Speech & Language Pathologists and Audiologists v. N.C. State Bd. of Education, 122 N.C. App. 15, 20, 468 S.E.2d 826, 830 (1996), *affirmed*, 345 N.C. 493, 480 S.E.2d 50 (1997). Just as in the *Pathologists and Audiologists* case cited immediately above, the State Board of Education in the current case has misapprehended its power under the North Carolina Constitution. The 2016 legislation challenged in the complaint is a legitimate exercise of the constitutionally-conferred plenary authority of the General Assembly. The three-judge Superior Court panel correctly recognized this in ruling in favor of defendants State of North Carolina and the North Carolina Superintendent of Public Instruction.

B. The State Board’s Reliance on Out of State Cases Fails to Account for the Fact That the North Carolina Superintendent of Public Instruction is a Constitutional Officer Elected by the People.

The office of Superintendent of Public Instruction is not authorized by statute. The Superintendent is not appointed by the Governor or the State Board. The office exists because the People of North Carolina enshrined it in their most important document and determined that he or she would be “elected by the qualified voters of the State.” N.C. CONST. art. III, §7(1).⁵ This fact fatally undermines the State Board’s reliance on the out of state cases cited in Section I, part C of its New Brief.⁶ None of those cases addresses the situation before this Court, in which the General Assembly has chosen to allocate responsibilities concerning the public school system among two entities of *constitutional* moment, both of which were created to oversee public education. Rather, the non-North Carolina cases the State Board cites in its briefs involve acts by legislative bodies that take authority committed generally to a constitutional entity and re-assign such authority to a board or individual for which the constitution makes no provision.

⁵ North Carolina’s Constitution has provided for a popularly elected Superintendent of Public Instruction without interruption since 1868. 1868 N.C. CONST. art. III, § 13.

⁶ See generally, Appellant’s New Brief at 31-38.

For example, the State Board cites a 1907 case in which the North Dakota Supreme Court considered whether a statute authorizing the Governor to appoint a “deputy enforcement commissioner” to enforce Prohibition laws, to the exclusion of the constitutionally established and popularly elected state’s attorney and sheriff, improperly infringed on the authority conferred upon those elected officers by the state constitution. *Ex parte Corliss*, 16 N.D. 470, 471-72 114 N.W. 962, 963 (1907). The court reasoned that if the legislature had the power to appoint a substitute sheriff, it likewise could appoint a substitute governor, substitute attorney general, or a substitute court, concluding:

The governor, attorney general and the judges are no more constitutional officers than are state’s attorneys and sheriffs. It seems too obvious for discussion that the framers of the constitution, in providing for the election of these officers by the people, thereby reserved unto themselves the right to have the inherent functions theretofore pertaining to said offices discharged only by persons elected as therein provided. The naming of these officers amounted to an implied restriction upon legislative authority to create other and appointive officers, for the discharge of such functions. If this is not true, then of what avail are the provisions of the constitution above referred to?

Id. at 475, 114 N.W. at 964. The court’s conclusion, that the legislature “cannot transfer the duties of any [constitutional] officers to a new office created by them” makes quite plain why the holdings in these cases are inapplicable. *Id.* at 481, 114 N.W. at 967. Unlike the “new” deputy enforcement commissioner in *Corliss*, the North Carolina Superintendent is an elected constitutional officer, and his office

has “inherent functions” traditionally associated with the office. The powers and duties reallocated back to the office through HB 17 all are within this notion of “inherent functions” discussed in several of plaintiff’s out of state cases. The State Board has neither cited nor discussed a single case involving legislative allocations of authority between two constitutional actors sharing the same subject matter space.⁷

In the same way, the Arizona Supreme Court’s ruling that the legislature’s creation of a “state purchasing agent” improperly stripped the duties and authority of the constitutional executive office of State Auditor is inapposite to the current case, despite having been cited by the State Board. *Hudson v. Kelly*, 76 Ariz. 255, 263 P.2d 362 (1953). This is, again, because the court was considering a constitutional entity that had lost power to a non-constitutional entity through legislative action, which is quite different from the case before this Court. As such, the State Board’s parenthetical after citing the case in its New Brief, claiming that state courts have “uniformly denounced the same arguments that Defendants make

⁷ To be sure, this “dual occupancy” of a single subject matter space likely is uncommon. For example, North Carolina is one of only 13 states with an elected Superintendent. *See* Wikipedia, “State Education Agency” at https://en.wikipedia.org/wiki/State_education_agency (last accessed on 15 January 2018).

here,” indicates that the State Board does not understand the Superintendent’s arguments. Appellant’s New Brief at 33.

Plaintiff’s discussion of the recent Wyoming case, *Powers v. State*, 318 P.3d 300 (Wyo. 2014) misses the mark for the same reason. That case involved legislation shifting powers from the constitutionally-provided Superintendent of Education to a statutorily decreed Director of the Department of Education. *Id.* The Wyoming court did not consider the constitutionality of a legislative reallocation of powers and duties among two entities of *constitutional* authority both charged with oversight of the public school system.

Although not helpful to the State Board, *Hudson* and other cases the State Board cites do shed light on the important issue of the General Assembly’s role in allocating powers and duties to a constitutional office pursuant to constitutional clauses such as “[t]heir respective duties shall be prescribed by law[,]” in Article III, § 7(2) of the North Carolina Constitution. The constitutional language at issue in *Hudson* is nearly identical to that at issue in this case. The Arizona State Auditor is established as an executive branch office in the same constitutional provision that establishes the governor, secretary of state, treasurer, attorney general, and superintendent of public instruction. ARIZ. CONST. art. V, § 1.⁸ The constitution

⁸ Article III, § 1 of the Arizona Constitution has been amended since the 1953 *Hudson* opinion, but the provision cited has remained the same.

further provides that the “powers and duties of secretary of state, state treasurer, state auditor, attorney-general, and superintendent of public instruction shall be as prescribed by law.” ARIZ. CONST. art. V, § 9.

Despite this identical language, the State Board analogizes the North Carolina Superintendent to the legislatively created “state purchasing agent” in Arizona. In doing so, the State Board ignores that the North Carolina Superintendent stands on an equal constitutional footing with the State Board. It is instructive to consider the lengths to which the Arizona Supreme Court went in its *Hudson* opinion to reinforce the importance of this *constitutional* aspect of the office of State Auditor, despite the fact that the constitution neither defines the office nor prescribes its duties. The court observed:

Clearly under the constitution the auditor is a member of the executive department of the state. Under our system of government, and of the state governments of the United States from the organization of the colonies and the states under our federal constitution, the offices of governor, secretary of state, state auditor, state treasurer and attorney general, have had a well-understood meaning and statute. They are words of long antiquity and in reference to officers of a government refer to offices occupied by these officers at common law.

Hudson, 76 Ariz. at 260, 263 P.2d at 365.

After an extensive historical analysis of the office of state auditor, utilizing sources from across the country, the Arizona Supreme Court noted that the mere inclusion of the office in the text of the constitution implies a requirement that it

exist and function in some fashion reflecting the powers and duties traditionally associated with the office.

Sections 1 and 9 of Article 5 of the State Constitution have been construed to mean that there is an implied mandate to the legislature to prescribe the powers and duties of the executive officers created by the Constitution in Section 1 of Article 5. [citation omitted] The mandate considered the grant of such powers and duties as would enable the auditor to perform the functions for which the office was created. Under the terms of the mandate the legislature has the power to enlarge or remove the duties and powers of the office as the future might require. But the language of the sections as construed [negates]⁹ the power to destroy the offices created by removing all of the duties it was mandated to confer.

* * *

By the very nature of the office in our scheme of government, the duties imposed by statute are comparable to the common-law duties of the office, added to and enlarged as the economies and necessities of this 20th Century demand.

Id. at 263, 263 P.2d at 367.

This principle – that the Superintendent is a constitutional officer with implied (and, as discussed at length in prior briefing, express) duties consistent with the “nature of the office” – means that the People of North Carolina have chosen what is essentially a bicameral approach to the operation of the State’s public school system. Nowhere else in State Government does the Constitution provide for two entities to exercise powers and duties simultaneously within a single field of government activity. It is in the light of this dual arrangement that

⁹ The opinion uses the word “negatives” as a verb here.

the wisdom of the provisos “subject to laws enacted”/“as provided by law” is most apparent.

Throughout this case the State Board has argued jealously that any grant of authority that might be defined as “supervision” or “administration” of the public schools is in derogation of the constitutional “mandate” contained in Article IX, § 5. As the Superintendent argued previously in this brief (*supra*, at 9), “these words, - ‘supervise’ and ‘administer’ – cover essentially everything.” To interpret those terms in Article IX, § 5 as *not* being “subject to laws enacted by the General Assembly,” as the State Board contends, would invalidate the decision of the People to have an elected Superintendent possessed of that authority and those duties prescribed by law (N.C. CONST., art. III, §7(2)). The citizens of North Carolina have decreed that a Superintendent and a State Board shall oversee the public school system, have granted the General Assembly the authority to allocate powers and duties among them, and have empowered the General Assembly to make changes to such allocations of power and duties to meet the changing priorities of the People over time.

C. The Plain Language of the Constitution Establishes the Supremacy of the General Assembly Over Both the State Board and the Superintendent of Public Instruction in Matters of Public Schools in North Carolina.

From the inception of the North Carolina State Board of Education as provided in the Constitution of 1868, the State Board’s authority as administrator

and policy-setter for the State's public school system has been subordinate to that of the General Assembly. The original text of the Constitution of 1868 authorizing the formation of the State Board is unambiguous in establishing the supremacy of the General Assembly over the State Board of Education:

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.***

1868 N.C. CONST., art. IX, § 10. (emphasis supplied). It is difficult to envision a clearer way than this to express the intention of the People that, as broad as the grant of authority to the State Board may be, it is entirely subject to the control of the directly elected members of the General Assembly.

To be sure, the same is true as relates to the office of Superintendent of Public Instruction. First established in the very same Constitution of 1868, the Superintendent's duties are, and always have been, the prerogative of the General Assembly. (See 1868 N.C. CONST., art. III, § 13 ("The respective duties of the Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, and Attorney-General shall be prescribed by law." See also N.C. CONST., art. III, § 7 (The Superintendent's (and other elective officers') "duties shall be prescribed by law."))).

In 1942 the People made certain amendments to the 1868 Constitution, including changes to the “Powers and duties of Board” section, then at Article IX, § 9:

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.***

1868 N.C. CONST., art. IX, § 9 (amended 1942) (emphasis supplied). 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. That is, whereas the original language authorized the General Assembly to *react* to acts, rules, and regulations of the State Board, the revised language empowered the General Assembly to take *preemptive* measures to exercise its control over the public schools.

Also of note is that the new provision in the 1942 amendment pared back the original language of the 1868 Constitution, deleting the old phrase conferring upon the State Board the “full power to legislate,” leaving it with the reduced mandate to

“make all needful rules and regulations” for the public schools. *Id.* The policy behind the changes is reflected in the preamble to the proposed constitution stating 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 the present conditions, but also in regard to future needed adjustments[.]” *The Report of the North Carolina Constitutional Commission*, 5 (1932).

The State Board’s argument that a 1944 change to the Constitution indicated an intent to marginalize the role of the Superintendent of Public Instruction both misreads the very heart of the matter at issue in this case and ignores the Superintendent’s independent source of constitutional authority contained in its authorizing provision in Article III. The 1942 amendment to Article IX, § 8 of the 1868 Constitution contained language characterizing the Superintendent’s role as including “general supervision of the public schools[.]” 1868 N.C. CONST. (amended 1942), art. IX, § 8. The 1944 amendment made the following change:

The State Superintendent of Public Instruction shall ~~have general supervision of the public schools~~ be the administrative head of the public school system and shall be secretary of the board.

N.C. CONST. of 1868 (amended 1944), art. IX, § 8. The State Board argues that this change “dispel[s] any notion that the SPI could possess the power of ‘general supervision’ of the public schools[.]” Appellant’s New Brief at 27. Whether or not

that is true, however, is irrelevant in the instant case, because HB 17 does nothing of the sort. To the contrary, in HB 17, the General Assembly reiterated that the power of “general supervision” of public schools rests with the State Board.

Consider N.C. Gen. Stat. § 115C-12, as amended by HB 17:

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 all needed rules and regulations for the system of free public schools, subject to the 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.

2016 N.C. Sess. Law 126, § 2 (emphasis supplied). The State Board acknowledges this – in graphic form, no less – by placing a text box at the beginning of its complaint and its briefs in this case containing what appears to be the language in HB 17 that is most offensive to it:

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.

2016 N.C. Sess. Law 126, § 4 (emphasis supplied) (*See Appellant’s New Brief at 3, and R p 52 ¶ 4 (Amended Complaint)*). This distinction – between general supervision and direct supervision – is important. It was important to the drafters of the 1940s amendments to Article IX, and it was important to the General Assembly in drafting HB 17. As will be discussed, nothing in HB 17 erodes the

State Board's powers as general supervisor and sole rulemaker. The State Board's contention that the 1942 and 1944 amendments did anything other than strengthen and reinforce the general authority of the General Assembly over the public schools of North Carolina is simply erroneous.

The last changes to Article IX occurred with the adoption of the current Constitution in 1971. Without exception, North Carolina courts and commentators have referred to the changes to the "powers and duties of Board" section of the Constitution of 1971 as "revisions" without any substantive effect. *See, e.g., Guthrie, supra* at 710, 185 S.E.2d at 199; *N.C. State Bar v. DuMont*, 304 N.C. 627, 640, 286 S.E.2d 89, 97 (1982) (noting that "the 1970 Constitution was meant to be an editorial revision of the 1868 Constitution and that fundamental changes in the constitution were made only by separate amendment."). Again, the provision reads:

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). Here, then, the operative phrase "subject to laws enacted by the General Assembly" means exactly the same thing it meant in the old constitution, albeit expressed more economically. The comma at the end of "thereto" establishes beyond question that the operative phrase applies

to the entirety of the provision and not merely to the State Board's rulemaking power.

In the lead argument in its New Brief, the State Board advocates the use of the canon of construction that requires an interpreting Court to "lean in favor of a [constitutional] construction which will render every word operative, rather than one which may make some words idle and nugatory," Appellant's New Brief at 18 (quoting *Bd. of Educ. v. Bd. of Comm'rs*, 137 N.C. 310, 312, 49 S.E. 353, 354 (1904)). The State Board cites the canon to argue that its application to this case means that the language of Article IX, § 4(2) providing that the Superintendent "shall be the secretary and chief administrative officer" of the State Board limits the General Assembly's authority to allocate any other powers and duties to the office. Thus is revealed, yet again, the State Board's pervasive refusal to acknowledge the Superintendent's independent constitutional standing in North Carolina.

To treat the language of Article IX, § 4 quoted above as an exhaustive description of the powers and duties of the Superintendent would mean that the words of Article III, § 7(2), "[the Superintendent's] duties shall be prescribed by law" have no meaning. This would be in clear contravention of the rule of interpretation advocated by the State Board. Clearly the phrase "duties shall be prescribed by law" in Article III, § 7 means more than "secretary and chief

administrative officer” of the State Board as provided in Article IX, § 4. Properly applied, the canon requires the conclusion that if the framers had intended the language of Article IX, § 4 to be an exhaustive and limiting description of the duties of the elected office of Superintendent, they would have provided in Article III, § 7 that such duties “are as provided in Article IX, § 4” rather than “shall be as prescribed by law.” By phrasing Article III, § 7(2) as they did, the framers clearly envisioned the Superintendent as more than what is described in Article IX, § 4.

This also is consistent with the general principle (expressly observed in several of the out of state cases plaintiff cited in its New Brief) that state constitutional officers are impliedly vested with powers and duties consistent with the nature of the office, as discussed above. This principle supports the conclusion that the People of North Carolina, in enacting a constitution providing for two entities to oversee public schools, intended those entities to serve as complementary yet independent actors subject to the plenary authority of the General Assembly.

D. The 2016 Legislation Was a Legitimate Exercise of the General Assembly’s Power to Limit and Define the Constitutionally Enumerated Powers of the State Board, and Largely Mirrors a Reallocation of Similar Scope Enacted in 1995.

The State Board’s amended complaint breathlessly claims that the General Assembly’s enactment of HB 17 has upset some totemic order within the State’s public school system “for the first time in the State Board’s 148-year history.” (R p

51 ¶3) This is false. In fact, HB 17 is a carefully drafted effort to restore the relative duties and powers among the major entities in public education as they existed prior to the enactment of 1995 N.C. Session Law 72 and 1995 N.C. Session Law 393. For instance, the example the State Board presents (graphically, on page 3 of its New Brief) as emblematic of the General Assembly's overreach actually is simply removing 1995 language giving oversight authority to the State Board and restoring the provision to its pre-1995 language.

As will be discussed in more detail below, this and the other changes in HB 17 are directed at returning to the Superintendent of Public Instruction authority that had been stripped through the far-reaching 1995 legislation. These amendments demonstrate that the objective of the General Assembly here is to re-establish the traditional role of the Superintendent as the chief day-to-day, or *direct*, administrator of the State's public schools, while reinforcing the State Board's traditional role as the chief policy-setting, *general* administrative body for the schools. Inherent in this objective is the legislative recognition that the Superintendent, a directly elected individual on the job 365 days a year, is far better suited to respond to the day-to-day challenges of the public schools than the State Board, which meets a total of 18 days a year and is comprised of eleven

appointed and two elected individuals¹⁰ – most of whom have full-time jobs not involving the public school system. The new legislation continues the longstanding tradition requiring that the Superintendent carry out the policies and rules established by the State Board. As discussed at length above, HB 17 is a legitimate exercise by the General Assembly in the push-and-pull of “limitation and revision” of the relative duties of these constitutional entities as provided in Article IX, § 5. *See Guthrie*, 279 N.C. at 710, 185 S.E.2d at 198.

Although the amended complaint points to dozens of provisions in HB 17¹¹ as offending Article IX, § 5, a plurality (40%) of the items listed in paragraph 25(b) involve changes made to N.C. Gen. Stat. § 115C-21, which provides for the “powers and duties generally” allocated to the Superintendent. *See, generally*, R pp 56-60. These amendments are detailed in Section 4 of the Session Law (R Supp pp 251-54; also at Appx. at 2-4).¹² A closer look at these amendments begins to reveal the legislative objectives behind them.

¹⁰ See Affidavit of North Carolina Superintendent of Public Instruction Mark Johnson, ¶¶ 20, 24 [hereinafter “Johnson Affidavit”], (R Supp pp 261-63; also at Appx. at 27-29).

¹¹ As discussed *infra* at pp. 41-51, although the State Board challenged sixty-two specific provisions of HB 17 as unconstitutional in its amended complaint, it only devoted specific discussion to four of them in briefing in the trial court.

¹² To facilitate a detailed review of the changes contained in HB 17, and to trace these changes to their antecedents in previous legislation, defendant Superintendent of Public Instruction has created two spreadsheets containing

Subsection (a) of § 115C-21 contains a numbered list of administrative duties the General Assembly has allocated to the Superintendent. HB 17 made the following change to the preamble:

(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:

The removal of the “Subject to . . . the Board of Education” language here appears particularly troubling to the State Board, in that the amended complaint quotes this part of the statute at least twice (R pp 52 ¶ 4, 56-7 ¶ 25(a)). The deleted passage, however, dates only as far back as 1995. *See* 1995 N.C. Sess. Law 72. Prior to the 1995 amendment, the statute read exactly as it reads in HB 17, and in fact had been that way at least since the recodification of Chapter 115 as Chapter 115C in 1981.

changes made by HB 17 to Chapter 115C, Section 126-5(d), and Chapters 143 and 143A. The larger of the two spreadsheets (beginning at R Supp p 181), lists the statute number and subsection vertically on the left-hand side of the spreadsheet, and details changes made to the statute in the various session laws passed since 1971 (the year of the last revision to the Constitution). A blank cell on the spreadsheet indicates that the session law made no change to the corresponding statute subsection. Although a printed version of the spreadsheet is being provided with this brief, the spreadsheet is difficult to use in printed form. The spreadsheet in electronic form is much easier to use. With the consent of Appellant, counsel has provided the electronic file to this Court and all counsel of record.

The second spreadsheet (beginning at R Supp p 242) uses information from the first spreadsheet, but in a more focused way to show only the changes made in HB 17 as compared to the two 1995 session laws at which the more recent legislation was directed.

See 1981 N.C. Sess. Law 423. HB 17 is merely removing the 1995 amendment and restoring the prior statutory language.

Section 4 of HB 17 also restores the most important provision related to the ongoing management responsibility for the public schools to its pre-1995 language. It is instructive to consider the changes to this statute, § 115C-21(a)(5), in the context of its evolution from 1981, to 1995, to 2016.

The 1981 version reads:

(5) To have under his direction, in his capacity as the constitutional administrative head of the public school system, all those matters relating to the supervision and administration of the public school system, except the supervision and management of the fiscal affairs of the Board.

1981 N.C. Sess. Law 423. In 1995, the Legislature made the Superintendent's exercise of his or her duties under this provision entirely subject to the direction of the State Board:

(5) To ~~have under his direction, in his capacity as the constitutional head of the public school system,~~ manage all those matters relating to the supervision and administration of the public school ~~system.~~ system that the State Board delegates to the Superintendent of Public Instruction.

1995 N.C. Sess. Law 72. In HB 17, the General Assembly deletes the language added in 1995 and, with minor modification, restores the 1981 language to read:

(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.

2016 N.C. Sess. Law 126. It is important to note that the 2016 changes here represent more than a simple return to the pre-1995 state of affairs between the Superintendent and the State Board. The inclusion, for the first time, of the adjective “direct” indicates a concern on the part of the General Assembly that the Superintendent concern himself or herself with the day-to-day administration of the public schools, while implicitly acknowledging that the State Board still controls the bigger picture administrative issues.

This recognition of the continuing vitality of the State Board as policy-setting entity is not an isolated example of the General Assembly’s intentions.

Section 4 of HB 17 adds a new subsection, § 115C-21(a)(8) to the Superintendent’s duties, which reads:

(8) To administer, through the Department of Public Instruction, all needed rules and regulations established by the State Board of Education.

2016 N.C. Sess. Law 126.

A further illustration of the General Assembly’s effort to allocate day-to-day duties to the Superintendent and big-picture, “legislative” duties to the State Board is observed in changes made to personnel and staffing provisions in Chapters 115C and 126. For example, the General Assembly created a new subsection in the “administrative duties” provisions - § 115C-21(a)(9) – which reads:

(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.

Id. This language is nearly identical to a prior version of § 115C-21(a)(7), which had been repealed by the 1995 legislation:

(9) To have solely under his direction and control all matters relating to provision of staff services and support to the State Board of Education, including implementation of federal programs on behalf of the State Board of Education, except as otherwise provided in the Current Operations Appropriations Act.

1991 N.C. Sess. Law 812.

As explained in detail in Superintendent Johnson's affidavit filed with his trial court briefs, issues related to staffing and organizational hierarchy have bedeviled the day-to-day workings of the Department of Public Instruction. See, generally, Johnson Affidavit at ¶¶ 6-19 (R pp 257-61; also at Appx. at 23-27). The State Board's insistence on micromanaging nearly all hiring decisions, coupled with its inability make quick decisions because of its limited meeting schedule, mean that full-time, day-to-day positions at the Department of Public Instruction remain unfilled for months. It is this sort of engineered ineffectiveness that the General Assembly took action to correct in passing HB 17. Likewise, the HB 17 changes to N.C. Gen. Stat. § 126-5(d) restore the Superintendent to a decision-making role in staffing and personnel matters under the North Carolina Human

Resources Act. The General Assembly had removed the Superintendent from this role in 1995, substituting the State Board instead. 1995 N.C. Sess. Law 393.

The foregoing examples represent only a few of the changes made by HB 17, but illustrate the predominant motivation of the General Assembly in enacting the law. In 1995 the General Assembly, by passing Chapters 72 and 393 of the 1995 Session Laws, marginalized the constitutional office of Superintendent of Public Instruction – reducing it in stature to little more than a spokesperson role. The then-elected Superintendent, Bob Etheridge, complained to the Department of Justice and sought an Attorney General Advisory Opinion regarding the constitutionality of this legislation. Chief Deputy Attorney General Andrew A. Vanore, Jr., acknowledging that the legislation “stripped the State Superintendent of Public Instruction of many historic duties and gave those duties to the State Board of Education[,]” advised that Superintendent Etheridge’s complaint was a political matter, but not a constitutional one. *In re Advisory Opinion*, 1995 N.C. AG LEXIS 77 (R Supp p 251, also at Appx. at 33) Observing that the Supreme Court, in *Guthrie v. Taylor*,¹³ had held that the Constitution’s “subject to such laws . . . enacted . . . by the General Assembly,” language “empowered the General Assembly to limit and revise the State Board’s express constitutional powers,” the Attorney General Opinion concluded:

¹³ 279 N.C. 703, 185 S.E.2d 193 (1971).

Without question, the Supreme Court decided in *Guthrie* that, even as to powers expressly conferred on the State Board by the Constitution, exercise of the State Board's enumerated powers is subject to laws enacted by the General Assembly. If the General Assembly may change the State Board's enumerated constitutional powers and duties, the General Assembly likewise may change, the State Superintendent's enumerated constitutional powers and duties.

In re Advisory Opinion, 1995 N.C. AG LEXIS 77 (R Supp p 253, Appx. at 35).

In 2016, the General Assembly thought again about the role it had created for the Superintendent, and thought again about whether such a role best served the mission of the State's public school system. Such questions of public policy are for legislative determination. *Martin v. N.C. Housing Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970). Just as the 1995 legislation stripping away the Superintendent's traditional powers was a legitimate exercise of the General Assembly's constitutional franchise, HB 17, in restoring autonomy to a constitutionally established, directly elected office, reflects the best judgment of the legislature in current educational policy. The North Carolina Supreme Court has observed that the wisdom of an enactment is a legislative and not a judicial question: "The General Assembly has the right to experiment with new modes of dealing with old evils[.]" *Id.* at 37, 175 S.E.2d at 675. Through the enactment of HB 17, the 2016 General Assembly determined that the time had come to move on from the 1995 experiment in marginalizing the office of Superintendent of Public Instruction. The newly restored balance between the State Board and the

Superintendent is authorized by the plain language of the North Carolina Constitution. Redress for the State Board's complaints may be found only in the voting booth, and not at the courthouse.

E. The Challenged Legislation Does Not Disenfranchise the State Board.

1. HB 17's Severability Clause.

Although the State Board appears to claim in its amended complaint that as many as sixty-two provisions in HB 17 are unconstitutional (*See Verified Amended Complaint for Declaratory and Injunctive Relief and Motion for Preliminary Injunctive Relief*, ¶ 25 (R pp 56-60)), it chose to discuss only four of them in its briefing¹⁴ and argument before the Superior Court three-judge panel. The State Board, of course, bears the burden of persuasion in overcoming the “great deference” afforded the General Assembly, and the “strong presumption that [each] statute is constitutional.” *Rhyne v. K-Mart Corp.* 358 N.C. 160, 167-68, 594 S.E.2d 1, 7-8 (2004). To be sure, the State Board's sampling of four allegedly offending provisions will not suffice to invalidate the entirety of HB 17 (or at least those sixty-two provisions listed in paragraph 25 of the Verified Amended

¹⁴ These four provisions of HB 17, amending N.C. Gen. Stat. §§ 115C-19, 115C-21(a)(1), 115C-21(a)(5), and 115C-21(b)(1b), are discussed by the State Board at pages 2-3 and 9-10 of the State Board's Memorandum in Support of Plaintiff's Motion for Summary Judgment and Motion for Preliminary Injunction (R Supp pp 2-3, 9-10).

Complaint) even if one or more of these four sections were declared unconstitutional. The Supreme Court has held:

If the legislature intended that the constitutional part of [a] statute be enforced after the other part has been declared unconstitutional, and if the separate parts of the statute are not so interrelated and mutually dependent that one part cannot be enforced without reference to another, the offending part must be severed and the rest of the statute enforced.

Fulton Corp. v. Faulkner, 345 N.C. 419, 421-22, 481 S.E.2d 8, 10 (1997). The General Assembly's intention regarding the severability of HB 17 is quite clear.

Section 42 of Session Law 2016-126 provides:

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.

2016 N.C. Sess. Law 126.

The State Board's reliance on this Court's holding in *Flippen v. Jarrell* to support its argument in favor of ignoring the clear legislative intent expressed by the inclusion of a severability provision is misplaced. *Flippen* involved an as-applied challenge to the then-newly enacted N.C. Gen. Stat. § 1-15(c), which created a special statute of limitations applicable to medical negligence actions. *Flippen v. Jarrell*, 301 N.C. 108, 110-11, 270 S.E.2d 482, 484-85 (1980). The new law changed both the definition of when an action accrues as well as shortened the overall limitations period for medical negligence claims to four years, effectively

reducing the plaintiff's limitations period to thirty-nine days. *Id.* at 114, 270 S.E.2d at 487. The defendant argued that even if the four year period in § 1-15(c) was unconstitutionally short as applied to the plaintiff, because the legislation had included a severability clause, the claim still should be barred by the new one year post-discovery limitations period also in § 1-15(c). *Id.* at 117, 270 S.E.2d at 488. This Court rejected the argument, stating that “[w]e do not think the legislature intended the severability provision . . . to refer to the various *clauses* of G.S. 1-15(c), which comprise only one section and indeed constitute only one ‘provision’ of Chapter 977.” *Id.* (emphasis in original). The Court then engaged in a lengthy analysis of why the various time periods provided within § 1-15(c) are so “interrelated and mutually dependent that one clause cannot be enforced without the other.” *Id.* at 118, 270 S.E.2d at 488. The *Flippen* Court’s analysis regarding severability is instructive not only because it illustrates the difference between attempting to strike small pieces of a single provision as opposed to dozens of entire provisions as sought by the State Board, but also because it shows what the State Board *did not* do in the present case – which is engage in *any* meaningful analysis of fifty-eight of the sixty-two challenged provisions.

Indeed, the contention in its New Brief that the General Assembly is “clinging to a boilerplate severability clause”¹⁵ by including Section 42 above in

¹⁵ Appellant’s New Brief at 43.

HB 17 is a variation on the pervasive theme of the State Board's contempt for the General Assembly's superior position in charting the course for the State's public schools. The legislature's use of uniform, or "boilerplate", language should strengthen this argument, not weaken it. The General Assembly used this language to avoid any mistake about its intention that all constitutional provisions within HB 17 are to be made effective.

2. The Four Provisions of HB 17 That the State Board Challenged and Analyzed in the Superior Court Are Constitutional.

The phrase "subject to laws enacted by the General Assembly" at the end of Article IX, § 5, discussed at length in the Superintendent's principal brief, "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." *Guthrie*, 279 N.C. at 710, 185 S.E.2d at 198 (emphasis supplied). Each of the provisions cited by the State Board is simply a part of the restoration of relative powers and duties that existed between the Superintendent and the State Board prior to the General Assembly's 1995 legislation that stripped nearly all meaningful authority from the constitutional office of Superintendent of Public Instruction.

The first provision noted in the State Board's brief¹⁶ concerns an amendment to N.C. Gen. Stat. § 115C-21(a)(5). Prior to 1995, § 115C-21(a)(5) provided that one of the administrative duties of the Superintendent of Public Instruction was:

To have under his direction, in his capacity as the constitutional head of the public school system, all those matters relating to the supervision and administration of the public school system.

1981 N.C. Sess. Law 423.

The 1995 legislation amended the statute as follows:

~~To have under his direction, in his capacity as the constitutional head of the public school system,~~ manage all those matters relating to the supervision and administration of the public school ~~system.~~ system that the State Board delegates to the Superintendent of Public Instruction.

1995 N.C. Sess. Law 72. The obvious intent of the 1995 legislation was to subordinate the Superintendent's exercise of authority such that it was dependent on the State Board's specific delegation. The 2016 amendment removes the 1995 language and restores the provision to essentially the same language that had been in place since 1981:

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.

¹⁶ R Supp pp 2-3.

2016 N.C. Sess. Law 126. As argued previously, the General Assembly’s insertion, for the first time, of the adjective “direct” indicates a careful attention to policy in that it implies that the more “general” supervision and administration still resides with the State Board. As such, it hardly can be interpreted as stripping the Board of its constitutional powers and duties as the State Board complains in its New Brief.

The State Board’s second example concerns N.C. Gen. Stat. § 115C-21(b)(1b).¹⁷ Although this is a new subsection being added to § 115C-21, the language of the amendment is not new. The General Assembly first used it in 1989, when it created a new Superintendent duty codified at § 115C-21(b)(1a):

To administer the funds appropriated to the Department of Public Education for the operations of the State Board of Education and for aid to local school administrative units.

1989 N.C. Sess. Law 752. The allocation of this authority to the Superintendent in 1989 did not trigger any litigation. The General Assembly repealed § 115C-21(b)(1a) in the 1995 legislation. 1995 N.C. Sess. Law 72. HB 17 restored this language in a form nearly identical to its 1989 predecessor subsection:

To administer the funds appropriated to the Department of Public Education for the operations of the State Board of Education and for aid to local school administrative units.

2016 N.C. Sess. Law 126.

¹⁷ R Supp pp 9-10.

Given the General Assembly's repeated directives throughout HB 17 requiring the Superintendent to administer educational funds "in accordance with all needed rules and regulations adopted by the State Board of Education," the restoration of the 1989 language in the new § 115C-21(b)(1b) hardly can be considered an unconstitutional disenfranchisement of the State Board. For example, HB 17 adds this language to § 115C-408(a), which reads as amended:

It is the policy of the State of North Carolina to create a public school system that graduates good citizens with the skill demanded in the marketplace[.] 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 education funds through the Department of Public Instruction in accordance with all needed rules and regulations adopted by the State Board of Education.

2016 N.C. Sess. Law 26. A similar directive is in the changes to § 115C-410 regarding 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.

2016 N.C. Sess. Law 126.

These and other similar provisions in HB 17 clarify the General Assembly's concern with the State Board's continuing role in the oversight and supervision of North Carolina's public schools and educational funds. In the context of the holdings in *Guthrie*, *Whittle Communications*, and the other North Carolina cases considering the language of Article IX, § 5 and its predecessor, the reallocation of duties and powers effectuated by the General Assembly in HB 17 are appropriate exercises of legislative policy-setting authority.

The State Board's third and fourth examples¹⁸ of purportedly unconstitutional disenfranchisement are even more obviously appropriate in that both of the "offending" amendments add *new* language expressly tethering the Superintendent's exercise of his or her authority to the rules and regulations promulgated by the State Board. In the 2016 amendments to N.C. Gen. Stat. § 115C-19, the only language the General Assembly deleted was the language that had been added in the 1995 legislation. *See*, 1995 N.C. Sess. Law 72; 2016 N.C. Sess. Law 126. As with other 1995 amendments, this language had subordinated every action of the Superintendent to the "direction, control, and approval" of the State Board. 1995 N.C. Sess. Law 72. Although the 2016 legislation removed this millstone that had hindered the Superintendent's effectiveness, it restored pre-1995

¹⁸ R Supp p 10.

language¹⁹ requiring fealty to the State Board’s policies, directing the Superintendent to “administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction.” 2016 N.C. Sess. Law 126.

Likewise, the amendments to N.C. Gen. Stat. § 115C-21(a)(1), which the State Board complains deprive it of its authority to administer funds, require all actions of the Superintendent to be “in accordance with all needed rules and regulations adopted by the State Board of Education.” *Id.* Again, the language in the 2016 amendments adding “administer funds” and “enter into contracts” to the Superintendent’s duties was merely a restoration of language from 1989 legislation (with minor modifications) that had been deleted in the 1995 legislation. *See* 1989 N.C. Sess. Law 752; 1995 N.C. Sess. Law 72. The “in accordance with [State Board] rules and regulations” language quoted above appears for the first time in the 2016 amendments, reflecting the General Assembly’s intention that the State Board retain all of its policy-setting authority. 2016 N.C. Sess. Law 126.

Thus, the four examples cited by the State Board in its amended complaint as emblematic of the legislative disenfranchisement wrought by HB 17 turn out to

¹⁹ See 1987 N.C. Sess. Law 1025 (“The Superintendent of Public Instruction shall administer the policies adopted by the State Board of Education.”). This language, as noted above, had been deleted in the 1995 legislation. 1995 N.C. Sess. Law 72.

be anything but. They stand, rather, as examples of the General Assembly's policy determination that the State Board should retain its power to establish the rules by which the Department of Public Instruction operates. It is fair to conclude that the other fifty-eight provisions in HB 17 cited by the State Board but not discussed in its principal brief are likewise anodyne.

3. The State Board Has Not Carried Its Burden.

Curiously, the State Board in its New Brief peremptorily defends itself by pointing its finger at the Superintendent (and, to the extent it argues the same, the State), claiming that "the SPI has not offered a reason why any of the challenged [but not discussed] provisions should be treated differently from the rest[.]" Appellant's New Brief at 43. The clear implication is that the defendants bear some burden to prove that the legislation is constitutional. The unmet burden, however, rests with the State Board.

In an action challenging the constitutionality of a statute, the burden of proof is on the challenger. *Rice v. Rigsby*, 259 N.C. 506, 510, 131 S.E.2d 469, 472 (1963). The statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground. *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991). One who attacks an act of the Legislature on the grounds that it is unconstitutional must point out the particular provision of the Constitution which it

is claimed the act violated. *Rice*, 259 N.C. at 511, 131 S.E.2d 469. This Court has warned that it “will not undertake to determine [the constitutionality of legislation] except on a ground definitely drawn into focus by plaintiff’s pleadings.” *Hudson v. Atlantic C. L. R. Co.*, 242 N.C. 650, 667, 89 S.E.2d 441, 453 (1955).

The State Board shrugs off its failure to “draw into focus” why fifty-eight provisions of HB 17 are unconstitutional by claiming that it “used a scalpel, not a sledgehammer, to challenge the law.” Appellant’s New Brief at 43. By all accounts, however, HB 17 is an important and complex piece of legislation affecting the oversight of the public schools of North Carolina. It is so important that this Court determined it appropriate to grant a petition for discretionary review directly from the trial court. The Superintendent respectfully suggests that in this case, a sledgehammer was in order. The decision of the three-judge panel should be affirmed.

CONCLUSION

For the reasons stated and upon the authorities cited, the defendant-appellee, North Carolina Superintendent of Public Instruction Mark Johnson, respectfully requests that this Court affirm the decision of the North Carolina Superior Court three-judge panel, lift the stay, and allow the will of the General Assembly to take effect.

This the 16th day of January, 2018.

**BLANCHARD, MILLER, LEWIS
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **New Brief 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:

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APPENDIX

2016 N.C. Sess. Laws 126.....Appx. 1

Affidavit of North Carolina Superintendent of Public
Instruction Mark Johnson.....Appx. 21

In re Advisory Opinion, 1995 N.C. AG LEXIS 77.....Appx. 33

- Appx. 1-
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:

- Appx. 3-

- (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 ~~4,500~~ 425 exempt positions throughout the following departments and offices:

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

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

...

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

...."

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

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

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

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

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

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

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

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

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

"§ 143A-44.1. Creation.

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

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

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

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

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

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

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

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

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

"§ 115C-75.6. Achievement School District.

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

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

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

(c) ~~The State Board of Education shall consider the recommendation of the ASD Superintendent Selection Advisory Committee and Superintendent of Public Instruction shall appoint a superintendent to serve as the executive officer of the ASD. The ASD Superintendent shall serve at the pleasure of the State Board of EducationSuperintendent of Public Instruction at a salary established by the State Board of EducationSuperintendent 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 EducationSuperintendent of Public Instruction.~~

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

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

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

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

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

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

...

(b) North Carolina Charter Schools Advisory Board. –

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...."

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

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

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

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.

**AFFIDAVIT OF NORTH CAROLINA
SUPERINTENDENT OF PUBLIC
INSTRUCTION MARK JOHNSON**

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

1. While serving as a teacher at West Charlotte High School, I witnessed the struggles our students face both inside and outside of the classroom. My experiences in the classroom ultimately motivated me to seek elected office to work towards the improvement of our public schools. In 2014, I ran for and won a seat on the Winston-Salem/Forsyth County Board of Education. My work on a local school board focused on helping students overcome the achievement gap, but I also was on the front line of the frustrations of all parents, teachers, students, and school leaders. The need for many changes for our public schools became apparent: better professional development and support for teachers and principals, authentic review of state standards, calendar flexibility, genuine support of good local leaders, and a host of other policies necessary for the improvement of our public schools in North Carolina.

2. On November 8, 2016, the voters of North Carolina elected me as their next Superintendent of Public Instruction to bring the changes I promoted during our campaign.

3. I took the oath of office and arrived in Raleigh on January 2, 2017, with the intent of instilling the values of urgency, ownership, and innovation in the Department of Public

Instruction (hereinafter referred to as “DPI”) to transform the culture and vision of DPI, as per the will and intent of North Carolina voters. Unfortunately, I have learned that the authority of the Superintendent of Public Instruction is severely limited by the past statutory provisions and by the policies and practices of the North Carolina State Board of Education (hereinafter referred to as the “State Board”). The impacts of these provisions and policies are especially evident in the staffing of DPI, which I will discuss in further detail. The end-result of these policies and practices is that the voters’ intent of bringing positive change to DPI to better support our public schools, the reason North Carolina voters elected me, can and has been blocked by the State Board due to the current injunction.

4. The duties of the State Board and the Superintendent of Public Instruction are set forth in N.C.G.S. § 115C-12 and N.C.G.S. § 115C-21. The language of N.C.G.S. § 115C-21(a)(1) *prior* to the passage of HB 17 stated that the Superintendent of Public Instruction could make all appointments of administrative and supervisory personnel to the staff of DPI. However, the language of N.C.G.S. 115C-21(a)(1) *prior* to the passage of HB 17 also *restricted* such authority of the Superintendent of Public Instruction by stating that all appointments were “subject to the approval of the State Board of Education.”

5. The State Board sets forth its procedures and authority through its own board policies. Importantly, SBOP-011 outlines certain operations and responsibilities of the State Board. **See Attachment A, SBOP-011.** Also, the State Board has instituted a policy delegating only certain, qualified powers and duties from the State Board to the Superintendent of Public Instruction. **See Attachment B, SBOP-013.** These policies *further restrict* the authority of the Superintendent of Public Instruction and divide DPI staff into three categories: State Board Office, “dual reports,” and staff reporting to “dual reports.”

6. First, in SBOP-011, the State Board granted itself the power to create advisory and support positions “accountable and responsible” only to the State Board. These include an Executive Director, Assistant Executive Director, Legislative Liaison/Policy Analyst, Board Staff Attorney, Board Staff Paralegal, Clerical Staff, and unlimited “other staff as approved by the State Board of Education.” Upon information and belief, there are roughly 14 positions in the State Board Office today. The North Carolina Constitution, Article IX, Section 4(2) states that the Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board; however, the staff for the State Board Office primarily handles the State Board communications, schedule, agenda, and policies. The Superintendent of Public Instruction has absolutely no authority or role in the selection or hiring of these State Board Office positions.

7. Second, in paragraph 4 of SBOP-013¹, the State Board identifies ten leadership positions in DPI that are “accountable and responsible” to the Superintendent of Public Instruction *and* the State Board (hereinafter “dual reports”). These ten positions include the Deputy State Superintendent, Chief Financial Officer, Chief of Staff, and Director of Communications. While SBOP-013 describes dual reports as accountable to both the State Board and Superintendent of Public Instruction, SBOP-011 states that the State Board shall make the *final* employment decisions respecting dual reports.

8. As an example of the dual reporting relationship causing confusion both inside and outside DPI, on January 5, 2017, DPI sent out a press release to its list serve with a statement from attorneys for the State Board, Bob Orr and Drew Erteschick, stating “we are pleased that

¹ EEO-C-013, *Policy delineating the delegation of authority from the State Board of Education to the Superintendent of Public Instruction and to the Chief Executive Officer*, appears to be a precursor to the current language of SBOP-013. EEO-C-013 granted the Chief Executive Officer for the State Board the authority “to manage the Department of Public Instruction on a day-to-day basis subject to the direction, control, and approval of the State Board.” The policy also required this CEO to report “all employment requests for the positions of director and above to the State Board, which shall make the employment decision.”

the legislation continues to be blocked, and that the *status quo has been maintained* for the Board, the public school system, and North Carolina's 1.5 million students" and highlighting the extension of the temporary restraining order. (*Emphasis added*). Upon information and belief, the Director of Communications, a dual report, was instructed to send out the press release by the State Board, a single member of the State Board, or staff for the State Board. I, the duly elected Superintendent of Public Instruction, was not informed of the release before it was sent. I only saw the release because I subscribe to the DPI list serve.

9. Lastly, under SBOP-013, while the Superintendent of Public Instruction has the delegated authority to approve, upon the recommendation of a dual report, all agency employment decisions for the positions of "Director" and below that report to a dual report, any disagreement between the Superintendent of Public Instruction and such dual report shall be reported to the State Board, which shall provide *final* resolution to the disagreement.

10. The cumulative effect of SBOP-011 and SBOP-013 severely hinders the authority of the Superintendent of Public Instruction to appoint staff of DPI. While other members of the Council of State may designate and hire for at least 20 exempt policymaking and 20 exempt managerial positions, as NC Superintendent of Public Instruction, I could hire only three confidential assistants and one exempt policymaking position in January. *See N.C.G.S. § 126-5(d)(2).*

11. SBOP-011 outlines a specific process by which (i) the Chairman of the State Board shall report all the Superintendent of Public Instruction's requests to hire or promote dual reports to the State Board, and then (ii) the State Board shall make the final employment decisions respecting those positions. However, this policy does not reflect actual State Board processes. Upon information and belief, as opposed to evaluating a recommendation from the

Superintendent of Public Instruction, the State Board has routinely elected to appoint "*ad hoc* committees" comprised of board members and the Superintendent of Public Instruction to identify and evaluate potential candidates for dual reports.

12. Pursuant to the statutory authority contained in N.C.G.S. § 115C-21(a)(1) and the policy language contained in SBOP-011, I made a request in January 2017 to the Chairman of the State Board to hire a certain candidate who shares in my vision for North Carolina public education as my Chief Financial Officer of DPI, a dual report. The Chief Financial Officer manages the state and federal funds for public education that pass-through DPI and oversees financial services, school business, and support for school operations, school facility planning and operation, school nutrition services, and teacher licensure. The position of Chief Financial Officer is critical in implementing the changes on which I campaigned across the state of North Carolina. I selected a candidate who would have been a positive change agent for DPI.

13. Instead of voting to approve or disapprove my recommended candidate, the State Board chose to post an advertisement for the position and have an *ad hoc* committee comprised of the Chairman of the State Board and the Chair of the Business Operations Committee interview new internal and external candidates who applied for the position. The *ad hoc* committee then made *their own* recommendation to the full State Board. The full State Board voted to approve the *ad hoc* committee's recommended candidate, who previously served as former Superintendent June Atkinson's Chief of Staff.

14. The State Board did not follow its own policy nor did it hire a positive change agent. The State Board promoted more of the same after I was voted into office by the people of North Carolina to bring change to the financial management of DPI.

15. With the Chief of Staff position vacant, I asked the Chairman of the State Board in early March to remove the Chief of Staff position as a dual report and to permit me to select my own candidate for the position. The Chief of Staff serves as the *primary* point of contact for district leaders, charter school leaders, community leaders, members of the press, the Office of the Governor, and the University and Community Colleges Systems. The Chief of Staff also coordinates major initiatives for DPI and directs cross-agency work and program development. At this point in time, the State Board has made no change to the dual reporting structure for the Chief of Staff, and the Chairman of the State Board has informed me that the State Board has no intention to make such a change. As a result, I am still forced by the State Board to operate DPI without a Chief of Staff while the State Board defines the process by which they will hire a Chief of Staff.

16. The previous Deputy State Superintendent gave her notice of retirement in November 2016. I stood ready to hire a Deputy State Superintendent immediately upon the retirement of the previous Deputy State Superintendent in February 2017. Again, instead of voting on my recommendation, the Chairman of the State Board created another *ad hoc* committee to handle the hiring of a Deputy State Superintendent. While I am attempting to work with the State Board to fill this vacancy, it has taken months to agree on a job description, advertise, coordinate schedules, and interview candidates. Meanwhile, agency resources have been stretched extremely thin without a Deputy State Superintendent or Chief of Staff to help with the demands of operating DPI and responding to requests of the General Assembly, local school leaders, stakeholders, and constituents.

17. I alone cannot carry out my platform and ensure DPI provides the necessary support to our local school districts. In order to affect change, I need the authority to hire staff to

help carry out these goals. If I do not have the authority to direct agency resources, organize agency staff, and manage agency activities, I cannot make the changes the voters of North Carolina elected me to make.

18. The recent vacancies at DPI have created both the need and the opportunity to re-evaluate some of the reporting structures within the agency. Under the existing structure established by the State Board and former Superintendent June Atkinson, a total of almost 20 dual reports or direct reports report to me. Few institutional leaders would choose to structure their organization this way. In January, I made recommendations to the Chairman of the State Board for revisions to the organizational structure of DPI. Again, the Chairman created an *ad hoc* committee to recommend organizational changes of DPI to the full State Board. Despite my recommendations in January, there has been no decision or action by the State Board.

19. The need for the State Board to approve who various directors and sections chiefs report to has resulted in months of delay, interim organizational plans, and a lack of clarity for agency staff and local school districts.

20. Having both the State Board and the Superintendent of Public Instruction – up to 14 individuals in total – involved in the day-to-day management of DPI slows decision making to a crawl and makes it difficult to implement any changes or be responsive to the needs of the education community. DPI should be able to evolve, quickly if necessary, to serve immediate needs, support local districts, acknowledge shifts in state and federal resources, and take advantage of opportunities to innovate for public education. The full State Board meets in Raleigh an average of one and one-half days each month. I'm at DPI every week, but the staff and the agency must wait for the State Board to finalize what are frequently time-sensitive decisions.

21. While the State Board has delegated certain, qualified duties to the Superintendent of Public Instruction in the past, recent policy changes demonstrate that the State Board does intend to exert even greater oversight of the day-to-day management of DPI. SBOP-013 previously delegated to the Superintendent of Public Instruction the duty to execute agency contracts approved by the Chief Financial Officer and to report these contracts to the State Board monthly. On December 1, 2016, the State Board instituted a new policy on contract procedures. **See Attachment C, CNTR-002.** Under this new policy, all proposed and pending contracts shall also be reported to the State Board monthly, and State Board members may request additional information or a presentation on any executed or proposed contract from the Superintendent of Public Instruction or the Superintendent's designee. Presumably, this provides the State Board with the opportunity to comment on or influence contracts before they are signed.

22. Furthermore, save for the formally noticed meetings of the State Board each month where formal actions are taken, it is not the full State Board being briefed and speaking on internal issues, but only a few select members of the State Board or State Board staff.

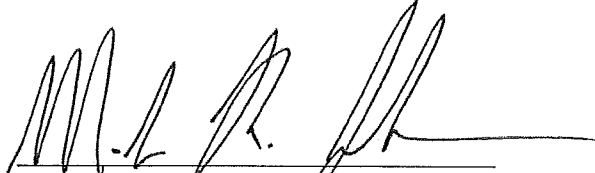
23. As an elected official, I am accountable to the voters of North Carolina. My name was on the 2016 statewide ballot. I am the duly-elected constitutional officer, vested with authority under N.C. Constitution, Article IX, Section 4(2) to serve as the secretary and chief administrative officer of the State Board of Education. The Superintendent of Public Instruction should not be denied the authority to serve as the administrative head and to manage the day to day administration of DPI.

24. None of the voters in North Carolina voted for 11 of the 13 voting members of the State Board. These members have no accountability to the voters of North Carolina. I firmly believe that the General Assembly, the elected body closest to the voters, has every right to

revise a statute so that the North Carolina Superintendent of Public Instruction has the right to manage the day to day of DPI.

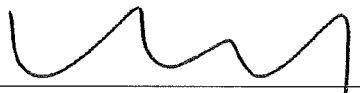
FURTHER, Affiant sayeth not.

This the 12th day of April, 2017.



Mark Johnson
North Carolina Superintendent of
Public Instruction

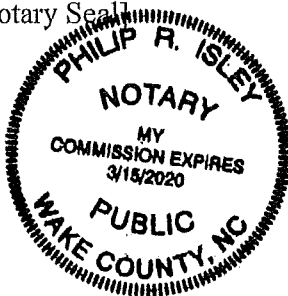
Sworn to and subscribed before me,
this the 12th day of April, 2017.



NOTARY PUBLIC

My Commission Expires: 3/15/2020

[Notary Seal]



CERTIFICATE OF SERVICE

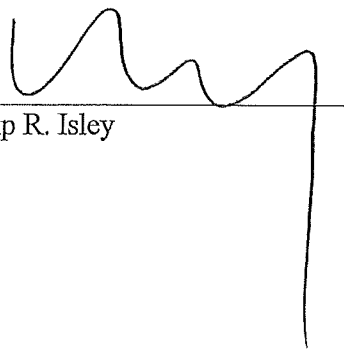
The undersigned hereby certifies that a copy of the foregoing **Affidavit of North Carolina Superintendent of Public Instruction Mark Johnson** was served upon the following attorneys by U.S. Mail and e-mail to the following:

Amar Majmundar
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*Counsel for North Carolina State Board
Of Education*

This the 12 day of April, 2017.


Philip R. Isley

- Appx. 31-
- Doc. Ex. 265 -
Attachment A

4/11/2017 Responsibilities of the SBE in supervising/administering the public school system of NC and the funds provided for its support — NC State Board of Educ...

Responsibilities of the SBE in supervising/administering the public school system of NC and the funds provided for its support

| Item | Description |
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| Policy Title | Responsibilities of the SBE in supervising/administering the public school system of NC and the funds provided for its support |
| Policy Category | SBE/DPI Operation (SBOP) |
| Policy ID | SBOP-011 |
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| Statutory Reference | GS 115C-12; GS 115C-21; NC Constitution, Article IX, Section 4 and 5 |

Formerly TCS-C-011

POLICY STATEMENT - OPERATION AND RESPONSIBILITIES

The Constitution of the State of North Carolina provides that the State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support. In order to carry out these constitutional duties, the State Board of Education believes it is necessary to outline in policy the various responsibilities associated with this mandate. Accordingly, the State Board of Education, as a matter of policy, delineates the following responsibilities:

1. The State Board of Education shall set all policies of the state of North Carolina regarding public education and shall supervise and administer the free public school system.
2. The State Board of Education shall have general supervision and administration of all public education funds provided by both state and federal government, including all prior year refunds, except as outlined in Section 7, Article IX of the State Constitution.
3. The State Board of Education shall accept and receive, use and reallocate to local administrative units federal grants and funds.
4. The State Board of Education shall have final authority for applying for federal funds or federal aid related to any phase of North Carolina's free public school system. Any expenditure of these funds shall be under the final authority of the State Board of Education.
5. The State Board of Education shall have authority to accept and disburse any private grants or funds.
6. The Chairman of the State Board of Education, in consultation with the State Superintendent and other Board members, shall set the agenda for each State Board of Education meeting.
7. The Chairman of the State Board shall meet regularly with the Superintendent and review the implementation of all the Department of Public Instruction's obligations under state and federal laws and State Board policies.
8. The Chairman of the State Board shall report all of the Superintendent's requests to hire, promote, terminate, discipline, reduce-in-force, increase or decrease the salary of or otherwise change the terms or conditions of employment of candidates for or persons employed in the positions listed in TCS-C-013, paragraph 4, to the State Board, which shall make the final employment decisions respecting those positions.
9. The State Board may create the following advisory and support positions which shall report to and be accountable and responsible to the State Board:

A. Executive Director;

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B. Assistant Executive Director;

C. Legislative Liaison/Policy Analyst;

D. Board Staff Attorney;

E. Board Staff Paralegal;

F. Clerical staff; and

G. Other staff as approved by the State Board of Education.

10. The Superintendent shall execute those powers and perform those duties delegated to the Superintendent in TCS-C-013.



NORTH CAROLINA
DEPARTMENT OF JUSTICE
ATTORNEY GENERAL JOSH STEIN

EXHIBIT

E

December 14, 1995

Bob Etheridge, State Superintendent

N.C. Department of Public Instruction Education Building 301 North Wilmington Street Raleigh, North Carolina 27601-2825

RE: Advisory Opinion; Authority of the North Carolina General Assembly and the State Board of Education to Supervise and Control the Administrative and Secretarial Duties of the State Superintendent of Public Instruction; Article IX of the North Carolina Constitution; N.C.G.S. §§115C-19, and 115C-21

Dear Superintendent Etheridge:

We reply to your letter dated December 12, 1995 requesting our opinion on the following, which I quote directly from your December 12 letter: Among the legislation approved by the 1995 General Assembly were House Bill 7 and other statutes [Chapter 72 of the 1995 Session Laws, codified as N.C.G.S. §§115C-19, and 115C-21] that stripped the State Superintendent of Public Instruction of many historic duties and gave those duties to the State Board of Education.

I fully understand the legislation was designed to transfer to the State Board the responsibility for making educational policy for North Carolina schools. However, that same legislation specified that the State Superintendent was to be the chief administrative officer for the State Board of Education, with responsibility for implementing policy. Nowhere in the legislation do I find any stipulations that could be used to ignore the State Superintendent's chief administrative officer duties or lawfully pass those duties on to others, including the chairman of the State Board of Education or any other administrative officer appointed by the State Board. Therefore, I formally request that you issue in writing your interpretation of the language of the recent legislation affecting this office, with particular emphasis on those that constitute my duties as chief administrative officer. I ask that you deal with my rights to direct staff, to be notified of top administrative staff meetings, to sign contracts, and to be kept abreast of policy directions mandated by the State Board of Education.

The major change made by the General Assembly in House Bill 7, Chapter 72 of the 1995 Session Laws was to subordinate the statutorily designated duties of the State Superintendent of Public Instruction as chief administrative officer and secretary to the State Board of Education "to the direction, control, and approval of the State Board of Education." See, N.C.G.S. §115C19, which restates Article IX, Section 4(2) of the Constitution that the State Superintendent is the secretary and chief administrative officer of the State Board of Education "subject to the direction, control, and approval of the State Board of Education;" and N.C.G.S. §115C-21, which designates the administrative and secretarial duties of the State Superintendent "subject to the direction, control, and approval of the State Board of Education."

The Constitution gives the State Board the responsibility generally to supervise and administer the public school system. N.C. Constitution, Article IX, §4. Responsibility for the day-to-day operation of the public school system is given to the State Superintendent -- a constitutional officer elected by the people -- by making him the chief administrative officer of the State Board, as well as its secretary. N.C. Constitution, Article IX, §5. Most importantly, the Constitution expressly makes the authority and responsibilities of both the State Board and the State Superintendent subject to laws passed by the General Assembly. Article IX, §5 provides that the

State Board "shall supervise and administer the free public school system . . . subject to the laws enacted by the General Assembly." Article III, §7(2) provides that the Superintendent's "duties shall be prescribed by law." (Emphasis added). Unquestionably, the framers of the Constitution intended for the State Superintendent's powers and duties to be adjusted from time to time by the General Assembly.

Moreover, our Supreme Court has recognized the General Assembly's power in this regard and established several very important and pertinent doctrines concerning the constitutional powers of the State Board, which doctrines equally apply to the constitutional powers of the State Superintendent. Our Supreme Court has made crystal clear; (1) that the State Board's constitutional powers are subject to limitation and revision by acts of the General Assembly, (2) that the State Board is bound by the General Assembly's policy determinations, and (3) that the State Board acts beyond its authority when it attempts to take actions contrary to statute. Guthrie

v.

Taylor, 279 N.C. 703, 710, (1971), cert. denied, 406 U.S. 920, (1972). State v. Whittle Communications, 328 N.C. 456, 466, 468, 470-71, (1991). Although neither of these Supreme Court decisions directly addresses the constitutional powers of the State Superintendent, the rationale and conclusions reached by our Supreme Court in each decision apply with equal force to the constitutional authority of the General Assembly to change, extend or limit the responsibility and duties of the State Superintendent.

I.

In Guthrie v. Taylor, 279 N.C. 703 (1971), cert. den., 406 U.S. 920 (1972), the Supreme Court held that the State Board's powers are subject to limitation and revision by the General Assembly.

In the Guthrie case, a teacher attacked a State Board regulation that required teachers to renew their teaching certificates every five years by earning credits based on college courses completed at their own expense. The case arose under Article IX of the former Constitution which provided, in pertinent part, that:

Sec. 8: "State Board of Education. - The general supervision and administration of the free public school system . . . shall . . . be vested in the State Board of Education . . ."

Sec. 9: "Powers and duties of the board. - The State Board of Education shall . . . have power . . . to regulate the grade, salary, and qualifications of teachers . . . 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. Guthrie, 279 N.C. at 709-10, (emphasis added).

The Court then focused on the "subject to" language in former Section 9 and concluded that this clause empowered the General Assembly to limit and revise the State Board's express constitutional powers, including the power to regulate teacher qualifications -- a supervisory power expressly included in the Constitution. The Court held that in the absence of legislation to the contrary, the State Board had the authority to enact the challenged regulations:

The last sentence in Article IX, §9, above quoted, 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. The Constitution, itself, however, 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 teachers in the public schools was limited only by other provisions of the Constitution itself.

Id., at 710. (emphasis added). The Court noted that the changes made in the 1971 Constitution (during the pendency of the case) retained in §5 of Article IX the provision making the State Board's powers "subject to the laws enacted by the General Assembly," and the Court concluded that "(t)here is no difference in substance between the powers of the State Board of Education with reference to this matter under the old and the new Constitutions." Id.

Without question, the Supreme Court decided in Guthrie that, even as to powers expressly conferred on the State Board by the Constitution, exercise of the State Board's enumerated powers is subject to laws enacted by the General Assembly. If the General Assembly may change the State Board's enumerated constitutional powers and duties, the General Assembly likewise may change, the State Superintendent's enumerated constitutional powers and duties.

In *State v. Whittle Communications*, 328 N.C. 456 (1991), the Supreme Court held that the State Board is bound by the General Assembly's policy determinations.

In *State v. Whittle Communications*, the State Board attempted to prevent local school districts from contracting with Whittle Communications for receipt of a short video news program known as Channel One. The determination of what type of educational materials could be presented to school children across the State logically comes within the ambit of the State Board's constitutional power to "supervise and administer" the State's public school system. That is what the State Board contended in court to support the rules it enacted to prevent local school boards from entering into Channel One contracts. However, the Supreme Court focused on the language in Article IX, §5 that the School Board's power was "subject to the laws enacted by the General Assembly" and concluded that "we must examine our statutes to ascertain whether the General Assembly has enacted laws which would limit the power of the State Board in the area of selection of materials such as Channel One which we conclude is a supplementary instructional material." 328 N.C. at 464. The Court then concluded that the General Assembly had enacted a statute -- N.C.G.S. §115C-98(b) -- that placed the responsibility for selection of supplementary materials in the hands of the local school boards. As a consequence, the Supreme Court held that the State Board acted in excess of its authority by taking actions in contravention of that statute:

. . . Thus, the General Assembly, by adopting [N.C.G.S. §115C-98(b)] placed the decisionmaking process for the selection and procurement of these supplementary instructional materials in the exclusive domain of the local school boards . . . Since Channel One is a supplementary instructional material and since the General Assembly placed the procurement and selection of

supplementary instructional materials under the control of the local school boards, the State Board acted in excess of its authority in enacting this rule because the State Board had no authority to enact a rule on this subject.

Whittle Communications, 328 N.C. at 466. The *Whittle* case made clear that the General Assembly has the preeminent constitutional power to make policy decisions relating to the public school system which are binding on the State Board and the State Superintendent.

Finally, the intent of the General Assembly to subordinate the State Superintendent to the will and authority of the State Board when it enacted N.C.G.S. §§115C-19 and 115C-21 is beyond question. The General Assembly made all of the statutorily designated duties and responsibilities of the State Superintendent "subject to the direction, control, and approval of the State Board of Education." (emphasis added) Because the General Assembly did not define the words "direction," "control," or "approval," we look elsewhere to see what those words commonly mean. Black's Law Dictionary, DeLuxe Fourth Edition (1951) defines those words as follows:

Direction - the act of governing; management; superintendence; that which is imposed by directing; a guiding or authoritative instruction; order; command. Control - to exercise restraining or directing influence over; regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern. Approval - the act of confirming, ratifying, sanctioning, or consenting to some act or thing done by another. Although it would have sufficed for the General Assembly to indicate its intent that the State Board would clearly predominate over the State Superintendent in this regard by the use of only one of those three words, it chose three of the strongest expressions indicating authority over another.

Based on the clear language of Article III, §7(2) of the Constitution that the State Superintendent's "duties shall be prescribed by law," and the clear language of N.C.G.S. §§115C19 and 115C-21 that all of the State Superintendent's prescribed duties as chief administrative officer and secretary to the State Board are "subject to the direction, control, and approval of the State Board of Education," it is our opinion that the State Board has the authority to determine and control the duties and responsibilities of the State Superintendent. Should the State Board conclude that the day-to-day operation of the Department of Public Instruction should be the responsibility of someone other than the State Superintendent, it is our opinion that the State Board has that authority by virtue of the laws enacted by the General Assembly. In exercising that authority, we are confident that the State Board recognizes that the State Superintendent is a constitutional officer, and that the State Board and the State Superintendent will work together for the good of all our citizens, and especially for our children.

Andrew A. Vanore, Jr. Chief Deputy Attorney General

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